

The Deferred Option?

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Deferred prosecution agreements (DPA's) are yet to become law. But the authorities are already making it clear that nobody should view a DPA as an easy option. Here, Aziz Rahman considers the latest official statements on DPA's and what they could mean for anyone under investigation.

It seems as if the authorities are very keen to set their stall out as early as possible when it comes to DPA's. Recent comments and attempts at consultation have made it clear that the notion of a deferred prosecution agreement will not slip unnoticed into the UK's legal framework. The Crime and Courts Act – which includes measures to introduce DPA's into the UK legal system – has only just received Royal Assent. This means that it DPA's will come into effect in 2014. And many interested parties are already keen to help shape the destiny of the DPA.

From what we have seen of DPA's across the Atlantic, they appear to be the legal equivalent of Marmite. For very person who hails them as the greatest invention in their field there are at least as many who seem to screw up their face in revulsion at the very thought of them. In the UK, only time will tell whether the DPA manages to tickle enough taste buds. But it certainly seems as if people in certain positions have already worked up an appetite for them; even if they're not quite sure whether they will leave a bitter taste in the mouth.

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A DPA will be used when the authorities are seeking to come to an arrangement with a company that they believe to have been involved in wrongdoing. A DPA allows a company to voluntarily admit wrongdoing and give an undertaking to put right the wrongs it has told the authorities about. If the company gives such an undertaking then – under the terms of a DPA – the investigating authority agrees to defer any criminal prosecution. But this deferment is done only on the condition that the company agrees to make certain changes to put right all the wrongs that have been admitted to or otherwise identified. If these wrongs are not put right then a criminal prosecution may still be brought against the company. Such a DPA may see a prosecution deferred for a set number of years while a company pays a fine or compensation, removes staff identified as being responsible for the wrongdoing or introduces anti-corruption precautions. Putting it simply: if the company does what it said it would under the terms of the DPA it avoids being prosecuted, if it fails to do what was agreed then it will be prosecuted.

In the United States, the process has had its critics. Much criticism has centred on the cost of court-appointed monitors, who have the task of overseeing the company's compliance with the terms of its DPA. Others have accused DPA's of giving people who should be prosecuted a chance to wriggle free from possible conviction. But such an argument ignores a couple of very important points. Firstly, the company being investigated does not escape any sanctions – it has to carry out a thorough review of the way it works and make very significant changes to its working practices. Secondly, the idea that prosecuting a company – as opposed to using a DPA - brings instant and straightforward punishment is wide of the mark. One look at UK organisations, such as the Serious Fraud Office, will show that large amounts of time, money and effort expended on prosecuting companies and individuals for corporate crimes such as bribery do not guarantee results. Conviction rates are far from impressive.

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All of which makes it understandable that UK authorities seem to be broadly in favour of DPA's. And yet, as I mentioned earlier, there already seems to be a hard stance being adopted by some in this country who will have DPA's at their disposal from next year.

The Solicitor General, Oliver Heald QC MP, has said that DPA's are less likely to be used in the UK if the offence is deep rooted at the higher levels of a company. If the offending involves a company's senior executives, it is his belief that traditional prosecutions are still likely to be sought. According to him, if companies are being used as vehicles for fraud by senior managers than it is unlikely a DPA will be used. He sees DPA's as being a far more effective (and more commonly used) tool in situations where criminality is detected when new senior managers are brought into a company and discover such problems – not when existing executives involved in wrongdoing decide it is time to “come clean”.

According to him: “The higher up the company the individual wrongdoing goes, the less likely there is to be a deferred prosecution agreement....It is important to give confidence to the public and the City that prosecutions will still occur where appropriate.”

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Mr Heald was talking as a draft code of practice on DPA's for prosecutors was released. The guidance examines whether it would be in the public interest to prosecute or go down the DPA route. Consultation on the draft code of practice for DPA's involves opinions being sought, with submissions to be made by interested parties and individuals by September 20. It is thought that, at this stage, a DPA would not be in the public interest if there has been previous wrongdoing at a company. It is believed that prosecutors are being given guidance that indicates a DPA would be appropriate where a company has been proactive in looking to settle a case. In such cases, a company would be expected to highlight the wrongdoing itself, which would then lead to a dialogue with the prosecutor. From there, the company would be invited into negotiations about a DPA, resulting in a formal recognition of the wrongdoing. That can lead to a DPA being formally agreed which would then be taken to court, where the first hearing would be held in private.

A judge overseeing a DPA will have the power to alter the terms of the DPA. Such a provision, combined with the stance being taken at this stage by the authorities, does seem to suggest that there is no way a DPA can be viewed as a fraudsters' charter in the UK. For a start, not every company that has acted illegally will be considered eligible for a DPA. And even if a company is invited to discuss one, it appears that it will be far from a cosy agreement. A DPA will not be a done deal, free from legal scrutiny, as has been the accusation made when the SFO has tried to broker its own civil settlements in the past.

There is little doubt that the authorities view DPA's as another tool to tackle corporate crime rather than a magic solution to all wrongdoing. A belief held by the Solicitor General and others in the ability of DPA's to help the UK reach quicker settlements in cases that go beyond its borders is, of course, yet to be tested. And only the companies themselves know whether the prospect of a DPA is sufficiently enticing for them to self report. We also have to see if any new approaches are adopted for DPA's as a result of the consultation on the code of practice.

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But while questions about the exact circumstances for a DPA's use may still need answers, it is already clear that such discussions should serve as stimulation for all companies to ensure they are legally compliant. At this stage, the DPA is yet to be introduced. But it is already apparent that the authorities are pre-empting any accusations that it would give companies a chance to whitewash their wrongdoing simply by being seen to go down the DPA route. If a company is judged suitable for a DPA – and it looks as if the criteria for such a decision could prove very rigorous – then it will have to put its house in total order. A DPA will not be about half-baked measures being approved on a nod and a wink. Companies, it seems, will have had to earn the right to a DPA and then earn the right to have any deferred prosecution dropped.

We have spoken before about how it would be wrong for anyone to view DPA's as some kind of emergency exit that helps wrongdoers escape prosecution. The Solicitor General's comments seem to confirm this. Perhaps the safest way to ever avoid being dependent on being granted a DPA is to make sure your company is legally compliant from day one.

Rather than simply hoping to avoid immediate prosecution, it makes much more sense to take steps now to prevent corruption in the workplace or, at the very least, - if it is too late for that – identify what has gone wrong. Such activity will reduce the chance of immediate prosecution, enhance your ability to enter into a DPA and, ultimately, put your company on a far safer legal footing for the future.

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