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A Briefing Guide to

Deferred Prosecution Agreements (DPA)

RAHMAN RAVELLI

Deferred Prosecution Agreements

Deferred prosecution agreements (DPAs) can be an attractive alternative to prosecution for a company that is being investigated for corporate crime. But obtaining one is far from easy.

Rahman Ravelli is one of a very small group of UK firms with experience of DPA negotiations. Since DPAs were introduced to the UK legal system in 2014 under the Crime and Courts Act there have only been four granted. It is essential, therefore, that any company hoping to obtain one employs legal representatives who are familiar with the intricacies of DPA negotiations and the criteria that the Serious Fraud Office (SFO) wants to see met before it grants one. In-depth knowledge and expertise in this area is essential if a DPA is to be obtained.

Rahman Ravelli has not only been involved with DPA discussions with the SFO. As a firm, we have vast experience of dealing with the SFO in all the areas of corporate crime that could lead to a DPA being granted. From the very first signs that DPAs were to be introduced into the UK legal system, we made sure we were one of the most obvious choices for corporates seeking a DPA as an alternative to prosecution.

That is why our lawyers can offer unrivalled expertise in this field.

What is a DPA

A DPA is an agreement that is reached between the SFO or Crown Prosecution Service (CPS) and an organisation that could be prosecuted for a corporate crime offence. The agreement, which is made under the supervision of a judge, allows a prosecution to be suspended for a set period of time on the condition that the organisation meets (and continues to meet) certain specified conditions.

DPAs can be used for fraud, bribery and other economic crime and can only apply to organisations. An individual cannot be the subject of a DPA.

A DPA enables a corporate to make what is called full reparation for criminal behaviour without suffering the sanctions and possible reputational damage that could accompany a conviction. As a conviction can be hugely damaging to a company, obtaining a DPA when corporate crime allegations are made can be a very attractive option. For the prosecutor, a DPA has the benefit of avoiding a potentially lengthy and costly trial, where the outcome may not necessarily be the conviction that was being sought.

So far, only the SFO has agreed DPAs. The CPS has yet to conclude one. Each DPA must be concluded under the supervision of a judge. The judge will only approve it if he or she is convinced that the DPA is in the interests of justice and that the terms imposed on the company are fair, reasonable and proportionate.

The DPA Process

Under a DPA, a prosecutor charges a company with a criminal offence. But the criminal proceedings are suspended if the DPA is approved by the judge.

It should be emphasised that a company will only be invited to enter DPA negotiations if it has fully cooperated with the criminal investigation. If negotiations do go ahead, the company has to agree to a number of terms. These terms can include paying a fine, paying compensation, co-operating with future prosecutions of certain individuals, removing members of staff and giving undertakings to make certain changes to its working practices to prevent the wrongdoing being repeated. Arrangements for monitoring compliance with the conditions is set out in the terms of the DPA. If the company does not honour the terms of the agreement, the offer of the DPA is taken back and the SFO goes ahead with the prosecution that had been suspended.

The UK's Four DPAs

As of early 2019, there had been four DPAs concluded in the UK.

These are:

Standard Bank

In 2015, Standard Bank (now known as ICBC Standard Bank) became the first subject of a UK DPA when it was ordered to pay nearly $26M in fines and disgorgement of profits and $6M in compensation to the government of Tanzania. The bank also agreed to commission an external report on its anti-bribery and corruption controls and to recommend improvements to strengthen its controls.

The DPA related to a $6M payment by a former sister company of Standard Bank to a trading partner in Tanzania. The payment was alleged to be a bribe intended to induce members of the government of Tanzania to support Standard's proposal for financial arrangements involving $600M to be carried out on behalf of the government.

It was announced by the SFO in November 2018 that Standard had complied with all of the terms of the DPA and that the DPA had now ended.

XYZ

In July 2016, the SFO announced that it had obtained its second DPA against an anonymous company which was a small to medium-sized enterprise (SME) trading on the Asian export market. The SME was the subject of an indictment alleging conspiracy to corrupt, conspiracy to bribe and failure to prevent bribery regarding contracts to supply its products to customers in a number of countries.

Under the DPA, the company was ordered to pay £6.2M in disgorgement of gross profits and a £352,000 financial penalty. The company also

agreed to continue to cooperate fully with the SFO, provide a report addressing all third party intermediary transactions and review the effectiveness of its existing anti-bribery and corruption controls every twelve months.

Rolls-Royce

In January 2017, a DPA was approved between the SFO and Rolls-Royce Plc. Rolls-Royce did not self-report its unlawful conduct.

In February 2012, the SFO asked Rolls-Royce if it could provide further information regarding allegations of corruption that had been made by a former employee. This prompted a huge internal investigation by Rolls-Royce that revealed 12 offences of conspiracy to corrupt, false accounting and failure to prevent bribery that had been carried out over three decades and involved various different Rolls-Royce business divisions in seven countries.

Although Rolls-Royce did not self-report what were very serious offences, its subsequent cooperation with the SFO was instrumental in it obtaining a DPA and avoiding prosecution. Its DPA led to it having to pay a total of £497M in disgorgement of profits and penalties plus SFO costs of £12.9M.

Tesco

In April 2017, the SFO agreed a DPA with Tesco Stores Ltd (Tesco) over the supermarket company's falsifying of accounts in 2014 to overstate profits by £284M. Tesco had to pay £129M in financial penalties and the SFO's costs of £3M. The company also had to agree to remedial measures and to co-operate with the SFO and other law enforcement and regulatory authorities regarding any investigations arising from the conduct.

Advantages Of A DPA

Obtaining a DPA brings the obvious advantage to a company that it avoids being convicted of the offence that prompted the criminal investigation. As well as being less damaging to a company's reputation, a DPA ensures that a company escapes the cost, disruption and harmful impact that prosecution, trial and conviction can bring.

But, as we mentioned earlier, any company that believes or suspects it is implicated in wrongdoing cannot view a DPA as a get-out-of-jail-free card. The SFO has repeatedly made it clear that DPAs will not be freely available to any company that simply goes through the motions in order to seek one. Senior SFO staff have emphasised on a number of occasions that DPAs will only be granted to companies that meet its criteria for one. And when it comes to obtaining a DPA, the bar is set fairly high, as we explain below.

For that reason, companies have to seek informed advice from experts in this particular area of law before committing themselves to seeking a DPA.

Holding Your Nerve In DPA Negotiations

DPAs are not given out easily. Trying to obtain one will require adopting a careful, considered approach that looks at the possible implications as well as the obvious benefits.

The attraction of avoiding being prosecuted is obvious, which is why it is understandable that a company would want a DPA. But there will be a benefit in holding your nerve, putting your case robustly and challenging anything that the SFO says or alleges with which you disagree.

A shrewd, strategic approach in negotiations with investigators can bring rewards in terms of both a DPA and even lenient financial penalties that form part of the DPA. Such an intelligent and, when necessary, bold approach is always likely to be more rewarding than not contesting allegations that could be contested, in the hope of securing a DPA.

In 2019, Tesco realised that this can happen. In 2017, the supermarket giant admitted wrongdoing in relation to a multi-million pound accounting black hole and reached a DPA with the SFO. Under the DPA, it admitted wrongdoing and paid a £129M penalty plus £85M in costs. Yet by early 2019, all three former Tesco directors that had been charged with fraud in relation to this were cleared.

Tesco found itself in the contradictory position of having paid a huge fine and admitted wrongdoing, for which nobody has ever been found guilty. In clearing two of the directors, the judge said the case against them was "so weak it should not be left for a jury's consideration". This raises the question of why Tesco admitted wrongdoing if the case for prosecuting the company was not strong – and emphasises why, as we said earlier, not contesting allegations that could be contested will rarely be the best course of action. A corporate doing this may later wonder if it made the right decision.

This was highlighted in early 2019 when the SFO decided to drop its investigation into widespread bribery by Rolls-Royce. As mentioned elsewhere on these pages, the company obtained a DPA in 2017 that saw it pay £497M in penalties plus £12.9M SFO costs – and yet neither the company nor any individual is to be charged over the wrongdoing as the investigation has been brought to a close.

Internal Investigations

Becoming Aware of an Investigation

The Tesco situation highlights the need for a company to conduct a thorough internal investigation if it believes or suspects that there may be a legal problem that could involve the authorities. This is a complex area in itself, which we have written about extensively elsewhere.

It may be that the first a company knows of any possible wrongdoing is when the SFO or other law enforcement agency makes contact with it. In the case of the SFO, it may enter into correspondence with the company outlining its concerns or it may go straight to issuing a Section 2 notice under the Criminal Justice Act 1987, which gives the SFO powers to search property and require persons to answer questions and produce documents.

Such an authority may have received information from a whistle blower or become

aware of a problem with the company's activities overseas. Alternatively, the company may become aware of a possible legal problem before anyone has notified the authorities of it. Like the authorities, this information may have come from a whistle blower or reports of problems in one of the locations where it does business. It may even be a historical issue that has been highlighted during the merger or acquisition process.

But however the company is notified of a possible problem, it will benefit from conducting an internal investigation. And that investigation has to be tailored to both the nature of the allegations and how the company was made aware of them.

An internal investigation helps a company establish the exact scale and nature of the problem. But if the company is aware of the wrongdoing before the authorities, an internal investigation also gives it the advantage of having some control over the situation and the ability to self-report the problem. Self-reporting can result in more lenient treatment from the authorities and can avoid the problems, such as a dawn raid, that can result from the authorities becoming aware of the wrongdoing before the company has reported it.

If the SFO notifies a company that it is looking into allegations against the company, an internal investigation is the best way for the company to assess the strength of the allegations for itself. It can then respond appropriately to the SFO and devise the best strategy to defend itself against the accusations. Another advantage of this situation is that the company can effectively be controlling the investigation and reporting its findings to the SFO. Such control can mean the company is cooperating with the SFO; meaning it is unlikely to feel the full force of the SFO's Section 2 powers or be the subject of a dawn raid.

In situations where the company is aware of the allegations before the authorities, conducting an internal investigation allows it to examine what – if any – wrongdoing has been committed and discover the reasons for it. Once the internal investigation is complete– and if it has established there has been wrongdoing - the company can self-report the wrongdoing to the SFO. This gives the company the chance to put its case first and outline any mitigating factors, rather than have to respond to the authorities' allegations. But it also makes it more likely that it will be treated more leniently for bringing the problem to the attention of the authorities.

Internal investigations can, therefore, be of great value if a company is arguing reasons for why it should obtain a DPA. But such an investigation can also strengthen a company's case when it is disputing that it has done anything wrong. Information gathered during an internal investigation can be vital in challenging any allegations and in arguing that there is no grounds for the company to be charged or to have to accept a DPA as an alternative.

Legal Privilege

The right legal advice is essential for an internal investigation. Those conducting one need to know the legal situation regarding all aspects of

conducting an investigation; including any legal developments that can significantly affect a company's ability to carry one out and then obtain a DPA.

Legal privilege and internal investigations is one area that has undergone significant change. The judge in the 2017 bribery case of SFO v ENRC (Eurasian Natural Resources Corporation) ruled that material, such as notes of interviews with employees and former staff conducted by ENRC's former law firm and documents produced during a review by forensic accountants, was not subject to legal privilege as it had been created before criminal legal proceedings had been contemplated. But in 2018, the Court of Appeal reversed this decision and ruled that in-house advice prepared before court proceedings is as protected by privilege as that given in the defence of proceedings.

This ruling on privilege was a boost for lawyer-client confidentiality – and could be of huge help to any company conducting an internal investigation.

Yet although this ruling is now in place, the issue of privilege is one that has been subject to changes and has prompted different views from different SFO directors. It is essential, therefore, that any corporate looking to obtain a DPA is represented by lawyers who are fully aware of the most recent developments regarding privilege. Such lawyers also need to know the SFO's current and exact stance on whether issues of privilege are a factor when considering how much cooperation has been offered by the corporate under investigation. Specialist expert advice has to be taken to ensure that precisely the right steps are taken.

Obtaining A DPA

The SFO has indicated that there will be little or no chance of a DPA for a company that:

- Does not self-report its wrongdoing to the SFO
- Offers little or no genuine cooperation with the SFO investigation
- Shows no genuine desire to change working practices to prevent any further wrongdoing
- It is important that any company seeking a DPA obtains advice regarding how to co-operate with the SFO and how to implement changes that will both prevent further corporate crime and convince the SFO of its good intentions. There have been cases where DPAs have been granted to a company that has not self-reported its wrongdoing. But these have only been offered when the other two criteria have been met.

Self-reporting

The SFO will not be offering DPAs to any company that decides to co-operate simply because it has no other option. SFO investigators regard a DPA as a reward for openness. The sooner a company self-reports and the more open it is with SFO investigators, the greater the possibility of a DPA.

A company reporting its own wrongdoing has a greater chance of a DPA; especially if it has taken that step as early as possible. In the UK's second DPA – the case referred to as XYZ – the

judge remarked on the swiftness of the self-reporting and stated that such openness should be of benefit to the company.

Self-reporting, however, should never be seen as an easy and obvious escape route from prosecution. The way it is done and the subsequent negotiations with the SFO have to be overseen by those with legal expertise and experience of such situations. Otherwise even the most genuine attempt at self-reporting runs the risk of being viewed by the SFO as a cynical attempt to avoid prosecution.

Investigation and Cooperation

Whether a company's cooperation with an SFO investigation is seen as well-intentioned by the investigating agency will depend largely on how much genuine assistance it provides; however early it self-reports.

The amount of work a company has undertaken on an internal investigation, how much access to its findings it gives investigators and the quality and quantity of the records of its efforts can all be factors in determining whether a DPA is granted. No DPA will be offered if the SFO feels that it has not been given all the information it needs. And a DPA is unlikely if the SFO believes an internal investigation has tipped off potential suspects, prompted the deleting of valuable potential evidence or failed to examine the role of those in senior positions.

It is worth noting that Rolls-Royce did not report its bribery, which involved paying millions over many years, and yet it obtained a DPA. The SFO found out about the company's bribery from a third party. Yet Rolls-Royce then offered all possible cooperation and reported wrongdoing that the SFO had not known about. The DPA settlement even referred to the "extraordinary cooperation" that Rolls-Royce had offered the investigation. As a case, it emphasises the value of genuine cooperation in securing a DPA.

Reform

But no amount of co-operation will, on its own, be enough to obtain a DPA. A company must make genuine reforms to the way it works. This can include removing senior staff who were involved in the wrongdoing or who turned a blind eye to it. All DPAs granted so far in the UK have come after the companies under investigation removed such staff.

No DPA will be offered if a company cannot demonstrate that it has made comprehensive changes. In obtaining its DPA, Rolls-Royce devised tougher anti-bribery measures, revised its ethics and compliance procedures, re-examined its due diligence and risk assessment methods and reviewed its activities with third parties. The DPA settlement noted that Rolls-Royce is "no longer the company that once it was" – a clear indicator that it had reformed itself.

Companies that are hoping for a DPA may be keen to introduce reforms. But what they must always remember is that such reforms should not simply be change for change's sake – an attempt to be seen to be taking action in the

hope that it will persuade the SFO to grant a DPA. Any reforms must involve examining both the problems that led to the company being investigated and ways in which they can be prevented in future. If a company is unsure how to assess the problems and remove the potential for them being repeated, it must seek advice from those who are capable of devising appropriate preventative measures.

Negotiation

Self-reporting, internal investigation, cooperation with the investigating authority and reform are all factors which the SFO appraises when assessing a company's suitability for a DPA. The SFO itself has commented on the importance of them on a number of occasions.

Yet communication and negotiation with the SFO are also important when attempting to secure a DPA.

If a company does not, for example, self-report at the right time or in the right way, or fails to properly communicate its willingness to be totally open with the authorities, it will place itself at a disadvantage. If it does not make clear just how thorough – and carefully carried out - its internal investigation was or misses opportunities to emphasise the extent and appropriateness of any changes it has made, it is reducing its chances of obtaining a DPA.

A company needs to explain why it deserves a DPA. And the success of this will largely be down to the way it articulates its position to the SFO by:

- Demonstrating everything it has done to right the wrongs
- Emphasising its belief in the need to change
- Highlighting the effect a criminal prosecution may have on the company
- Making the SFO aware of any mitigating circumstances that led to the wrongdoing
- Such an approach must be articulated in a way that will not alienate the investigators - which is why it is best handled by those who deal regularly with the SFO.

The SFO knows what it wants from companies who seek a DPA. Those companies need to know how to meet the SFO's requirements – and communicate in the most appropriate way that they have met those requirements.

Such a situation requires tact, diplomacy and the art of negotiation. Rahman Ravelli offers all of these, plus nationally and internationally-recognised experience and expertise, to maximise the chances of a company obtaining a DPA.

A DPA can be the most appropriate way for a company to right the wrongs of the past and move forward. Conducted properly, DPA negotiations can be a perfect, successful example of crisis management. But careful consideration must be given to exactly what is the best approach to securing a DPA. And that approach must be one that has the full backing of the company's board and be the result of taking the right legal advice.

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