

Counting the cost of the courtroom

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Companies can no longer reclaim their legal costs if acquitted in the legal courts. As this financial restriction comes into force, Deferred Prosecution Agreements (DPA's) appear to be making their way into the UK legal system. Aziz Rahman of Rahman Ravelli explains why the choice between a DPA and a day in court is a crucial one.

Companies who find themselves facing prosecution at present may feel that the legal system is giving with one hand and taking away with the other. In fact, the hand that is doing the taking away seems much fuller than the other.

Such companies can now no longer recover their legal costs if acquitted in the criminal courts. Until now, a company that paid for its legal representation in the criminal courts and was then acquitted could be awarded money from the public purse to compensate them for their legal costs. It was rarely enough to cover the company's total legal bill but it was a payment worth having. Such payments are now part of history.

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The current Government has used the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to amend the Prosecution of Offences Act 1985. This 1985 Act gives the Lord Chancellor the power to set the rates at which an award of legal costs must be calculated by the court and restricts the availability of legal costs to certain type of proceedings and to individuals. Schedule 7 to the 2012 Act, which came into force in October, now takes away the power of the court to make an award in respect of legal costs to companies, except regarding proceedings before the Supreme Court. The court no longer has the power to award successful defendants an amount in respect of any legal costs incurred where Legal Aid is available, as in most Crown Court cases. The likely effect for companies having to defend themselves against fraud and serious business crime allegations is that companies who do not obtain Legal Aid will have to bear the costs themselves or obtain insurance to cover them. One argument against this is that it will force many small companies to plead guilty simply because it is the quickest and cheapest option available to them. The issue of Legal Aid is not one that will apply to many companies facing prosecution. So it is probably best if we dismiss it as a genuine option and consider what realistic routes are open to a company facing prosecution.

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There can be little doubt that the removal of a company's right to reclaim their legal costs if acquitted has been done to save money. All the research carried out prior to the change indicated that most people supported retaining the system as it was. It was thought to be a fair and transparent process whereby defendants could defend themselves against allegations they believed to be untrue, knowing that their costs would eventually be paid if and when they won the case. To take such a stance now, companies must now ensure they have appropriate insurance cover to cover their defence costs – and yet may still find themselves under pressure from their insurers to plead guilty because it is the quickest, most cost-effective option.

While saving money is one reason for such change, it is hard to believe that it is mere coincidence that it is happening at a time when Deferred Prosecution Agreements (DPA's) are being ushered in. In the same month as the removal of costs came into effect, Justice Minister Damian Green announced that DPA's would be established under the Crime and Courts Bill. The argument voiced by the government is that fraud costs the UK £73 billion a year and that DPA's are a way of making sure organisations report wrongdoing and prevent it happening again. A DPA involves a company reporting and then admitting wrongdoing, subjecting itself to stringent conditions to prevent repeat offending, paying an agreed penalty and – most crucially – avoiding a criminal prosecution. As instant justice, it is regarded by prosecutors as more reliable, cheaper, quicker and generally more efficient than a criminal prosecution that could prove lengthy, costly and offers no guarantee of a conviction.

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The UK government sees DPA's as a vital tool in tackling the increasingly sophisticated nature of economic crime. There is no doubt that they can be an effective plea bargain and will probably encourage the culture of self-reporting that the authorities can benefit from. They give companies a chance to confess to previous wrongdoing, pay the necessary penalties, make the required changes to their working practices and start with a clean, conviction-free slate. At the same time, the authorities are seen to "get their man" while not having the risk and cost of a trial. It must be the case now that DPA's seem more attractive option to a company facing prosecution than they ever could have done before. In the past, a company that believed it was innocent of the allegations of fraud and business crime being made against it would more than likely go to trial. The company would know that if it won in court its costs would be reimbursed and it could pretty much emerge unscathed from the whole episode. Now that is no longer the case. There is no way its defence costs will ever be paid by the public purse. Any company in such a situation will have to think long and hard about whether it can devote the time, money and effort to what could be a lengthy, costly and complex court case – a case that will most likely carry no guarantee of success for the defendant. How many companies in such circumstances will see DPA's as a more viable option than trial? At present, we do not know for sure. But all the information points to the likelihood of DPA's being favoured by a vast majority of defendants. If you have to weigh up the chance of losing a trial, being convicted and having to pay your defence costs against entering into an agreement where wrongdoing is admitted, no conviction results and costs are kept to a minimum, the latter option is going to seem more attractive to many.

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There will always be cases where companies facing prosecution are adamant that they are not guilty of wrongdoing and are determined to have their time in court, regardless of the possible cost. It would be a damning indictment of the legal system if no companies felt there was any value in taking such an approach to prove the integrity of their personnel. Yet in many cases it is possible that a company which genuinely believes it is innocent may subject itself to a DPA because it is the most straightforward option. Alternatively, such a company may go to trial confident of victory, only to lose and face a hefty legal bill that could have been avoided by swallowing some pride and going down the DPA route.

Supporters of Legal Aid, those banging the drum for DPA's and the believers in the British court system all believe the objects of their affection are valuable tools for ensuring justice. But those facing prosecution have to consider carefully what is the most effective and realistic option for them.

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