Great expectations?

Ross Dixon charts the evolution of deferred prosecution agreements in the UK & assesses their credibility

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Five years ago, an article in *NLJ* provoked an interesting debate about deferred prosecution agreements (DPAs), which were then recently introduced and widely hailed as a possible solution to the difficult question of how to deal effectively with corporate crime (see 'A blessing or a curse?',166 *NLJ* 7685, p8).

Jonathan Pickworth's article set out some reasons why a corporate body accused of financial impropriety may not want to sign up to one of these then newly minted deals. It prompted some interesting responses, including one from Matthew Wagstaff, then head of bribery and corruption at the SFO, regarding the necessity or otherwise for companies to waive privilege.

At that stage, however, the debate was largely theoretical. Only one DPA had then been agreed and no one could be certain how DPAs would work in practice. Five years on we have a body of cases to help us answer the question posed by the original article's headline: 'A blessing or a curse?'

Background

Adopted from the American model, DPAs were introduced into domestic law in 2014 pursuant to Sch 17 of the Crime and Courts Act 2013.

DPAs are agreements between the prosecutor and a company which enable the company to avoid criminal prosecution providing it accepts guilt, complies with the terms of the deal, and co-operates with the SFO both during the investigation and in any subsequent prosecution of individuals.

DPAs are overseen by a judge, who should examine the proposed agreement in detail, before determining whether it is 'fair, reasonable and proportionate' and in the interests of justice to approve.

Once ratified, the DPA's terms are set out in an agreed Statement of Facts which summarises the wrongdoing admitted by the company. This is a public document (although it may be held back from publication until after any criminal prosecution of individuals has concluded).

The attractions of a DPA for a company are clear: they enable a line to be drawn under what has probably already been a long criminal investigation and avoid criminal proceedings against the company. These may be attractive outcomes for the company and the market (the announcement of a DPA commonly resulting in a bounce in share price).

The benefits of a DPA for the SFO are also plain. It is able to bring a misbehaving company to book without the cost, delay and risks inherent in a criminal trial. The agency wins plaudits for the scalp and generates revenue for the Exchequer. Doing so also warns other companies to put their houses in order.

Expectations

Considering all the mutual advantages to companies and the SFO, it is perhaps unsurprising that DPAs entered domestic law with high expectations.

In 2014, the then Solicitor General, Sir Oliver Heald, said DPAs would 'contribute to the welcome trend of an increase in self-reporting by organisations' which would 'enable the Serious Fraud Office and the Crown Prosecution Service to obtain better evidence so that prosecutors will be able to bring more cases'.

In 2015 the then home secretary, Theresa May, described DPAs as 'an innovative new tool [...] that will enable more organisations that commit economic and financial crimes to be brought to justice'.

In 2019, Lord Edward Garnier QC, who as solicitor general immediately prior to Sir Oliver Heald helped shepherd DPAs into law, said that at the time of their introduction he thought there would be around 'eight to ten DPAs each year'.

What has happened?

DPAs have undoubtedly had a significant impact on the legal landscape for white collar and corporate crime. The option of such an agreement will now form part of the decision-making matrix for any corporate caught up in allegations of serious fraud or corruption.

However, the expected flood of agreements has not occurred. At the time of writing the SFO has agreed a total of nine DPAs. These are with:
- Standard Bank, 2015.
- Sarclad Ltd, 2016.
- Rolls-Royce, 2017.
- Tesco, 2017.
- Serco Geografix Ltd, 2019.
- Güralp Systems Ltd, 2019.
- Airbus SE, 2020.
- G4S Care & Justice Services (UK) Ltd, 2020.
- Airline Services Ltd, 2020.

While some these agreements have resulted in large financial penalties (the biggest being Airbus which paid €991m in the UK as part of a €3.6bn global resolution), that DPAs have not proved more numerous is probably a consequence of a number of factors.

First, the SFO works slowly. Investigations can take years to conclude even if the end result is a DPA (see for example, the investigation into Serco which started in 2013 yet the DPA was not agreed until 2019 even though it was praised by the SFO for prompt reporting and substantial cooperation). We can perhaps expect the number of DPAs to rise as more of the SFO's current investigations come to an end.

Second, it may be the case the relatively small financial benefit of agreeing a DPA as opposed to the penalties that might be imposed if prosecuted, makes it a less attractive option to some boardrooms. Some companies may consider there to be too little

difference between the cost of a DPA on the one hand and the equivalent penalty if the matter was prosecuted on the other.

Third, DPAs are based on individual wrongdoing which, one way or another, results in the guilt of the corporate body. However, where the SFO has followed a DPA with the prosecution of the individuals blamed, it has failed to secure a single conviction. It would not be surprising if agreeing a DPA on the basis of the guilt of individuals who are subsequently convicted was giving some boardrooms pause for thought.

Fourth, there is the question of whether the SFO can credibly threaten prosecution of a corporate without a DPA. The SFO does not have a good record of successful prosecution of companies. Without the stick of a credible threat of prosecution, the carrot of a DPA may seem less appetising to corporates.

Judicial oversight

A common criticism of DPAs is that they are the result of a deal struck between two parties who both want to achieve the same outcome. As a result—the argument goes—the narrative on which the DPA is based may not properly reflect the underlying evidence. In answer to this, defenders of DPAs point to the role played by the court overseeing the agreement before it is approved.

In his judgment on the first DPA (with Standard Bank), Sir Brian Leveson, then President of the Queen's Bench Division, was clear that the court 'retains control of the ultimate outcome'. It must 'examine the proposed agreement in detail'. he wrote, and 'decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA'. The courts, Sir Brian was clear, should be no mere rubber stamp.

As DPA hearings are private, it is difficult for someone who is neither the judge nor a party to a DPA, to know how well the courts are fulling this oversight role.

However, it has been noted by some commentators, that the hearing at which the judge exercises scrutiny does not appear to take up an enormous amount of court time: normally lasting less than a day. It is hard to conceive that a judge will have the time or resources to forensically test the account of corporate wrongdoing with which they are presented, especially when both parties appearing before them are speaking in support of an agreed narrative.

Impact on individuals

Although DPAs are only available to corporates, their introduction has had a significant impact on individuals. Of the seven DPAs which may be considered to have completed their journey through the criminal justice system (all those listed above save G4S and Airbus), not a single person has been found guilty of any crime.

In three of these seven (Standard Bank, Rolls-Royce and Airline Services), the SFO chose not to prosecute anyone. In the four matters in which it did prosecute (Sarclad, Tesco, Serco and Güralp Systems), not one individual was found guilty.

Look further into the four matters which have ended in acquittals and the picture is even bleaker for the SFO.

While Sarclad and Güralp Systems ended with not guilty jury verdicts, the two cases in which my firm acted for individuals did not even get this far. The Tesco prosecution ended at half time, when having heard the prosecution evidence, the judge ruled there was no case for the defendants to answer. Serco ended three weeks into the prosecution case when the judge refused an SFO application to adjourn following disclosure failings, while at the same time expressing real concerns in relation to the nature of the prosecution case.

In total, of the 11 individuals to have faced trial following DPAs agreed between the companies where they worked and the SFO, none have been convicted. Time after time, the narrative on which the DPA was based has not stood up to the scrutiny of a criminal trial.

The evidential gap

Why is this happening? One reason is the gap between the evidential test required for a DPA, and that needed to achieve a criminal conviction. The test is not as stringent for a DPA.

However, this is not the whole story. The 'identification principle' means that for many criminal offences (notably in this context fraud and false accounting) a company can only be found guilty if an individual with 'directing mind and will' commits a criminal offence. In practice this usually means a member of the company's board or senior executive must commit an offence in his or her own right for a company to be guilty.

If a DPA requires the guilt of a directing mind and will, there is a risk that the evidence will be interpreted in such a way as to find one. In both the Tesco and Serco cases, there is a question mark as to whether the attraction of a DPA may have exerted an influence over the narrative. Here, individuals deemed to fulfil the role of directing mind and will were blamed for wrongdoing and the companies were able to admit guilt and agree the DPA. However, when that narrative was put to the test in the criminal proceedings against individuals that followed the DPAs, neither prosecution case made it beyond half time.

In both these cases the DPA and the criminal prosecution resulted in contradictory outcomes. The obvious question these outcomes pose: did the prize of a DPA adversely impact SFO decision making when the evidence was assessed?

My deep concern is that in order to achieve a DPA in these cases the evidence is shoehorned into a narrative that wrongly blames particular individuals.

Lasting impact

While it is true that everyone prosecuted after a DPA has so far been exonerated in the criminal courts, this has usually come at significant personal cost to them.

All have been forced to live for years under the stress and disruption of a criminal investigation and prosecution. The experience of being 'thrown under a bus' by a company to which you have dedicated years of your life is deeply unpleasant. It can be difficult to fully recover from this even if you leave court with your reputation intact.

Then there is the problem that the DPA statement of facts remains a public document, even when the information contained within it has been disproved in court. In Tesco, this unfairness was exacerbated by the decision to name the individuals blamed in the statement of facts even though by the time it was published all three had been acquitted in the criminal proceedings.

There have been some changes since the Tesco case with subsequent DPAs not naming individuals. But more could be done to protect the rights of individuals in these circumstances such as, for example, limiting identifying information in the statement of facts.

Comment

While we have not had as many as initially expected, DPAs are surely here to stay: they have already proved far too useful to both the SFO and to the companies the agency is tasked with policing to turn back the clock.

But while DPAs enable the SFO to clear up corporate criminality more swiftly and efficiently than a prosecution, there is a danger that this is at the expense of justice for individuals. This concern is reinforced by the persistent inconsistency between the criminal verdicts and the alleged wrongdoing on which the DPA is based.

The SFO have a long way to go to demonstrate that the narrative on which they are basing DPAs is always fully supported by the evidence. Until it can do so convincingly, then in my view there remains a question mark over the fairness of DPAs which will continue to undermine their credibility. NLJ

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