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The Verdict

Round-up of corporate crime developments across CMS

June 2014

UK spotlight

Deferred Prosecution Agreements

In February 2014, UK prosecutors (including the Serious Fraud Office – **SFO**) were given a new tool to combat corporate crime: deferred prosecution agreements (**DPAs**). DPAs are judge-approved agreements negotiated by a prosecutor with a corporate defendant, under which the defendant avoids a criminal conviction for specified offences by agreeing to certain terms (which are published) and complying with them during the life of the agreement.

DPAs are a discretionary tool, available only to corporate offenders, not individuals, and only in relation to economic crimes, such as bribery, fraud or money laundering. Before offering a DPA, the prosecutor must be satisfied that the full extent of wrongdoing has been identified, that existing evidence provides a realistic prospect of conviction (or that given more time to investigate, it is reasonably believed such evidence would be found) and that it is in the public interest to enter into a DPA rather than prosecute. The intention is that DPAs will ease the financial burden of lengthy investigations and prosecutions and make it easier for the prosecutor to secure a positive outcome. The success of DPAs will likely depend on the extent to which corporates are attracted to self-report wrongdoing in order to seek an offer of a DPA.

The key benefits for the corporate are a swift and certain outcome, the avoidance of a conviction and all the ancillary negative knock-on effects of a prosecution and conviction. However, the very nature of a DPA, which requires a public agreed statement of facts to be issued in relation to specific offences, will mean there will inevitably be some negative impact, including reputational damage and the potential for other regulators or prosecutors with jurisdiction to use the DPA against the corporate in their own investigations.

The first DPA is yet to materialise and so it remains to be seen what sorts of cases prosecutors consider appropriate for DPAs, the kinds of terms offered and how they will work in practice. However, one key issue arising from the publication of the DPA Code of Practice for prosecutors (the **Code**) concerns the use that can be made of any documents disclosed by the corporate before and during DPA negotiations.

The Code and SFO stress the importance of self-reporting and disclosure in persuading a prosecutor that it is in the public interest to offer a DPA, as well as the need to co-operate fully with the SFO, in particular in investigating and prosecuting individual wrongdoers. The SFO has suggested this is likely to require full disclosure of any internal investigation reports and witness interviews, which may otherwise be protected from disclosure by legal privilege. The Code envisages that such disclosure may be required to justify the prosecutor entering DPA negotiations in the first place. However, if corporates do disclose such documents at that stage, they are not protected and the SFO is free to use the documents as they wish, including against the corporate if DPA negotiations fail or the terms of any DPA are later breached.

Given the SFO's expectation of early disclosure of sensitive documents, those tasked with deciding whether to self-report wrongdoing in the hope of being offered a DPA will need carefully to weigh up the risks and benefits of doing so in complying with their fiduciary duties. If the risks are considered too great, or the benefits too remote, the tool may rarely be deployed.

Key benefits of a DPA are a swift and certain outcome and the avoidance of a conviction.

CMS Round-up

AUSTRIA

Recent parliamentary study highlights corporate corruption risk. In May 2014, a study was presented to Parliament, evaluating the effectiveness of the Collective Responsibility Act (Verbandsverantwortlichkeitsgesetz, "**VbVG**"). The VbVG was introduced in 2006 and created criminal liability for corporates arising from misconduct by management or employees. The study noted that there were 528 corporate prosecutions between January 2006 and December 2010. It concluded that companies from the banking, finance and insurance sector, as well as major companies in the transport and construction sectors, were particularly affected. The study also points out that those companies who had invested time and money in an effective legal compliance system had an advantage over competitors and are less at risk of being criminally prosecuted.

CROATIA

Specialist unit for proceeds of crime. The Croatian Office for the Suppression and Prosecution of Organised Crime now has a specialist unit tasked with locating and recovering the proceeds of crime. The unit, called the Section for the Research of Property Gained from Criminal Activities, was created in January 2014.

FRANCE

Amendments to the rules applicable to the corruption of French agents. Recently adopted laws in October 2013 on transparency in public life impose increased transparency obligations on political and administrative leaders. An independent administrative authority (Haute autorité pour la transparence de la vie publique) will monitor mandatory declarations of assets and interests that must be provided by national leaders at the beginning and at the end of each mandate. In addition, the laws provide that political leaders, local elected officials and those in charge of public service missions "shall perform their missions with dignity, probity and integrity and shall prevent or cease any conflict of interests immediately".

The February 2014 European Commission Report on the fight against corruption in Europe notes this development, but deplores the lack of measures against corruption risk in public procurement. It recommends "a complete assessment" in order to identify the risks at a local level and to set the priorities to improve the mechanisms of control within public procurements.

THE NETHERLANDS

Dutch authorities continue to investigate largest corruption case in Dutch history. Against the backdrop of criticism from the OECD of the failure to enforce its foreign bribery laws, the Dutch authorities continue to investigate allegations of corruption against international construction company, Ballast Nedam.

The allegations concern fees paid to agents in relation to construction projects in Saudi Arabia in 2000-2003 (some US$500 million). While cases against the company and its auditors, KPMG, were settled for approximately €25 million and €7 million respectively last year, individual prosecutions against former directors of both the company and its auditors are ongoing, signalling a more robust approach to enforcement from the Dutch authorities.

SLOVENIA

Increased transparency for public payments. The Slovenian Commission for the Prevention of Corruption has announced that a new online tool will be available from October 2014, intended to create increased transparency in relation to payments made by public bodies. While there is currently a version of the tool in place, which publishes information on payments made by public bodies for goods and services, it does not currently track payments made by state or municipally-owned companies. The new tool will include all public companies and institutions and will also include information on the recipients and the purpose of the payments.

SPAIN

Increased jurisdiction for the courts to prosecute overseas corruption. The Organic Law on Judicial Power, approved in March 2014, extends the jurisdiction of the Spanish courts to investigate crimes (including private sector corruption) committed by Spanish or foreign nationals outside of Spain, where such crimes were committed by a director, an executive or employee of a corporate entity headquartered or registered in Spain.

SWITZERLAND

Strengthened legislation on private sector bribery. Swiss law currently treats private sector bribery as a matter of unfair competition, and so bribery in a non-commercial context is typically not punishable under Swiss law. Prosecution of bribery in the private sector requires a private criminal complaint to be filed; penal authorities may not act on their own initiative. This is perceived as significantly impeding the effectiveness of the anti-corruption legislation. On 30 April 2014, the Swiss government approved a bill supplementing the Criminal Code with a set of rules eliminating deficiencies in the current law. If adopted by the Parliament, the new law is likely to prompt a surge in the number of investigations of alleged bribery in the private sector.

UKRAINE

Ukraine yet to create an independent anticorruption authority. In February 2014, the Ukraine government introduced new anticorruption laws which, amongst other things, aimed at tackling public sector corruption. The government also adopted an Action Plan, which envisaged the creation of a new, independent anticorruption authority, tasked with investigation and enforcement of corruption offences. However, despite two drafts outlining the form the authority should take being submitted to Parliament, nothing has been approved and so the Authority is yet to be established.

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