Recent Developments in UK White Collar Crime Prosecution: Deferred Prosecution Agreements and the SFO’s Revised Policies

Introduction

There have been two developments in the UK with regard to the prosecution of economic (or "white collar") crime. The first is the announcement by the UK Serious Fraud Office (the “SFO”) of revised policies relating to the enforcement of the Bribery Act 2010 (the “Bribery Act”) on facilitation payments, corporate hospitality and self-reporting. The key change is a tougher stance on self-reporting which may dissuade companies from approaching the SFO. The second development is the UK Ministry of Justice’s publication of the Government’s response dated 23 October 2012 (the “Response”) to the consultation on the introduction of deferred prosecution agreements (“DPAs”) as an option to deal with economic crime committed by organisations.1 The Response states that amendments will be made to the Crime and Courts Bill (which is currently passing through the House of Lords) to legislate for the introduction of DPAs in England and Wales. DPAs are thus likely to be available in around 12 – 18 months.

SFO Revised Policies

On 9 October 2012, the SFO announced revised policies relating to the enforcement of the Bribery Act on facilitation payments, corporate hospitality and self-reporting. These policies are short statements on the SFO’s website2 and replace the SFO’s previously stated positions on these key issues.

The policy on facilitation payments3 makes clear that facilitation payments (regardless of size and frequency) are illegal under the Bribery Act and were illegal before the Bribery Act was implemented. The decision to prosecute is stated to depend on whether there is a “realistic prospect of conviction” and if it is in the public interest to do so.

The policy on corporate hospitality4 reinforces that “bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business”. The policy notes, however, that “bribes are sometimes disguised as legitimate business expenditure”. This policy also states that the decision to prosecute will depend on the prospects of conviction and the public interest.

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The policy on self-reporting is of the greatest significance as it replaces the SFO’s previous guidance to corporations. The reference to the previous guidance which appeared in the Joint Prosecution Guidance on the Bribery Act has been replaced with a reference to the new policy. The previous guidance had indicated a willingness to reach a civil rather than a criminal outcome in cases where corporations self-reported. The new policy states that where a company self-reports the fact of self-reporting will be taken into consideration as a factor against prosecution but that “self-reporting is no guarantee that a prosecution will not follow”. This is further emphasised in the Q&A which accompanied the “revised policies” which states:

“The SFO encourages corporate self-reporting, and will always listen to what a corporate body has to say about its past conduct; but the SFO offers no guarantee that a prosecution will not follow any such report. The SFO is primarily an investigator and prosecutor of serious and/or complex fraud, including corruption. It is not the role of the SFO to provide corporate bodies with advice on their future conduct”.

This approach arguably could make self-reporting a less attractive prospect for companies, at least until new legislation introducing DPAs is implemented. This approach reflects the tough stance which David Green QC, the new Director of the SFO, indicated he was intending to adopt.

**Introduction of DPAs**

The Response followed a consultation on the introduction of DPAs for economic crime (the “Consultation”)8. A DPA is an agreement between the prosecutor and the accused in which the prosecutor agrees to defer its decision to prosecute in return for the accused organisation complying with an agreed set of terms. Such terms may include monetary penalties, changes to the structural governance and internal compliance of the organisation, and the appointment of independent monitors to review the effectiveness of any compliance programme. At the end of the deferral period, if the organisation has complied with the terms of the DPA in a satisfactory manner the prosecutor will inform the court and offer no evidence to the charges meaning the prosecution will cease.

**The Details**

The Response confirms the proposals set out in the Consultation with some clarifications. DPAs will only be available to deal with behaviour that “can be classified as economic crime, in particular fraud, bribery (specifically offences under the Bribery Act 2010), and money laundering”9.

The terms and conditions imposed by a DPA will be specific to the particular case, for example, a financial penalty; disgorgement of profits or benefit; reparation to victims by way of repayment of money or charitable donation; replacement of implicated individuals; and a requirement to put in place proper anti-corruption policies and procedures.

To ensure consistency of decisions and treatment of DPAs, the Response indicates that the Director of Public Prosecutions and the Director of the SFO will be required to produce a Code of Practice for Prosecutors on DPAs but given the range of views on the contents of any such Code of Practice, it is likely to be the subject of a separate consultation. The Response states that there will be no specific guideline on penalties under DPAs and that the

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6 The Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions in relation to the Bribery Act was released on 30 March 2011 and set out the decision-making approach likely to be adopted by the relevant prosecutors in respect of offences under the Bribery Act.


8 Ministry of Justice Consultation Paper CP9/2012, Consultation on a new enforcement tool to deal with economic crime committed by commercial organizations: Deferred prosecution agreements.

9 See paragraph 39 of the Response.
legislation will not contain an exhaustive list of terms and conditions of DPAs but will set out some examples. Commercial organisations may feel that there is still insufficient clarity with regard to penalties.

One key point regarding the content of DPAs is, however, clarified in the Response where it mentions that a DPA will be required to include a statement of facts:

"The statement will have been agreed by the commercial organisation before inclusion in the DPA and an admission of guilt will not be required"  

Judicial involvement will occur at an early stage, with the proposed DPA being considered at a preliminary hearing before it returns for final judicial approval. In line with other court proceedings, the details of the finalised and approved DPA will also be published. However the initial stages of the process will be conducted in private until the DPA has been approved in principle by the court. Following approval, the DPA would be published along with the ruling at the final hearing and any previous hearings.

If an organisation were to fail to comply with the DPA’s terms a range of options will be available: the terms of the DPA may be amended; the prosecution may bring formal breach proceedings or the DPA may be terminated and the substantive charges revived.

The intended process may still prove problematic for corporations:

a) If a corporation enters into discussions with a prosecutor regarding a DPA and a DPA is not ultimately concluded, the Response states that “prosecutors should not be prevented from relying on evidence obtained from enquiries pursued as a result of anything said in any unsigned statement of facts/draft DPA”.

b) A judge’s approval of the DPA will not be capable of being judicially reviewed, however, the prosecutor’s decision to enter into a DPA rather than prosecute may still be capable of challenge by third parties, impacting certainty.

c) The Response does not consider how the process will fit in with the global settlement process which is often required in complex bribery cases involving prosecutorial authorities in multiple jurisdictions.

Comparison with the US System

While the English proposal is based on the US system there is a difference in the envisaged degree of judicial involvement. In the US the judiciary does not take part in plea negotiations and is only involved with the approval of the deferral of prosecution once the substance of the DPA has been agreed. Judges in the US do not approve the contents of the DPA itself, and there is little judicial involvement if terms are breached. Here the English court would handle significant events in the DPA process so the system may not be as fast and flexible as the US system.

An important element of the US system is that DPAs are available to prosecutors in relation to any type of corporate crime. While the English system will be applicable to economic crime only, the Response indicates that the list of economic crimes for which DPAs will be available may be broadened over time.

Conclusion

While the Government’s plan to introduce DPAs as a tool to deal with economic crime committed by commercial organisations is a positive step, there are several issues that have the potential to be problematic for organisations, primarily certainty.

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10 See paragraph 96 of the Response.
11 See paragraph 167 of the Response.
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