Are DPAs becoming the SFO's enforcement method of choice?

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Corporate Crime Analysis: Following two deferred prosecution agreements (DPAs) being agreed in quick succession, Dechert LLP partner Matthew Cowie, partner Caroline Black, senior associate Daniel Natoff and associate Lisa Foley discuss the DPA landscape and how the Serious Fraud Office's (SFO) use of them is evolving.

How has the SFO's approach to DPAs developed since they were first introduced?

Three years after the inception of the DPA in the UK and four DPAs later, the circumstances in which the SFO may be minded to offer a DPA are becoming clearer.

Recently, the Rolls-Royce DPA highlighted that proactive co-operation is key and can be used to mitigate a company's failure to voluntarily self-report. However, the SFO has equally shown that securing a DPA is not a 'tick box' exercise and each case will be determined on its facts, with a company's actions being assessed by the SFO in the round. For example, in the earlier DPAs for Standard Bank and XYZ, Lord Justice Leveson placed considerable weight on the promptness of self-reporting in favour of the companies securing a DPA. Following Rolls-Royce, it would be too simplistic to say that the need for companies to self-report has gone and companies can rely on 'extraordinary co-operation' to secure a DPA. Rather, there are a number of factors which the SFO will consider in offering a DPA and, as a minimum, companies seeking the option of a DPA would be well-advised to always consider self-reporting and co-operating with the SFO.

It is not yet possible to comment on the factors considered by the SFO in favour of the Tesco DPA as there is currently an embargo on the publication and reporting of the DPA, the statement of facts and the hearing approving the DPA, until the conclusion of the trial of three Tesco executives scheduled to begin in September 2017.

How have the financial penalties imposed been determined? To what extent is business profitability relevant to the calculation of the penalty?

The SFO and the company agree on a financial penalty and submit it to the court for approval, as they must for all the proposed terms of the DPA. The court will consider the penalty as part of its broad assessment of the DPA, including whether it is fair, reasonable and proportionate. While a formal matrix is not used when calculating the penalty, certain principles are applied to the facts of each case, with the court undertaking an assessment of the culpability of, and harm caused by, the prosecuted company.

The Sentencing Guideline for Corporate Offenders: Fraud, Bribery and Money Laundering (the guidelines) provide that the court must first consider whether it is appropriate to make a compensation order, which takes priority over any fine where the financial means of the company are limited. Any compensation paid voluntarily by the company will be a mitigating factor when it comes to calculating the penalty. The guidelines further provide that the penalties should effectively remove any gain to the company from the wrongdoing, as this represents the harm caused. In respect of bribery cases, 'gain' is interpreted as the gross profit associated with the tainted contract.

An alternative measure of ‘gain’ in bribery cases may be the likely cost avoided by the company in failing to put in place appropriate measures to prevent bribery. The guidelines provide that where the ‘gain’ cannot be established, the appropriate measure for a penalty will be the amount the court considers was likely to have been obtained by the company. However, in the absence of any evidence to this effect, 10–20% of the company’s relevant revenue may be deemed an appropriate measure for a penalty.

Once the harm/gain is quantified, a multiplier based on culpability is applied. There is a non-exhaustive list of aggravating and mitigating circumstances in the guidelines which can be used to adjust the multiplier. In respect of the DPAs for Standard Bank, XYZ and Rolls-Royce, the multiplier was assessed as ‘high’, ranging between 250% and 400%.

Finally, financial penalties may be subject to discounts. As long as the ultimate penalty appears to the court to be fair, reasonable and proportionate, there is a wide discretion as to which factors may be taken into account in determining the penalty and discount. The DPA for Standard Bank applied the general principle set out in the Deferred Prosecution Agreements Code of Practice that the calculation of the financial penalty should be broadly comparable to the penalty that would have applied if the company had entered an early guilty plea at trial, thereby obtaining a maximum discount of 33%. However, the DPAs for XYZ and Rolls-Royce went considerably further, applying a discount of 50% in each case.

Are there any trends when it comes to the size of DPA penalties? Are they getting larger?

The determination of the DPA penalty is dependent on the circumstances of each particular case and the scale of the wrongdoing, so it cannot be said that there is a trend of penalty sizes getting larger. In fact, looking at the history of DPAs, the size of penalties has undulated:

• Standard Bank was $16.8m (about £13.5m equivalent, following a 33% discount)

• XYZ paid a penalty of £352,000 (following a 50% discount)

• Rolls-Royce paid a far larger penalty of £239,082,645 (following a 50% discount)

While the penalty applied to Rolls-Royce drastically exceeded those imposed on Standard Bank and XYZ, its infringements were more extensive, there were numerous aggravating factors in play and it was in a financial position to be able to pay a larger penalty.

Tesco paid a penalty of around £129m but it remains to be seen what level of discount, if any, was applied, and how corresponding action taken and penalties levied by the Financial Conduct Authority were addressed in calculating these sums.

A trend is apparent in the increasing willingness of the courts to consider a substantive discount to the penalty. Both Rolls-Royce and XYZ received a sizeable discount of 50%, well above the statutory maximum of 33% for an early guilty plea at trial. The rationale for this trend seems to be to incentivise companies to self-report and co-operate with the SFO for the purpose of seeking a DPA.

Are DPA penalties being seen by companies as 'just another cost of doing business’?

DPA penalties cannot be regarded as ‘just another cost of doing business’. While companies may often desire a DPA to avoid the prospect of criminal prosecution and conviction, there is no guarantee that the SFO will offer one, even if a company has provided the pro-active assistance required in the form of self-reporting and co-operation with the investigation.

Whether this view changes will depend on how many companies the SFO chooses to prosecute. In this regard, companies should note David Green’s comments on 2 April 2017 that DPAs should not be considered the ‘new normal’ and of course Sweett Group PLC has already been successfully prosecuted by the SFO for its misconduct.

It is not a simple case of a company co-operating and agreeing to a financial penalty under a DPA and moving on. The company is likely to have to undertake a number of substantive, ongoing, costly and time-consuming remediation measures. These may include:

- implementing a comprehensive review of its compliance policies and procedures
- making changes to personnel including its senior management
- co-operating with ongoing global investigations
- appointing a monitor for a fixed period of time

How does the UK's approach to dealing with corporate offences compare to other jurisdictions and how much was this approach inspired by other jurisdictions, such as the US?

When compared to other jurisdictions, it appears that the UK is currently playing catch up when it comes to attributing criminal liability to companies. The US has the longest and most prolific history of holding a company criminally liable for the acts of its employees, officers or agents, when committed within the scope of their employment and with intent to benefit the company, provided that there are grounds to impute criminal intent to the company.

In France, a company is vicariously liable for acts committed by management bodies, legal representatives or employees given a specific power to represent the company, whenever they act on behalf of the company and irrespective of whether the offending act benefits the company. Whilst the US has long used DPAs as an alternative to prosecuting corporate offenders, France has only recently reformed its law to cater for DPAs.

The UK looked to the US in considering its options for dealing with corporate offenders when constructing the DPA regime. However, the UK has not produced a carbon copy of the US DPA and has put its own stamp on its DPAs. A key difference is that in the UK, the courts play a more proactive role in overseeing the terms of the DPA with judges only approving a DPA if they consider it to be in the interests of justice, and its terms fair, reasonable and proportionate.

Although the US undoubtedly inspired the UK to implement the use of DPAs, the 2015 Yates Memorandum shows that the inspiration has been reciprocal. The SFO’s approach to pursuing individual accountability for corporate misconduct is longstanding, and it expects assistance from companies in this regard when working towards a DPA. This approach was echoed in the Yates Memorandum which states that ‘to be eligible for any

co-operation credit, corporations must provide to the Department (DOJ) all relevant facts about the individuals involved in corporate misconduct'.

France has also recently aligned their approach to dealing with breaches of corporate offences laws. The 'Sapin II' law (French Law n° 2016-1691 of 9 December 2016) will, amongst other things, create the 'Convention Judiciaire D'intérêt Public' ('CJIP') which has been largely compared to the UK and US DPAs. It remains to be seen how CJIPs will operate in practice, but early indications are that they will likely adopt a similar approach to the UK DPAs.

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