The UK's second DPA: a hopeful judgment

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The approval of the Deferred Prosecution Agreement (DPA) between the Serious Fraud Office (SFO) and XYZ Limited (XYZ) by Leveson LJ on 8 July 2016 has generated much breathless commentary, not least because it is only the second DPA to be approved in the UK[1] under the new regime for the disposal of corporate criminality introduced by the Crime and Courts Act 2013.

Whilst this remains a nascent area of jurisprudence and we should be cautious to draw any firm conclusions from a sample of two judgments, this article focuses on four aspects of XYZ's DPA which may offer encouragement to those companies and their advisers who were previously unpersuaded of the merits of a DPA: the scope for negotiation in determining the discount to be applied to the financial penalty; the anonymity provided to XYZ; the protection for material benefiting from legal professional privilege (LPP); and an understanding by the courts and the SFO that an initial internal investigation may be a necessary and appropriate response to the discovery of potential wrongdoing.

Scope for negotiation

The criminal defence community had rightly been sceptical about the lack of financial incentive for companies considering participating in the DPA regime. Such concerns were routed in the DPA Code of Practice, which provides that, *"a financial penalty must provide for a discount equivalent to that which would be afforded by an early guilty plea"*, i.e. a discount of one third. This was the discount granted to Standard Bank in the first DPA and it was argued that this did not offer sufficient incentive to companies to self-report wrongdoing, when set against the inherent difficulty of establishing corporate criminal liability in the UK.

Leveson LJ addressed this perceived failing head-on in XYZ, granting the company a 50% discount and acknowledging that XYZ's admissions as part of its self-report to the SFO were, *"far in advance of the first reasonable opportunity,"* for XYZ to plead guilty, had the company been charged and brought before the court as part of a prosecution.

In this welcome development, Leveson LJ relied on the broad discretion available to the court under the DPA Code of Practice when considering a financial penalty and on the obligation, under the Sentencing Guidelines, to *"step back"* and consider any financial penalty in the round. The resulting

discount level was designed, in Leveson LJ's own words, *"to encourage others to conduct themselves as XYZ has when confronting criminality."*

As a side note, it may also be no coincidence that under the US Department of Justice's Enforcement Plan and Guidance—issued in April this year—companies may be rewarded for voluntary disclosure and cooperation with a maximum 50% reduction off the fine range.

Of course, every DPA will be arrived at following a process of voluntary negotiation. The SFO is under no obligation to invite a company to negotiate a DPA and the company is under no obligation to accept that invitation, should it be made. Leveson LJ's judgment reminds us that, as with all negotiations, there is necessarily some flexibility over the precise terms, including the level of discount. Companies and their advisers who choose to enter the DPA process will be heartened: it appears open to advisers negotiating a DPA to argue that their clients are entitled to more than a one third discount.

Cloak of anonymity

In contrast with Standard Bank's agreement, XYZ's DPA is the first to be concluded in circumstances where criminal proceedings are pending in relation to a number of the company's former employees.

To reflect this, and in accordance with Schedule 17 of the Crime and Courts Act 2013, the respondent (XYZ) has not been identified in this case in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings. The redacted judgment, *"removes all detail which might potentially identify the parties."*

Should this become the default approach to anonymity in DPAs where criminal proceedings against former or current company employees remain ongoing, this would be a significant boon for companies; especially those looking to endure only one short, sharp burst of adverse publicity, rather than the protracted agony of being named in the initial DPA and then again in any subsequent trial which may take place months after the conclusion of the DPA.

Any optimism, however, should be tempered by the case-specific facts of the UK's second DPA. XYZ is a private UK company. It will be interesting to see what approach the courts take should a publicly listed UK company enter into a DPA where connected criminal proceedings remain ongoing, in light of a public company's market announcement obligations.

LPP protected

It is clear from the judgments in both Standard Bank and XYZ that summaries of witnesses' first accounts must be provided to the SFO for any company to be considered for a DPA. Crucially however, the judgment in XYZ made explicit that any well-made out or *"proper"* claims of LPP were permitted and did not count as a factor against the company having provided full and genuine cooperation.

Given that David Green QC described XYZ as having demonstrated *"exemplary co-operation"*, notwithstanding the proper claims of LPP, this is a reassuring development, particularly in light of

recent ambiguous statements by the SFO as to whether companies are expected to waive LPP in order to qualify for alternatives to prosecution.

Initial investigation permitted

Standard Bank's response to the discovery of suspected wrongdoing had been repeatedly referred to as a model for cooperation by the SFO. This had no doubt caused some discomfort amongst companies and their advisers facing similar issues, given that the bank's *"disclosure [to the SFO] was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation."*

The timeline in XYZ serves to reassure that Standard Bank's approach was atypical, and that the SFO is in fact willing to accept the propriety of external lawyers completing an independent internal investigation before making a written self-report of its findings to the SFO.

In late August 2012, concerns first came to light at XYZ about the way in which a number of contracts had been secured. Having instructed external lawyers in early September, the company and its advisers delivered an initial written self-report to the SFO, *"which was the result of an extensive investigation by the law firm"* on 31 January 2013. In practice, the investigation collected, searched and processed over 90 gigabytes of data, reviewed over 27,000 electronic records and conducted 13 interviews of four XYZ employees.

That David Green QC chose to describe XYZ as having demonstrated, *"exemplary co-operation"*, notwithstanding the fact the company's advisers had first carried out an *"extensive"* internal investigation before sharing its findings with the SFO (amid the SFO's public warnings of external lawyers 'trampling the crime scene'), will reassure companies and their advisers that it remains accepted practice to carry out an initial investigation to determine the veracity and scope of any allegations before self-reporting to the SFO.

Conclusion

Whilst there is certainly still some way to go, the second DPA appears to offer a number of reasons to be hopeful that, in time, the DPA regime can mature and develop into an attractive and well-balanced alternative means of disposal of corporate criminal wrongdoing.

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[1] The UK's first DPA was concluded with ICBC Standard Bank (Standard Bank) in November 2015.

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