

ADVISORY | Anti-Corruption

24 October 2012

THE UK GOVERNMENT CONFIRMS THE INTRODUCTION OF DEFERRED PROSECUTION AGREEMENT LEGISLATION

“DPAs will be an invaluable tool for the SFO and CPS. In cases where a company accepts wrongdoing, and is committed to put things right, a DPA will mean that it must comply with stringent conditions to compensate and ensure there are no repeat incidents, whilst avoiding a lengthy and expensive prosecution with the prolonged uncertainty it brings for the victims, blameless employees and others dependent on the fortunes of the company.”

UK Solicitor General, Oliver Heald QC, 23 October 2012

The UK Solicitor General, Oliver Heald QC, announced yesterday in a keynote speech at the World Bribery and Corruption Compliance Forum in London that the UK Government has decided to move forward with legislation giving the Serious Fraud Office (“SFO”) and the Crown Prosecution Service authority to enter into deferred prosecution agreements (“DPAs”) to resolve certain economic crime issues, including bribery, fraud and money laundering. Shortly thereafter, the legislation was tabled as an amendment to the UK Government’s Crime and Courts Bill.

A copy of Solicitor General Heald’s keynote speech, the DPA legislation that was tabled yesterday and the UK Government’s response to the recently concluded consultation on DPAs are attached to this advisory.

THE UK GOVERNMENT’S PROPOSAL: HOW DPAs WOULD WORK

Because of their purportedly “unique” nature, DPAs would be available under the legislation that Solicitor General Heald announced yesterday only for a limited list of economic crimes, including bribery, fraud and money laundering.

The legislation that was tabled yesterday contemplates that – following the commencement of a criminal investigation into possible bribery, fraud or money laundering – the SFO or CPS (the “Prosecutor”) would be authorised to consider the possibility of entering into a DPA with an organisation if it concludes that a DPA might be appropriate. DPAs would not be permitted for individuals.

Under the proposed legislation, once the Prosecutor and organisation had formulated a statement of agreed facts, the statement would be required to be presented in private to a Crown Court judge. Details of the alleged wrongdoing, a draft indictment, the agreed – or contemplated – conditions to

be included in the DPA and a list of any issues that had not yet been resolved also would be provided to the judge at the preliminary hearing or hearings.

At the conclusion of the preliminary hearing(s), the judge would be required to provide an initial indication of whether the Court was likely to approve the DPA proposal when presented to the Court in final form. Before doing so, the judge would be required to consider whether resolving the matter by means of a DPA would be fair, reasonable and proportionate and otherwise “in the interests of justice.” In appropriate circumstances, the judge would be permitted to decide that certain steps must be taken or further lines of enquiry must be pursued before he or she would consider approving the DPA.

The preliminary hearing(s) on the proposed DPA would not be open to the public. Solicitor General Heald explained yesterday that the decision to close the preliminary hearing(s) was intended to protect the organisation’s right to a fair trial in the event that a DPA was not ultimately agreed and approved. He also stated that closing the preliminary hearing(s) is intended to avoid inappropriate market speculation and media coverage, with the reputational damage and commercial impact that often entails.

Following the preliminary hearing(s) and the resolution of all outstanding issues, the Prosecutor and the organisation would return to the Crown Court for a final hearing. The Prosecutor would be required at that point to seek the Court’s approval of the DPA. Once the DPA had been approved by the Court, a voluntary bill of indictment would be prepared, which would be suspended so long as the DPA remained in effect. The Prosecutor also would disclose to the public at that time details of the preliminary hearing(s).

The Terms of DPAs

The DPA regime is intended to be flexible. For that reason – according to Solicitor General Heald – neither the DPA legislation nor the DPA Code for Prosecutors that the SFO and CPS will be required to produce will contain prescriptive guidance regarding the substance of DPAs. Instead, the legislation contains a non-exhaustive list of “indicative criteria” that are expected to be covered in DPAs, including:

- the need for and amount of any financial penalty;
- the need for and amount of any profit or benefit to be disgorged;
- the need for and amount of any reparation to victims;
- an obligation on the part of the organisation to use all reasonable efforts to make available to the Prosecutor relevant non-privileged information (e.g., the factual findings of any internal investigation that was conducted, including interview summaries);
- an obligation on the part of the organisation to implement anti-corruption or anti-fraud policies and procedures; and/or
- whether a compliance monitor is to be appointed.

Varying or Terminating DPAs

In deciding whether to permit changes in or early termination of a DPA, the Court would be required to determine whether variation or early termination would be fair, reasonable and proportionate and otherwise “in the interests of justice.” Once the DPA had expired, the Prosecutor would not be able to bring criminal proceedings against the organisation for the same offence unless the organisation

could be shown to have known or should have known that it had provided inaccurate, misleading or incomplete information to the Prosecutor.

NEXT STEPS

The legislation announced yesterday will be considered by a committee of the House of Lords on 30 October 2012. If approved by the committee, as seems likely, the legislation will be considered by the full House of Lords before being passed to the House of Commons for consideration. The UK Ministry of Justice has indicated that, subject to parliamentary approval, the SFO and CPS should be able to begin entering into DPAs in early 2014.

If you have questions concerning the developments discussed in this client alert, please contact the following members of our Anti-Corruption Practice Group:

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