"DPAs" Have Arrived in England: The Proof of the Pudding Is in the Eating

By Raymond L. Sweigart

As noted in our previous Alert in September 2013, the UK Crime and Courts Act 2013 has now come into effect this month making deferred prosecution agreements (DPAs) available to the Director of the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) in suitable cases involving bribery, fraud, or other economic crime committed by business entities such as companies or partnerships. Individuals are not covered, and the procedure in England will differ somewhat from the DPA process that has been used in the United States for many years. Nevertheless, DPAs are generally anticipated as a welcome addition to a system suffering from a history of prosecution delays and backlogs predating the Bribery Act 2010.

Criminal prosecutors in the United States federal courts have long enjoyed absolute discretion to decide not to prosecute, as well as near-absolute power under Fed. R. Crim. P. 48(a) to extinguish a commenced case, subject only to an exception where dismissal is "clearly contrary to manifest public interest." In addition to those options, often referred to as a Non-Prosecution Agreement or NPA, a federal government prosecutor may enter into a DPA where a criminal prosecution will remain pending (assuming all goes well) for at least five years, after which the proceeding will be dismissed by the court. U.S. District Judge John Gleeson of the Eastern District of New York recently pointed out that a pending criminal proceeding is not "window dressing" nor "the Court, to borrow a famous phrase, a potted plant" when considering issues related to DPAs. In sum, by placing a criminal matter on the docket of a federal court subject to the DPA and to ultimate dismissal, rather than the government declining to proceed at all pursuant to an NPA, the parties effectively make the Court an "instrument[ ] of law enforcement." By so doing, at least according to Judge Gleeson, they subject the DPA to the legitimate exercise of the court's inherent supervisory power, to ensure the DPA does not "so transgress[…] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court." Nevertheless, under U.S. practice, the prosecutors are in control, and the court's role appears limited to approving the exclusion of delay under the speedy trial provisions of 18 U.S.C. § 3161(c) during the deferral of prosecution. This limited role is not synonymous with approving the deferral of prosecution itself.

In addition, under the U.S. model DPAs can be applied in any federal criminal proceeding and can be entered into with both individual and organizational defendants. The United States Department of Justice, in addition to determining whether to enter into an NPA or DPA, retains the discretion to consider whether an agreement has been breached or complied with, and whether to modify, renegotiate or terminate the agreement.

As the following short summary of how DPAs will now operate under English law will indicate, the English approach is quite different and much more circumscribed.

- DPAs will allow commercial organisations (but not individuals) to settle allegations of criminal economic activity (for example bribery or money laundering) without being prosecuted or admitting guilt.
- An agreement may be offered by the prosecutor to the accused organisation, under which the prosecutor will bring criminal charges but then immediately suspend the process, on the basis of the alleged offender's agreement to, and compliance with, a number of terms and conditions.
- Among other conditions, the prosecutor may include any of the following in a DPA as appear appropriate:
    - Payment of compensation to any victims
    - Payment of a financial penalty
    - Full cooperation in any pending investigations
    - An accounting for any profits made
    - Requirements for improved internal training and policies
    - Termination of employment of involved individuals
- During negotiations toward a DPA, the prosecutor cannot commence criminal proceedings against the accused organisation unless it is shown that the organisation provided inaccurate or misleading information to the prosecutor.
- Likewise, if an organisation enters into DPA negotiations and provides information to the prosecutor that may be considered an admission of guilt and the negotiations subsequently fail, there are no currently effective restrictions on the prosecutor using the information gained during the negotiations in a subsequent prosecution.
- Upon the prosecutor and organisation having agreed to DPA terms, court approval must then be sought before the DPA can come into effect.
- The court is charged with independently deciding whether the proposed DPA is in the interest of justice and whether its terms are fair, reasonable and proportionate to the wrong committed, first in a preliminary hearing and then a final proceeding.
- This level of strict judicial scrutiny over the use of DPAs will, with some limitations, be transparent and ultimately occur in open court and appears to be the direct result of concerns raised during consultations that the United States courts are often perceived to "rubber-stamp" whatever the prosecutors decide. Whether or not that perception is truly accurate or fair in light of the fundamental systemic differences in

the case of DPAs vs. NPAs in the United States, the promise of transparency is meant to assure strict court oversight of the DPA process in England and Wales.

- The Sentencing Council of England and Wales has published guidelines that will come into effect in October 2014 to assist judges further in consistent treatment of DPAs.

- The SFO and DPP have also jointly published a draft Code of Practice specifying how they plan to use DPAs. This Code outlines factors that will aid the prosecutor, and presumably the court as well, in deciding whether or not the use of a DPA is in the public interest and provides the following general guidance:

    - The more serious the offence, the less appropriate a DPA.
    - A history of similar behaviour involving "criminal, civil and regulatory enforcement actions against the company", will be a factor favouring prosecution.
    - A DPA, as opposed to a prosecution, is likely to be considered more appropriate when an organisation self-reports.
    - Where the offence is recent and whether the organisation "in its current form is effectively a different body to that which committed the offences" will also be relevant to deciding whether a DPA or prosecution is justified.

There can be little doubt based upon reported statistics that DPAs and NPAs are key and very successful components of the government's aggressive prosecutorial arsenal in the United States. Whether the English version of DPAs, with the limitations built into the process, will likewise prove effective in addressing economic crime or have any impact in reducing the backlog in enforcement of bribery and fraud offences in England, remains to be seen. Nevertheless, DPAs will certainly now be an additional factor that must be taken into account by organisations and their legal advisors when considering whether to self-report criminal activity to the SFO. As these new procedures come into use, and the final version of the various draft codes and guidelines are released and implemented, they will continue to warrant close attention by all interested parties.

If you have any questions about the content of this client alert, please contact the Pillsbury lawyer with whom you regularly work, or the author below.

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