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UK Ministry of Justice Opens Consultation on Deferred Prosecution Agreements

On May 17, 2012, the UK Ministry of Justice (MOJ) opened consultation regarding adopting deferred prosecution agreements (DPA) to resolve corporate investigations of serious economic crime. The consultation remains open until August 9, 2012, and the MOJ expects to publish the results of the consultation process on October 31, 2012.

In light of the current U.S. and UK focus on anti-corruption enforcement and the enactment of the UK Bribery Act 2010, much of the consultation is geared toward a discussion of foreign bribery investigations and prosecutions, although DPAs also would be available in matters involving fraud and money laundering.

The MOJ currently views U.S.-style non-prosecution agreements (NPA) and DPAs — where, prior to court and judicial involvement, U.S. prosecutors can negotiate and agree on the enforcement outcome with the implicated corporate — as incompatible with the "legal traditions in England and Wales" and not constitutionally suitable. (*Id.* ¶ 69).

Instead, the MOJ has proposed a new procedure to permit the parties early access to the criminal courts without the filing of a charging document to ensure a speedy hearing with the competent judge in a private consultation and prior to the signing of a DPA. The MOJ proposes a Code of Practice to govern and guide the negotiation process between the prosecution authorities and the corporate and invites comment on a proposal to create guidance on sentencing principles or sentencing ranges to encourage certainty in the process.

Crucially, in the UK it is proposed that the judge be far more active in the DPA proceedings. The judge would use an "interests of justice" standard to assess whether a DPA is an appropriate structural resolution to the investigation. (*Id.* ¶¶ 107, 108). If the judge indicates that a DPA would be appropriate in principle, the MOJ consultation contemplates that negotiations would progress to a final approval stage. The consultation does not indicate to what degree the court might be involved in negotiations between the prosecution and defence or what powers the judge would have to call for evidence in either the defence or prosecution's possession. The final agreement would be presented in open court and would be assessed to determine whether it is "fair, reasonable and proportionate." (*Id.* ¶ 112).

UK DPAs are similar to the U.S. model in that they may provide a path of resolution that is more serious than a noncriminal or civil outcome but less draconian than a corporate plea of guilty. Though the MOJ states that the requirements of a DPA would not amount to a sentence in English law, under the consultation DPAs potentially could contain some or all the following financial and other consequences:

- a punitive financial penalty (*i.e.* a fine);
- disgorgement of profit or benefit;
- reparation to victims;
- ongoing cooperation in prosecutorial investigations;

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- replacement of implicated management or withdrawal from the market in which wrongdoing is admitted;
- enhancement of compliance policies and controls; or
- periodic reporting or external monitoring.

Although most of these elements are similar in concept and operation to U.S. DPAs, the replacement of implicated management and withdrawal from implicated markets normally are matters reserved for the prudent business judgment of responsible management and boards rather than conditions of resolving an investigation. Including such restrictions as a potential DPA term could give significant additional leverage to UK prosecutors in DPA negotiations.

The MOJ consultation proposes that organizations could be given credit for early engagement with prosecutors and cooperative resolution of an investigation, but that such credit would reduce only the financial penalty aspect of the DPA terms and would be limited to a one-third reduction from an otherwise appropriate fine. Structurally, allowing credit to be applied to all terms of the DPA would give corporate defendants and prosecutors more flexibility in negotiating agreements that are appropriate for specific circumstances.

More problematically, however, existing UK law lacks guidance regarding corporate criminal financial penalties. Under the UK Bribery Act, for example, there is no limitation on corporate criminal fines and no guidance on the calculation of appropriate financial penalties. The MOJ Consultation addresses the relative lack of judicial guidance by suggesting that the UK Sentencing Council develop sentencing guidelines for DPAs, either by providing "overarching narrative guideline[s]" or by providing "offense-specific guidelines." However, the UK has limited judicial authority on levels of fines and there will need to be guidance on the interaction between fines, disgorgement and reparation principles. As illustrated by continued and vigorous U.S. debate over the U.S. Sentencing Guidelines, this is easier said than done. To the extent achievable, practical and workable sentencing guidance can be expected to take a significant amount of time, during which period those corporations willing to consider a proposed DPA would need to carefully strategize their approach to negotiating fines and credit for cooperation.

Conclusion

In principle, UK deferred prosecutions would provide a useful additional means of resolving corporate criminal investigations. However, certain significant aspects of existing UK law and of the MOJ's proposal do not resolve structural impediments to UK DPAs being a flexible and predictable means of successfully resolving a criminal investigation without a trial or plea.

- First, the relevant UK criminal statutes do not provide guidance and limits on corporate criminal penalties. Corporate sentencing guidelines do not yet exist against which DPA negotiations could be benchmarked and assessed.
- Second, the MOJ consultation proposes to involve a judge early on in the DPA negotiation, to hold a "private hearing" on whether a DPA may be appropriate in a given case. The requirement of initial judicial oversight may discourage corporate entities from the DPA process in circumstances where the early rejection of a DPA would limit the options for resolution of a matter.
- Third, it remains unclear to what extent the prosecution will be able to agree on the sentencing ranges or the principles of aggravation and mitigation, where the judge remains the final arbiter on sentence.

The MOJ consultation process is an opportunity for corporate entities and industry groups to engage in promoting DPAs as a viable alternative to corporate criminal convictions through trial or plea.