Briefing

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Fraud and White Collar Crime - Deferred Prosecution

October 2013

Softening the blow? Deferred Prosecution Agreements available in 2014

Introduction

Following closure of the Serious Fraud Office's consultation on the use of Deferred Prosecution Agreements ("DPAs"), DPAs could be available to prosecutors as early as February 2014.

Deferred Prosecution Agreements

DPAs were introduced by the Crime and Courts Act 2013. They involve a company reaching an agreement with a prosecutor under which the company is charged with a criminal offence but the proceedings are automatically suspended. If a company breaches any of the conditions in the agreement the prosecution may resume, but as long as those conditions are adhered to, the prosecution will remain suspended.

When is a Deferred Prosecution Agreement likely to be appropriate?

A DPA is only available to companies, partnerships, and unincorporated associations, which face prosecution for a criminal offence. They are not available to individuals.

The Crime and Courts Act 2013 contains a definitive list of offences in relation to which a DPA can be entered into, but generally these are fraud, bribery, and similar economic offences.

Under the draft Code of Practice, a prosecutor would be able to propose a DPA when:

1. There is sufficient evidence to prosecute; and
2. It is in the public interest for the prosecutor to propose a DPA instead of prosecution.

However, there is no legal right to be invited to enter into a DPA: it will be the prosecutor's discretion whether to make such an invitation. The decision will turn on the crucial question of public interest, and the usual codes and guidelines on prosecution will be relevant. In particular, the draft Code of Practice highlights such factors in favour of prosecution as repeat offending, failure to have effective corporate compliance programmes, severe economic harm to victims, and such factors against prosecution as the existence of an effective corporate compliance programme, self-reporting, and assisting the prosecutor with his investigation.

What conditions are likely to be agreed?

After a prosecutor has invited a company to enter a DPA, a negotiation period will commence, during which there will be disclosure of information and, ultimately, an agreement of terms.

Schedule 17 of the Crime and Courts Act 2013 contains a non-exhaustive list of terms that a prosecutor may decide are appropriate, which may be one-off requirements, or obligations that last for a fixed period of time. They include requirements:

1. To pay to the prosecutor a financial penalty;
2. To compensate victims of the alleged offence;
3. To donate money to a charity or other third party;
4. To disgorge any profits made from the alleged offence;
5. To implement a compliance programme;
6. To co-operate in any investigation related to the alleged offence;
7. To pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

In addition, the prosecutor may decide to attach time limits for fulfilment of certain conditions. However, the draft Code of Practice states that the terms proposed must be fair, reasonable and proportionate.

Regardless of the outcome of the consultation, DPAs will not allow companies to escape from the financial consequences of being found guilty of an offence. The Crime and Courts Act 2013 states that financial conditions imposed under a DPA must be approximate to the fine that would have been imposed if the company had been prosecuted and pleaded guilty. This allows for no more than the one third reduction that is the maximum currently available for a guilty plea, although the draft Code of Conduct does suggest that *"there may also be an additional reduction where an organisation assists, for example, in the investigation or prosecution of offending by others"* as is currently available for offences under the Serious Organised Crime and Police Act 2005.

Summary

While the outcome of the consultation has not yet been published, it is evident from the draft Code that the situations where DPAs are most likely to be appropriate are where a company has appropriate corporate compliance procedures for the avoidance of fraud and bribery, and has reported to the SFO an exceptional case where those have failed. In this respect the Code reflects the onus of the bribery and fraud legislation on compliance and self-reporting.

However, the DPA will not give rise to a "soft" approach, even in the situations of reduced culpability described above. In particular, whatever the result of the consultation process, the Crime and Courts Act ensures that entering a DPA is not likely to be significantly better than pleading guilty after prosecution. However, the advantage it brings is that the case can be dealt with quickly and, though a DPA is public, it probably does not carry the stigma or effect to reputation that comes with a criminal conviction and fine.

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