

THE SFO, THE FUTURE AND SECURING A DPA

6 Oct 2017 Azizur Rahman.

After what appeared to be a far from certain future, the Serious Fraud Office (SFO) looks to be safe.

Prime Minister Theresa May's pre-election pledge to abolish the SFO seems to have been quietly dropped. In fact, its future looks decidedly rosier now that the Solicitor General has praised both its work and success rate.

Speaking at the Cambridge Symposium on Economic Crime, Robert Buckland MP said the SFO was continuing to deal with high profile cases and praised the deferred prosecution agreement with Rolls-Royce. He also highlighted the SFO's 89% conviction rate.

The fact that its work and achievements are being complimented by the Solicitor General must be seen as an acceptance of its value as an independent investigator and prosecutor. And, therefore, a sign that the SFO is going to be here for the foreseeable future.

Forward

But what does that tell us about the SFO's role in the future? And what will that role mean for those who are investigated by it?

Going forward, the SFO has many tools at its disposal; including legislation which has, in recent years, given it far greater scope to tackle business crime.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0) 121 827 7985

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500
Fax +44 (0)1422 430 526
DX16001 HX1

Legislation to tackle bribery, money laundering and fraud have all been introduced to address specific white-collar crime issues. The Bribery Act specifically has made corporates criminally liable while the introduction of unexplained wealth orders (UWO's) is set to further boost the authorities' powers regarding civil recovery.

Perhaps the main change that we may notice regarding the SFO is in its use of deferred prosecution agreements (DPA's).

DPA's

A DPA is an agreement reached between a prosecutor and an organisation which could be prosecuted. It is finalised under the supervision of a judge. The DPA allows a prosecution to be suspended provided that the organisation meets certain specified conditions.

The benefit for a corporate is that a DPA gives it a chance to make full reparation – essentially, put right the wrongs - without the reputational or financial damage that could result from a conviction.

DPA's were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013. They are available to the Crown Prosecution Service and the SFO, who can see them as a time and cost-saving alternative to a lengthy, complex trial.

But a company is only likely to be invited to enter DPA negotiations if it has assisted the SFO investigation. If the negotiations go ahead, the company agrees to a number of terms, such as accepting a financial penalty, paying compensation and, when necessary, co-operating with future prosecutions of individuals.

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DX16001 HX1

So
far,
there
have
only
been
four
DPA's.
But
that
number
is
likely
to
increase.
This
is
because
the
SFO
is
now
used
to
having
the
DPA
as
an
option.

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It is also because many long-running investigations will near a conclusion, some of which the SFO will deem suitable for a DPA.

If DPA's are to become more commonplace, therefore, a corporate seeking one needs to know the best way to approach the SFO if they believe wrongdoing has been committed.

While the circumstances may vary from case to case, a number of factors will boost a corporate's chances of obtaining a DPA:

Self-reporting

If a company takes it upon itself to report the wrongdoing that it has committed (or has been committed in its name), it will enhance the chances of a DPA being granted. In the second DPA to be granted in the UK – the case known as XYZ – the judge cited the promptness of the self-reporting as being in the interests of justice and went as far as to say “Openness must be rewarded and seen to be worthwhile.”

What must always be borne in mind, however, is that self-reporting is something that has to be done carefully and appropriately. It is a major step and anyone considering it will need advice from those with both the relevant legal expertise and extensive experience of dealing with the SFO.

Cooperation

A company failing to self-report the wrongdoing may reduce its chances of obtaining a DPA. But it will not make it impossible. In arguably the UK's most high-profile DPA, Rolls-Royce did not report its extensive use of bribery in far-flung countries. But once the SFO was aware of the bribery, the firm went to great lengths to cooperate with it; even to the point of bringing to the authorities' attention wrongdoing that they were not already aware of. This cooperation was highlighted by the judge as a factor in the DPA being granted.

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It is vitally important, however, that any offer of cooperation is not just offered to the SFO when it looks like you are about to be charged. The judge in the XYZ case stated clearly that if those under investigation did not offer openness when investigations were underway then they can expect little or no reward; meaning no DPA. The cooperation has to be there from Day One and be genuine and ongoing. By appointing a solicitor with experience and expertise in dealing with the SFO, you can be advised on exactly how to cooperate and what it entails.

Reform

When Standard Bank obtained the UK's first DPA, it did so having immediately reported its wrongdoing and taken a strong, proactive approach to disclosing everything it could. It acted swiftly to put right the problems. All DPA's that have been granted so far have been made after the corporates under investigation removed senior managers who were either implicated in the wrongdoing or should have been aware of it.

Speaking at the same symposium as the Solicitor General, the SFO's General Counsel, Alun Milford, said:

"Deferred prosecution agreements are pragmatic devices aimed first at incentivising openness leading to the uncovering of financial crimes and secondly at allowing companies to account to a court for those crimes in a way that does not also punish its innocent employees, suppliers and the local community in which it operates."

His argument was that companies are best served by self-reporting and the introduction of fit-for-purpose compliance structures. As the SFO looks towards its future and its use of DPA's, that is what the SFO will be seeking from those looking to avoid prosecution.

The challenge for corporates wanting a DPA from the newly-secure SFO is to make sure they meet that criteria.

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Fax +44 (0)1422 430 526
DX16001 HX1



Azizur Rahman
Senior Partner
aziz.rahman@rahmanravelli.co.uk
+44 (0)203 911 9339

Aziz Rahman is Senior Partner at Rahman Ravelli and its founder. His ability to coordinate national, international and multi-agency defences has led to success in some of the most significant corporate crime cases of this century and top rankings in international legal guides. He is recognised worldwide as one of the most capable legal experts regarding top-level, high-value commercial and financial disputes.

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