Swapping the Courtroom for the Boardroom: the introduction of Deferred Prosecution Agreements in the UK

At a time when corporate economic crime is increasingly in focus, from 24 February 2014, the Serious Fraud Office ("**SFO**") and Crown Prosecution Service ("**CPS**") will have a new weapon in their armoury for tackling economic crime – the Deferred Prosecution Agreement ("**DPA**"). DPAs are now commonplace in the US, but the extent to which they will be used to similar effect in the UK remains to be seen.

WHAT IS A DPA?

In both jurisdictions, a DPA is an agreement reached under judicial supervision between a prosecutor and a corporate, which allows prosecution of a corporate to be suspended for a defined period, subject to the corporate adhering to certain specified conditions. In the UK, DPAs will only apply to organisations in cases of economic crime and will not be available to individuals.

At present, if a company is convicted of a criminal offence, it may be fined, wound up by court order, and have its assets confiscated. These penalties inflict collateral damage on potentially blameless employees and shareholders. DPAs may allow this collateral damage to be minimised, or avoided altogether.

THE PROSECUTORS' GUIDELINES

The SFO and CPS have jointly issued a Code of Practice (the "**Code**"), which provides a set of guidelines for the use of DPAs.

A 'discretionary tool'

The decision whether to invite a corporate to negotiate a DPA is a discretionary one which rests entirely with the prosecutors, and the corporate has no formal leverage in the process. The prosecutors must however make their decision by applying a two-stage test:

1. *Is there sufficient evidence?* This requires the prosecutor to be satisfied that there is either a realistic prospect of a conviction or a reasonable suspicion that the corporate has committed an offence, as well as reasonable grounds to believe that an investigation over a reasonable period will uncover evidence which would be capable of securing a realistic prospect of conviction; and, if so,

2. *Would a DPA properly serve the public interest?* The Code sets out certain criteria which a prosecutor may take into account when answering this question. These include: the seriousness of the offence; whether the corporate has a history of similar conduct; any failure by the corporate to report wrongdoing within a reasonable time; and the proportionality of the collateral effects of a conviction.

Negotiation

The conditions which may be imposed on the corporate under a DPA will be subject to negotiation between the corporate and the prosecutor, but may include disgorgement of profits; payment of a fine; compensation; cooperation in any prosecution of individuals; and implementation of a compliance programme. Once invited to negotiate a DPA, a corporate is not obliged to engage in such negotiations and may also withdraw from negotiations at any time.

Court oversight

In contradistinction to the US, one of the key features of the DPA regime in the UK is that of judicial

oversight, which is provided for at all stages of the process. First, in the conduct of confidential hearings to decide whether a proposed DPA is in the interests of justice and fair, reasonable and appropriate, as well as subsequently, in approving the terms of the DPA and declaring its reasons in an open hearing.

Expiry

Once in place, the DPA remains active until the date of expiry, subject to early termination by court order upon a corporate materially breaching the terms of the DPA. Full compliance results in the corporate remaining free from prosecution.

THE CORPORATE'S POSITION

The introduction of DPAs has considerable implications for corporates in the UK.

Weighing up the risks: No guarantees, and the uncertainties of self-reporting

The DPA regime is very much aimed at encouraging organisations to self-report and cooperate with prosecutors. It is not, however, without its risks, and the fact that even a full, frank and early self-report gives no guarantee that a DPA will be offered means that many corporates may continue to play a tactical game.

Two further factors will be key to the decision-making process, namely (i) the lower evidential threshold (which means that a DPA could be agreed to, notwithstanding the lingering possibility of an acquittal); and (ii) the prosecutors' ability to use disclosed material and information, including reports of internal or independent investigations, witness statements or interviews in subsequent proceedings if a DPA fails to be agreed. When one then adds in the risk of a severe financial penalty, which could be up to 400 per cent. of the "relevant revenue" derived from the alleged misconduct, no corporate could be criticised for asking the question, "Why engage?"

The answer is threefold. First, the ability to avoid the litigation risks and negative publicity that are inherent in the trial process. Second, the ability to avoid the reputational and more onerous financial consequences of a criminal conviction. Third, the very real potential for the clever corporate to use the Code, and particularly the published public interest criteria, to its tactical advantage by building them into its thinking and the approach it adopts during the negotiation phase, thereby gaining the sort of leverage that it would otherwise lack.

FUTURE OUTLOOK

Only time will tell how popular DPAs will prove to be with prosecutors and whether their introduction will lead to a shift away from traditional prosecutions. David Green CB QC, Director of the SFO, has given an indication of the SFO's view on this, commenting that DPAs "*provide a welcome addition to the prosecutors' tool kit for use in appropriate circumstances*" but that "[p]*rosecution remains the preferred option for corporate criminality*".

Whilst all of the above suggests that we should not expect the DPA to become the 'new normal' in the tackling of economic crime, the ultimate popularity of this new weapon will surely be determined by the willingness of corporates to engage and how effectively prosecutors can use it to achieve their goals.

Jonathan Cotton
T 020 7090 4090
E jonathan.cotton@slaughterandmay.com

Richard Swallow
T 020 7090 4094
E richard.swallow@slaughterandmay.com