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The United Kingdom Adopts Deferred Prosecution Agreements

Introduction

With the adoption of the Crime and Courts Act 2013 ("the Act") on April 25, 2013,[1] the Deferred Prosecution Agreement ("DPA") is now on the UK statute book. Once the Code on DPAs has been issued by the Directors of Public Prosecutions and the Serious Fraud Office ("SFO"), UK prosecutors will have a new and flexible procedure to deal with corporate economic and financial offending to fill the gap between civil enforcement and criminal prosecution. This article briefly sets out the background to the DPA's adoption, outlines the procedure and substance of this new instrument, and provides some comparative analysis with the equivalent procedure in the United States.

Background

Policy background

The last decade or so has witnessed an on-going effort to make English white collar crime enforcement more effective. In 2002, the Law Commission published its report recommending the introduction of a general offence of fraud which led to the Fraud Act 2006.[2] In 2005, then Attorney General Lord Goldsmith QC established the inter-departmental review of arrangements for the detection, investigation and prosecution of fraud which produced its final report in July 2006. Among its implemented recommendations is the Attorney General's Guidelines on plea discussions in cases of serious or complex fraud published in March 2009. More recent reforms seeking specifically to target corporate offending include the Bribery Act 2010 and, to a lesser extent, the recent removal of the dishonesty requirement for the cartel offence in the Enterprise Act 2002.[3]

Despite these efforts, the recent history of UK white collar crime enforcement is one of mixed fortunes. Reciting the oft-quoted statistic that "fraud committed by all types of offenders costs the United Kingdom £73 billion per year,"[4] the UK Ministry of Justice

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1. Crime and Courts Act 2013, c. 22 [hereinafter "Crime and Courts Act 2013"].
2. Fraud Act, 2006, c. 35.
3. Bribery Act, 2010, c. 23, Section 14; Enterprise and Regulatory Reform Act, 2013, c. 24, Section 47. The Enterprise and Regulatory Reform Act 2013 received royal assent on the same day (April 25, 2013) as the Crime and Courts Act 2013.
4. Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organizations: Deferred prosecution agreements,* Consultation Paper CP9/2012, para. 1 (May 2012), https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements [hereinafter "Consultation Paper"]. The figure was first published by the National Fraud Authority in its 2012 Annual Fraud Indicator (March 2012). National Fraud Authority, *Annual Fraud Indicator* 8 (Mar. 2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118530/annual-fraud-indicator-2012.pdf; *see also* "Failure to make fraud a high priority comes with high price," *The Times* (Apr. 6, 2012), http://www.thetimes.co.uk/tto/business/industries/publicsector/article3375869.ece.

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("MoJ") consultation paper on DPAs from May 2012 posited that "despite years of good intentions and some high profile cases, previous attempts to prosecute economic crime have been only intermittently successful."[5]

So it was against a background of grave concerns about the ability of UK authorities to investigate and prosecute corporate fraud[6] that discussions began on how UK criminal procedure could be better adapted to dealing with the complex issues involved in offending by large corporate entities. One of the difficulties identified was the law of England and Wales on corporate criminal liability which the present government believes "does not reflect the 21st century commercial organisation."[7] The substantive difficulty singled out is the requirement that a corporate can be held criminally liable only if a "directing mind and will," in practice a board level executive or equivalent, can be shown to have had the requisite *mens rea* for the offence.[8] From a procedural perspective, with increasing international collaboration between prosecutors on large corporate investigations and prosecutions, it became increasingly obvious that UK prosecutors "have a relatively narrow range of tools available to identify and bring corporate offenders to justice,"[9] particularly compared to their US colleagues. This came into sharp relief in *R v. Innospec Limited,* in which the Serious Fraud Office sought to co-ordinate a global plea-bargain with the US Department of Justice, the Securities and Exchange Commission and the Office of Foreign Asset Control, and suffered such withering criticism from the judge in that case (Thomas LJ) as to guarantee no further such attempts in the absence of legislative change.[10] However, prior to the *Innospec* ruling, the SFO had entered into a "plea agreement" with a director responsible for corruption in relation to medical supplies in Greece. At the sentencing appeal, the Lord Chief Justice stated in no uncertain terms: *"In this jurisdiction a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle."*[11]

Comparing the UK system with the comparative effectiveness of US prosecutors,[12] the government clearly hopes that, with the recent adoption of the Act and its institution of DPAs, white collar crime enforcement in the UK will be much more effective in dealing with large, often multinational, corporate offenders.

Business community reaction

In the Consultation Paper, the MoJ stated that "the prosecutor at present has little to offer the commercial organisation by way of encouragement to engage, cooperate

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5. Consultation Paper at para. 2.
6. *See, e.g.,* Ed Hammond & Caroline Binham, "Finance and fraud: Serious shortcomings," *Financial Times* (Apr. 30, 2012), http://www.ft.com/intl/cms/s/0/904265ee-92a9-11e1-9e0a-00144feab49a.html.
7. Consultation Paper at para. 10.
8. Consultation Paper at para. 26.
9. Consultation Paper at para. 3.
10. *See R v. Innospec Ltd.,* [2010] Crim. L. R. 665.
11. *R v. Dougall* [2010] EWCA (Crim) 1048 [19] (appeal taken from Eng.).
12. Consultation Paper at paras. 56-70.

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919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

Moscow
+7 495 956 3858

London
+44 20 7786 9000

Hong Kong
+852 2160 9800

Paris
+33 1 40 73 12 12

Shanghai
+86 21 5047 1800

Frankfurt
+49 69 2097 5000

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or plead. The organisation has no real incentive of its own to resolve issues with the prosecutor, particularly as there will be significant uncertainty over where the process will lead."[13] Among the respondents to the consultation were representative organisations for business, some individual corporations as well as major accountancy and law firms.[14] The group of respondents as a whole was broadly, not to say overwhelmingly, supportive of the principles behind the government's plans[15] but also, albeit to a somewhat lesser degree, of the government's proposed approach which is now enshrined in law.

Despite the potentially significant change that the DPA brings to the white collar crime landscape, the reaction was muted when the Act received the Royal Assent on April 25, 2013 putting the DPA on the UK statute book. In a perhaps telling misunderstanding, the *Financial Times* reported the event with the headline: "Bill to introduce US-style plea bargains receives royal assent."[16]

Nature of the DPA

The Act defines a DPA as "an agreement between a designated prosecutor and a person ['the defendant'] whom the prosecutor is considering prosecuting for an offence specified in Part 2" under which "[the defendant] agrees to comply with the requirements imposed on [the defendant] by the agreement" and "the prosecutor agrees that, upon approval of the DPA by the court …[the provisions of this Schedule are] to apply in relation to the prosecution of [the defendant] for the alleged offence."[17]

DPAs will be brought into force by Ministerial Order[18] once the Directors of Public Prosecutions and the Serious Fraud Office have drafted the Code on DPAs,[19] expected either late this year or early 2014.

Offences concerned

DPAs will be available for the common law offences of conspiracy to defraud and cheating the public revenue as well as a range of statutory offences falling within the broad category of economic and financial crimes.[20] Of note is that despite significant support for DPAs to cover non-economic offences (environmental, health and safety, etc.),[21] the Act specifies that the range of offences covered by DPAs may only be extended to further "financial or economic crime."[22]

Also, of note is that DPAs will be available for "conduct occurring before the commencement of this Schedule as if an offence specified in this Part included any corresponding offence under the law in force at the time of the conduct."[23] That means, for example, that it is intended that DPAs should be available for acts of bribery carried out before the 1st July 2011 and constituting offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 (as the statutory predecessors of the Bribery Act 2010 which is explicitly covered).

Parties to a DPA

Suspects able to enter DPAs are bodies corporate, partnerships and unincorporated associations. Unlike in the US, individuals are expressly excluded from the DPA regime.[24]

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13. Consultation Paper at para. 37.
14. *See* Ministry of Justice, *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations,* Response to Consultation CP(R)18/2012 Annex A (Oct. 23, 2012), http://www.official-documents.gov.uk/document/cm84/8463/8463.pdf [hereinafter "Consultation Response").
15. By way of example, in its response to the consultation, PwC was of the view that DPAs "have the ability to balance the various criminal justice purposes of punishment, reduction of crime, rehabilitation, public protection and restitution. Additionally DPAs can improve certainty for commercial organisations and victims…alike…." Letter from PricewaterhouseCoopers LLP to Ministry of Justice (July 31, 2012), http://ebookbrowse.com/pwc-response-to-the-ministry-of-justice-consultation-deferred-prosecution-agreements-pdf-d394945420.
16. Caroline Binham, "Bill to introduce US-style plea bargains receives royal assent," *Financial Times* (Apr. 26, 2013), http://www.ft.com/intl/cms/s/0/51301fee-ae92-11e2-8316-00144feabdc0.html.
17. Crime and Courts Act 2013 at Schedule 17 para. 1. Section 45 of the Act simply states that: "Schedule 17 makes provision about deferred prosecution agreements." *Id.* at Section 45.
18. *Id.* at Section 61(2).
19. *Id.* at Schedule 17 para. 6.
20. *Id.* at Schedule 17. The statutory offenses for which DPAs will be available include: The Theft Act, 1968, c.60; the Customs and Excise Management Act, 1979, c. 2; the Forgery and Counterfeiting Act, 1981, c. 45; the Companies Act, 1985, c. 6; the Value Added Tax Act 1994, the Financial Services and Markets Act, 2000, c. 8; the Proceeds of Crime Act, 2002, c. 29; the Fraud Act, 2006, c. 35; the Companies Act, 2006, c. 46; and the Bribery Act, 2010, c. 23.
21. *See, e.g.,* Letter from PricewaterhouseCoopers LLP to Ministry of Justice, note 15, *supra.*
22. Crime and Courts Act 2013 at Schedule 17 para. 31(a).
23. *Id.* at Schedule 17 para. 30.
24. *Id.* at Schedule 17 para. 4(1).

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Prosecutors able to enter into DPAs are the Director of Public Prosecutions and the Director of the SFO.[25] Of note is that, subject to a very narrow exception, a designated prosecutor must "exercise *personally* the power to enter into a DPA."[26] The legislative intention is clearly that DPAs be reserved for the most complex and/or high-profile cases and that the heads of the relevant prosecuting authorities[27] take personal responsibility for them.[28]

Terms of the DPA

A DPA must contain:

- A "statement of facts relating to the alleged offence, which may include admissions made by [the defendant]."[29]
- An expiry date.[30]

The DPA will impose various requirements on the defendant, including, but not limited to:

- A financial penalty payable to the prosecutor;
- Compensation to victims of the alleged offence;
- Donations to charities/other third parties;
- Disgorgements of profits from the alleged offence;
- Implementation of/revisions to internal compliance programmes;
- Co-operation in investigations of the alleged offence; and
- Payment of reasonable prosecution costs.[31]

The DPA may impose time limits for the defendant to comply with any requirements imposed and it may also specify the consequences of non-compliance.[32]

It is important to note that a financial penalty is not a necessary term of a DPA. It is, however, a more than likely one and if imposed, the financial penalty "must be broadly comparable to the fine that a court would have imposed on [the defendant] on conviction for the alleged offence following a guilty plea." Although apparently restrictive, during the bill's passage through the House of Lords the government gave assurances that this principle of broad consistency with sentencing guidelines was not intended to prevent prosecutors, in appropriate cases, to agree lower financial penalties than sentencing guidelines would otherwise prescribe.[33] In any event, there is currently no specific guidance from the Sentencing Guidelines Council on the appropriate levels of fines to be levied on corporates guilty of economic offences.[34] If DPAs come into force before such guidelines are published, prosecutors and DPA defendants may, ironically, experience a period of greater flexibility.

Procedure

The Act sets out a dual-phase process leading to the formal adoption of a DPA, both phases being concluded by a judicial decision.

Initial negotiations and the judicial declaration

Once the parties to the proposed DPA have begun negotiations but before terms are agreed, the prosecutor must seek a declaration from the Crown Court approving the DPA process in principle.[35] The hearing of the application as well as the giving of reasons *must* be *in camera*.[36] In case of refusal, the prosecutor may make a renewed application.[37]

Settlement of the DPA and judicial approval

Following the obtaining of the judicial declaration and the subsequent finalisation of the terms of the draft DPA, the prosecutor

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25. *Id.* at Schedule 17 paras. 3(1)(a) & (b). Additional prosecutors able to enter into DPAs may be designated by the Secretary of State under Paragraph 3(1)(c).
26. *Id.* at Schedule 17 para. 3(2) (emphasis added).
27. Currently the Director of Public Prosecutions, Keir Starmer QC, and the Director of the SFO, David Green QC.
28. *See* Consultation Response at para. 79.
29. Crime and Courts Act 2013 at Schedule 17 para. 5(1).
30. *Id.* at Schedule 17 para. 5(2).
31. *See id.* at Schedule 17 para. 5(3).
32. *Id.* at Schedule 17 para. 5(3) & (5).
33. *See* Hansard, House of Lords, Dec. 18, 2012, Vol. No. 741, Part No. 87, Columns 1524-1526 (intervention by Lord Goldsmith), http://www.publications.parliament.uk/pa/ld201213/ldhansrd/index/121218.html. Relevant in this regard is that the general guidelines provide for a maximum reduction in sentence of one third to a defendant who pleads guilty at the earliest opportunity.
34. Minutes from the March 1, 2013 meeting of the Council indicate that a "draft model for sentencing corporate offenses" is currently under discussion. Sentencing Council, Meeting Minutes para. 5.10 (Mar. 1, 2013), http://sentencingcouncil.judiciary.gov.uk/docs/web_01-03-2013.pdf.
35. Crime and Courts Act 2013 at Schedule 17 para. 7(1). The contents of the prosecutor's application is one of the issues it is expected the Code on DPAs will provide guidance.
36. *Id.* at Schedule 17 para. 7(4).
37. *Id.* at Schedule 17 para. 7(3).

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must apply to the Crown Court for judicial approval of the finalised DPA.[38] The hearing on this application *may* be in private[39] but if the court decides to approve the DPA and grant the declaration, that decision, and the reasons for it, *must* be handed down in open court.[40]

In case the court refuses to approve the full draft DPA the prosecutor must decide whether to launch formal proceedings or, in case of determination to conclude a DPA, return to the drawing board with the defendant and renew the application for an initial declaration on different terms.

It is the granting of judicial approval which causes a DPA to come into force[41] and at that point the prosecutor must publish the following items[42]:

- The DPA itself.
- The initial judicial declaration and the court's reasons for granting it.[43]
- The court's final decision to approve the DPA and its reasons for doing so.

The court may order the postponement of publication "if it appears to the court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings."[44]

Effect of a DPA

Once the court's approval has been obtained, the prosecutor is bound by the DPA formally to seek the court's consent to prefer a voluntary bill of indictment[45] charging the defendant with the alleged offence(s). Once the bill of indictment is signed, and the proceedings formally instituted, they are automatically suspended[46] and the defendant cannot be prosecuted for the alleged offence.[47]

Policing the DPA

Non-compliance by the defendant

If the prosecutor is of the view that the defendant has failed to comply with the requirements of the DPA, she/he has two options:

The prosecutor may decide to take no action, in which case that decision and the reasons for it must be published.[48]

Alternatively, and at any time during the term of the DPA, the prosecutor may commence non-compliance proceedings before the Crown Court.[49] The court will determine on the balance of probabilities whether there has been non-compliance[50] and if it so finds three courses of action are open to it:

(a) Invite the parties to agree proposals to remedy the non-compliance;

(b) Terminate the DPA; or

(c) Take no action.[51]

In principle, the prosecutor must publish the outcome of any non-compliance application.[52]

If the court terminates the DPA, the prosecutor is at liberty to make a further application to the court for the lifting of the suspension of the formal proceedings.[53]

Variation of the DPA

The parties may agree variations to the terms of a DPA on a court invitation following a non-compliance application or if it is necessary for the defendant to be able to comply with the DPA due to the intervention of objectively unforeseeable circumstances.[54] In either case, the agreed variation must be approved by the Crown Court in a procedure mirroring

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38. *Id.* at Schedule 17 para. 8(1).
39. *Id.* at Schedule 17 para. 8(5).
40. *Id.* at Schedule 17 para. 8(6).
41. *Id.* at Schedule 17 para. 8(3).
42. *Id.* at Schedule 17 para. 8(7).
43. In case there had been an initial refusal by the court to grant such a declaration, those reasons must be published as well.
44. Crime and Courts Act 2013 at Schedule 17 para. 12.
45. *Id.* at Schedule 17 para. 2(1).
46. *Id.* at Schedule 17 para. 2(2).
47. *Id.* at Schedule 17 para. 2(4).
48. *Id.* at Schedule 17 para. 9(8).
49. *Id.* at Schedule 17 para. 9(1).
50. *Id.* at Schedule 17 para. 9(2).
51. *Id.* at Schedule 17 para. 9(3).
52. *Id.* at Schedule 17 para. 9(5)-(7).
53. *Id.* at Schedule 17 para. 2(3).
54. *Id.* at Schedule 17 para. 10(1).

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the procedure for judicial approval of the original DPA.[55]

> "The parties may agree variations to the terms of a DPA on a court invitation following a non-compliance application or if it is necessary for the defendant to be able to comply with the DPA due to the intervention of objectively unforeseeable circumstances."

Expiry of the DPA

Assuming there has been no judicial termination of the DPA before its date of expiry, the prosecutor will give notice to the Crown Court that she/he does not want the proceedings to continue.[56]

Such a notice prevents fresh criminal proceedings from being instituted against the defendant for the alleged offence(s).[57] The exception is if the defendant has knowingly or recklessly provided inaccurate, misleading or incomplete information to the prosecutor during the course of negotiations for the DPA.[58] Of course, if such behaviour is discovered during the course of a DPA, it is very likely to constitute a breach of requirement which can, at worst, lead to judicial termination of the DPA and the reinstitution of formal proceedings.

When the notice is given, the prosecutor must publish the fact of discontinuance as well as details of the defendant's compliance with the DPA unless, again, the court has ruled that such publication should be postponed to avoid "a substantial risk of prejudice to the administration of justice in any legal proceedings."[59]

Appeals

There is no statutory right of appeal against any of the decisions set out above. That means that any challenge to any "DPA decision" is limited to those which will be deemed susceptible to judicial review. While it is clear that any relevant decision by a prosecutor is susceptible to judicial review, in relation to the judicial decisions it is less so.

Judicial review is not available in respect of any matter relating to trials on indictment.[60] While it was certainly the government's intention that this general exclusion should apply to judicial decisions in the DPA procedure,[61] there lingers a doubt whether this exclusion has been achieved. The test formulated for whether a decision or ruling by a Crown Court is in respect of a matter relating to a trial on indictment is if it "aris[es] in the issue between the Crown and the defendant formulated by the indictment (including the costs of such issue)…."[62] It does not appear entirely self-evident that a decision by a Crown Court judge refusing a suspect the potential benefit of non-prosecution before any indictment is in existence falls within the scope of this formulation. It is therefore not inconceivable that this attempt to exclude the jurisdiction of the High Court may prove ineffective.

Complete and incomplete DPAs and subsequent prosecutions

Disclosure

The standard criminal disclosure regime under the Criminal Proceedings and Investigations Act 1996 applies only when a suspension is lifted against proceedings commenced (and suspended) following the judicial approval of a DPA.[63] The approach of designated prosecutors to disclosure in the course of the DPA process will be set out in the forthcoming Code on DPAs.[64]

Admissibility of material relating to a DPA that never entered into force

Material that shows that the defendant entered into negotiations for a DPA as well as material created solely for the purpose of preparing the DPA or the statement of

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55. *Id.* at Schedule 17 para. 10(2) *et seq.*
56. *Id.* at Schedule 17 para. 11(1). The wording of this Paragraph suggests that while proceedings remain live until the prosecutor has given notice to the Crown Court, she/he has no discretion whether to give such notice. Note, however, that there are circumstances when the DPA will be deemed to continue past the stipulated date of expiry. *See id.* at Schedule 17 para.11(4).
57. *Id.* at Schedule 17 para. 11(2).
58. *Id.* at Schedule 17 para. 11(3).
59. *Id.* at Schedule 17 paras. 11(8) & 12.
60. *See* Supreme Courts Act 1981, c. 54, Section 29(3).
61. *See* Consultation Response at para. 179 *et seq.*
62. *See R v. Manchester Crown Court, ex p. DPP* [1993] 1 W.L.R. 1524, 1530 (applying the test laid down in *Re Smalley* [1985] A.C. 622).
63. Criminal Proceedings and Investigations Act 1996, c. 25, para. 37.
64. Crime and Courts Act 2013 at Schedule 17 para. 6(1)(b).

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facts is admissible as evidence against the defendant, but only in relation to:

(a) "offences consisting of the provision of inaccurate, misleading or incomplete information; or

(b) some other offence where in giving evidence [the defendant]makes a statement inconsistent with the material," but only if the material becomes relevant as a result of procedural steps taken by the defendant.[65] This will include prosecution for offences intended to be covered by the proposed DPA.

Material relating to a DPA that entered into force

In this circumstance, the rule is simple: The statement of facts contained in the DPA is deemed to be an admission by the defendant under Section 10 of the Criminal Justice Act 1967.[66] The prosecutor would not have to lead any further evidence to prove the facts contained in the statement of facts and, conversely, the defendant would be debarred from leading evidence to contradict them.

The Code on DPAs

As stated above, the DPA regime will come into force only once the designated prosecutors have published a Code on DPAs. There are two main areas where potential DPA defendants will look to the Code for clarification:

First, the Code ought to set out the outlines of the prosecutors' procedure dealing with initial approaches by potential DPA defendants, initial negotiations and the level of defendant input into the content of the prosecutor's application for a declaration.

Second, the approach by designated prosecutors to suspected violations of the terms of a DPA needs to be clarified as well as the criteria that will be applied when deciding whether to institute non-compliance proceedings. In particular, it would be of assistance to future DPA defendants to know how and to what extent the defendant will be asked to provide explanations and/or clarifications before the prosecutor decides whether to make a non-compliance application.

Americanisation of UK white collar crime enforcement?

It is clear that the inspiration for Schedule 17 is the American DPA. There are, however, three major differences with respect to the US regime.

First, a description of the US system would not be complete without mention of the *non*-prosecution agreement ("NPA") under which a company agrees to undertake remedial action and cooperate with the authorities in exchange for a prosecutorial undertaking not to file charges. NPAs were considered in the Consultation Paper[67] and appear to have been excluded because it "leaves substantial power in the hands of the prosecution with no judicial oversight."[68] NPAs were barely touched upon in the Consultation Response[69] and the Act does *not* create a UK NPA.[70]

Second, judicial oversight is both more intensive as well as intervening earlier under the UK regime. While this makes the process itself less flexible for prosecutors and DPA defendants, it ought to minimise the risk of surprise judicial rejections of a "final" agreement. A related difference is the UK DPA's principle of non-disclosure until judicial approval has been secured. The US model of publication upon agreement by the parties brings with it the possible inconvenience of publishing an agreement only to see it rejected.[71]

Third, and crucially, unlike its US equivalent the UK DPA is not open to individual defendants. What effect, if any, this may have on the interaction between corporate defendants and individuals bearing operational responsibility within the corporate organisation remains to be seen. There may now be a clear incentive for

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65. *Id.* at Schedule 17 para. 13(3)-(6).

66. *Id.* at Schedule para. 13(2).

67. Consultation Paper at paras. 56-70.

68. *Id.* at para. 64.

69. For a brief mention *see* Consultation Response at para. 11.

70. For completeness, it should be mentioned that both the Director of Public Prosecutions and the Director of the Serious Fraud Office are specified prosecutors under Section 71 of the Serious Organised Crime and Police Act 2005 and thus able to issue immunity notices (*i.e.*, non-prosecution undertakings) to offenders who assist the authorities in the investigation or prosecution of indictable offences. This may, for example, be relevant for individual directors who assist the authorities in the investigation or prosecution of corporations.

71. Both of these issues are well-illustrated by the DPA between WakeMed Health and Hospitals and the US Department of Justice ("DOJ"). Though signed and published by the DOJ in December 2012, it was initially rejected by the District Judge in January 2013. *See* DOJ Press Rel., WakeMed Enters Into $8 Million Settlement To Resolve Investigation Concerning Outpatient Hospital Visits Billed to Medicare as Inpatient Hospital Stays (Dec. 19, 2012), http://www.justice.gov/usao/nce/press/2012/2012-dec-19.html. The DPA was finally approved in February 2013 following amendments which included judicial monitoring of the implementation. *See, e.g.* Anne Blyth & Joseph Neff, "Judge Agrees to Defer Prosecution of WakeMed for False Medicare Billing," *News Observer* (Feb. 9, 2013), http://www.newsobserver.com/2013/02/09/2664535/judge-agrees-to-defer-prosecution.html).

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corporate defendants to obtain immunity for prosecution in return for providing the authorities with evidence which can then be used against individuals in conventional criminal prosecutions.

What this means

David Green QC's appointment as director of the SFO has been widely reported as bringing in a less accommodating approach to corporate suspects than that practised by his predecessor, Richard Alderman.[72] David Green addressed DPAs within this approach and in the post-*Innospec* landscape in a speech in June 2012:

> At present we are in no man's land, between rock and a hard place. A corporate needs to see the advantages of self-reporting. At present the prosecutor's role is circumscribed by the *Innospec* judgment pending the clarity afforded by legislation introducing DPAs.
>
> A corporate which self-reports cannot be given a guarantee in advance that it will not face prosecution. No prosecutor could do that. But the fact of self- reporting will be recognised as a factor of significance in the assessment of the public interest limb of the code test applied in deciding whether or not to prosecute. If a prosecution is not in the public interest, the SFO will be likely to seek a civil settlement.
>
> Obviously, the introduction of DPAs will provide a very useful option in this context.[73]

The message, therefore, is that DPAs should be seen as an incentive to corporates to self-report potentially criminal wrong-doing. In this regard, there are three factors which will be of particular relevance to those advising corporates in a quandary: First, the relative safety of the limits to the use which prosecutors can make of material obtained in DPA negotiations should the DPA not enter into force; second, the comfort of early judicial agreement in principle; finally, the principle of confidentiality until judicial approval of the final agreement.

Nevertheless, despite these ostensibly comforting features, it must be born in mind that DPAs are completely new to the UK legal landscape. It is therefore difficult to know what David Green meant when he recently declared that "DPA's will only be used in the right circumstances…."[74] It must be hoped that the forthcoming Code for DPAs will provide clear guidance.

It also bears mention that although a successful DPA will result in an absence of a criminal conviction, it can still have serious consequences for the corporate concerned (in addition, of course, to the financial and reputational costs of compliance with the terms of the DPA). For instance, whereas debarment from public procurement contracts will not be a direct result of a DPA, such a clear admission of guilt is likely to be a factor the authorities will take into account for the purpose of discretionary exclusions from public tenders.

Finally, it should be mentioned that the scope of DPAs, both in terms of whether they should be available to individuals and for a wider range of offences, is likely to be the subject of future review once the government has assessed their impact. As mentioned above, the Act also provides for the designation by the Secretary of State of additional prosecutors able to enter into DPAs.[75] The introduction of DPAs in the UK was described as "a toe-dipping exercise" and if their efficacy is proved, the intention of the Act's authors is that their scope may very well be extended.[76]

John B. Missing
Karolos Seeger
Matthew H. Getz
Robin Lööf

John B. Missing and Karolos Seeger are partners, Matthew H. Getz is an international counsel, and Robin Lööf is an associate in the firm's London office. They are members of the Litigation Department and the International Corporate Investigations and Defence Group. The authors may be reached at jmissing@debevoise.com, kseeger@debevoise.com, mgetz@debevoise.com, and rloof@debevoise.com. Full contact details for each author are available at www.debevoise.com.

Those who wish additional information about the Crime and Courts Act or compliance matters relating to U.K. law may contact the authors or Lord Goldsmith QC, the firm's Chair of European and Asian Litigation, who may be reached at phgoldsmith@debevoise.com.

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72. *See, e.g.,* Caroline Binham, "New SFO director pledges tougher stance," *Financial Times,* (Apr. 26, 2012), http://www.ft.com/cms/s/0/6d8b01de-8fa0-11e1-98b1-00144feab49a.html#axzz2U9yUyyVG.

73. David Green, Speech to the 10th Annual Corporate Accountability Conference held at PricewaterhouseCoopers (June 14, 2012), available at http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/10th-annual-corporate-accountability-conference-held-at-pricewaterhousecoopers-on-14-june-2012.aspx.

74. David Green, Speech at the Inaugural Meeting of the Fraud Lawyers' Association (Mar. 26, 2013), available at http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2012/inaugural-fraud-lawyers'-association.aspx.

75. Crime and Courts Act 2013 at Schedule 17 para. 3(1)(c).

76. *See* Hansard, House of Lords, Dec. 10, 2012, Vol. No. 741, Part No. 81, Columns 961-962 (reply by Lord Ahmad of Wimbledon), http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121210-0003.htm.

Broker-Dealer Employees and Venezuelan Bank Official Charged with FCPA Bribery and Related Offenses: The Potential Significance for the Financial Services Sector

May 6, 2013 marked a new chapter in FCPA enforcement in the finance sector. On that day, the U.S. District Court for the Southern District of New York, at the request of the U.S. Attorney's Office for the same judicial district ("DOJ"), unsealed criminal FCPA, Travel Act, anti-money laundering and conspiracy charges against Tomas Alberto Clarke Bethancourt ("Clarke") and Jose Alejandro Hurtado ("Hurtado"), two employees of New York broker-dealer Direct Access Partners LLC ("DAP"), as well as against Maria de Los Angeles Gonzalez de Hernandez ("Gonzalez"), Vice President for Finance of the Economic and Social Development Bank of Venezuela (Banco de Desarrollo Económico y Social de Venezuela ("BANDES")), an entity of the Venezuelan state.[1]

The same day, the New York Regional Office of the U.S. Securities and Exchange Commission ("SEC") filed civil charges against Clarke and Hurtado, as well as against Hurtado's wife, Haydee Leticia Pabon ("Pabon"), and Iuri Rodolfo Bethancourt ("Bethancourt"), an alleged resident of Panama and apparent relative of Clarke.[2] The unsealing of the criminal action, which had been filed on March 12, 2013, and the filing of the related SEC action, followed the apparently coordinated arrest in Miami on May 3, 2013 of the three defendants in the criminal matter, including Gonzalez, the Venezuelan official.[3]

Although the case is still an evolving matter, the labyrinthine scheme alleged serves as a reminder to the financial services industry of the importance of periodically assessing the effectiveness and appropriateness of anti-bribery compliance programs. In this article, we summarize the government's charges to date and identify some of the unique risks faced by financial services firms stemming from the complex transactions in which they deal and the multiplicity of government entities with mandates that can encompass anti-bribery compliance.

I. The Alleged Scheme and Charges

The criminal and civil complaints[4] (together with a DOJ forfeiture action),[5] allege a brazen scheme that caused the loss of tens of millions of dollars to BANDES.[6] The DOJ and SEC allege that the scheme resulted in payment of millions of dollars to Gonzalez in exchange for her conniving with the charged DAP employees to create inflated bond trading profits in transactions that carried little or no economic risk to DAP, with millions more ending up in the pockets of Clarke, Hurtado, and family members; allegedly, Clarke and Hurtado, to increase their own takes, not only lied about the scope of the swindle to the Venezuelan official they were bribing but also took steps to conceal the scheme from other bond market participants, banks, and regulators.[7]

The defendants are alleged to have used two methods for routing payments to Gonzalez. The first involved efforts to hide the compensation paid by BANDES

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1. DOJ Press Rel. No. 13-515, Two U.S. Broker-dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-515.html. For a breakdown of the criminal charges against the defendants, see www.justice.gov/usao/nys/pressreleases/May13/ClarkeetalComplaintPR.pdf. For a description of BANDES' role in the Venezuelan economy, see http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapid=32993969.
2. SEC Rel. No. 2013-84, SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official (May 6, 2013), http://www.sec.gov/news/press/2013/2013-84.htm [hereinafter "SEC Release"].
3. *See* Docket, *United States v. Clarke et al.,* No. 1:13-mj-2646-AOR (S.D. Fla. May 3, 2013).
4. Complaint, *United States v. Clarke et al.,* No. 13 Mag. 0683 (filed under seal Mar. 12, 2013, unsealed S.D.N.Y. May 6, 2013) [hereinafter "Clarke Criminal Complaint"]; *SEC v. Clarke et al.,* No. 13 Civ. 3074 (S.D.N.Y. filed May 7, 2013) [hereinafter "Clarke SEC Civil Complaint"].
5. Complaint, *United States v. Assets of Cartagena Int'l, Inc. et al.,* No. 13 Civ. 3028 (S.D.N.Y. filed May 6, 2013) [hereinafter "DOJ Forfeiture Complaint"].
6. William Neuman, "Miami Workers Bribed, and Shortchanged, Venezuelan Banker, U.S. Says," *The New York Times* (May 22, 2013) [hereinafter "Neuman"], http://www.nytimes.com/2013/05/22/world/americas/venezuelan-banker-and-miami-brokerage-workers-are-accused-of-fraud.html?pagewanted=all.
7. Clarke SEC Civil Complaint ¶¶ 5, 25, 28, 30, 31, 33-34, 39, 42-44, 46-48, 50, 52, 54-56, 67-75, 78, 89-90. *See also* Clarke Criminal Complaint ¶¶ 12-14, 23, 30b.

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to DAP via "sham compensation" for the bond transactions to Hurtado (through, among other means, a purported Swiss entity controlled by Hurtado called Private Wealth Corporation S.A.), and to his then-fiancée Pabon,[8] some of which was routed to Gonzalez through payments to accounts at three different Swiss banks.[9]

A second alleged method involved routing payments to a Panamanian company named ETC Investment, S.A. ("ETC"), of which Bethancourt was the President and as to which Clarke held a power of attorney, as an intermediary used to pay another Panamanian entity, Cartagena International, Inc., allegedly controlled by Gonzalez.[10] Routing of payments from ETC to Gonzalez was also accomplished through yet another Panamanian entity, Castilla Holdings S.A., and one or more accounts at one of the Swiss banks used in the first routing scheme and an account at another bank, located in Panama.[11]

Profits taken by the charged DAP employees were allegedly facilitated by Clarke's and Hurtado's provision of false information to Gonzalez about the size of the markups and markdowns DAP was taking on bond purchases and sales for BANDES.[12]

The entire scheme was masked from other market participants, such as DAP's clearing brokers, through devices such as "internal wash trades" in which multiple clearing brokers were used to conceal the ultimate purchaser of bonds being bought and sold with no underlying economic purpose, as well as the use of an "inter-positioning" broker to facilitate multiple markups in price for securities at the heart of the scheme.[13]

> "[T]he investigation into the BANDES matter 'is continuing.' DAP itself has refused to respond to press inquiries, and the level of its cooperation and that of other DAP employees has not been discussed to date in government press releases."

The DOJ's complaint charges Clarke and Hurtado as U.S. nationals (and therefore "domestic concerns" under 15 U.S.C. § 78dd-2) with violation of the anti-bribery provisions of the FCPA, as well as the Travel Act, federal anti-money laundering laws, and conspiracy to violate all three statutes.[14] Gonzalez, who (as the bribe recipient) under established law could not be charged with violating the FCPA or conspiring to violate it, is charged with violation of the Travel Act and federal anti-money laundering statutes, and conspiracy to violate each.[15] Because DAP and the DAP employees were not subject to the SEC as an "issuer," they were not charged under the SEC's authority to enforce the FCPA, but with multiple counts of violating Section 10(b) of the Securities Exchange Act of 1934, related SEC rules, aiding and abetting those violations, and related violations of the broker registration mandates.[16]

II. Preliminary Observations

Although the BANDES case is still in its infancy and the defendants have yet to have their day in court, a number of observations can be made about the potential significance of the case for the financial sector. Perhaps most importantly, as the SEC stated explicitly in its press release announcing its prosecution, the investigation into the BANDES matter "is continuing."[17] DAP itself has refused to respond to press inquiries,[18] and the level of its cooperation and that of other DAP employees has not been discussed to date in government press releases.

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8. As alleged by the government, neither Hurtado nor Pabon had the necessary broker-dealer registrations or qualifications for exemptions from registration requirements, making all of their alleged transaction-related compensation allegedly illegal. Clarke SEC Civil Complaint ¶¶ 35-40, 42, 44.
9. Clarke SEC Civil Complaint ¶¶ 28. 35, 39, 41-52, 57-66. *See also* Clarke Criminal Complaint ¶¶ 3, 8, 13, 23, 31-35; DOJ Forfeiture Complaint ¶¶ 15-17.
10. Clarke SEC Civil Complaint ¶¶ 14, 53-57, 62-66. *See also* Clarke Criminal Complaint ¶¶ 3, 8, 14, 23, 37-40; DOJ Forfeiture Complaint ¶¶ 18-28.
11. Clarke Criminal Complaint ¶¶ 3,8, 14, 23, 37-40. *See also* DOJ Forfeiture Complaint ¶¶ 18-28.
12. Clarke SEC Civil Complaint ¶¶ 67-74.
13. *Id.* at ¶¶ 75-96.
14. Clarke Criminal Complaint ¶¶ 1-14.
15. *Id.* at ¶¶ 6-14.
16. Clarke SEC Civil Complaint ¶¶ 108-116.
17. *See* SEC Release, *supra* note 2.
18. *See* Neuman, *supra* note 6.

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Neither DOJ nor the SEC have indicated publicly whether any additional charges are being considered, and it is not yet known how the arrests came about. The possibility of charges against the company or others, however, cannot be ruled out.[19] As stated in the SEC's complaint, uncharged DAP employees other than Clarke and Hurtado shared in the profits of DAP's Global Markets Group to which Clarke belonged, and DAP's revenues "soared" in 2009, when the scheme was operating at its height; specifically, revenue increased to $75 million, five times the revenue in 2007, with the increase "almost exclusively due" to transactions related to the BANDES bond trading scheme alleged.[20] In addition to others affiliated with DAP and DAP itself, the civil and criminal complaints also identify at least one other Venezuelan official as having received allegedly improper payments as part of the same or similar misconduct.[21]

> "The brazenness of the alleged scheme will undoubtedly cause many at financial institutions – large and small – to conclude that 'this couldn't happen here.' Nevertheless, the case is cause to review the reasons why anti-bribery compliance in the financial sector is a critical corporate function."

The brazenness of the alleged scheme will undoubtedly cause many at financial institutions – large and small – to conclude that "this couldn't happen here." Nevertheless, the case is cause to review the reasons why anti-bribery compliance in the financial sector is a critical corporate function, and why, in particular, foreign officials with significant authority at state banking institutions are potentially risky counterparties whose interactions with company personnel must be closely scrutinized and monitored. Foreign officials operating in the public finance, banking, and investment sectors often have significant authority over multi-million dollar transactions that, at least on a short-term basis, can be a tempting target for those seeking to profit in the financial sphere. The potential complexity of financial transactions with state entities makes them acutely ripe for bribery schemes, particularly when facilitated through financial intermediaries.

This is particularly true with respect to dealings with state financial institutions in jurisdictions well-known for corruption, such as Venezuela. As press reports have emphasized, Venezuela ranked last among Latin American countries in Transparency International's 2012 Corruption Perception Index, and ranked similarly low in the years in which the alleged corrupt scheme was running. Aside from the red flags associated with the payments to entities in Panama and Switzerland, two jurisdictions known for bank secrecy, revenues that were potentially "too good to be true" stand out as a red flag that compliance professionals have seen time and again as worthy of inquiry. These charges should further heighten sensitivity to the risks that business units performing better than expected may be doing so for the wrong reasons.

Moreover, especially in light of Dodd-Frank's amendment to the SEC's authority to seek injunctions against and monetary relief[22] from aiders and abettors for knowing or reckless conduct that provides substantial support to securities law violators,[23] the case illustrates how banks, market makers, and other financial intermediaries are at potentially significant risk from the conduct of customers who may seek to exploit the ethical weaknesses of non-U.S. government officials whose corrupt discretionary decisions are a target of FCPA criminal and civil enforcement.

The risk that improper transactions will be detected is further heightened for the financial sector given mandatory record-keeping requirements such as those set forth SEC Rule 17a-4(b), which requires exchange members, brokers, and dealers to "preserve for a period of not less than three years, the first two years in an easily accessible place… (4) [o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer

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19. *See also, e.g.,* 15 U.S.C. § 78o(b)(4)(B) (2006) (suspension or revocation of broker-dealer registration).
20. Clarke SEC Civil Complaint ¶¶ 2, 21-23, 75-78.
21. *See* DOJ Forfeiture Complaint ¶¶ 12, 28-32.
22. *See* 15 U.S.C. §§ 78u(d)(1), (3).
23. *See id.* § 78t(e).

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(including inter-office memoranda and communications) relating to its business as such."[24] While these record-keeping provisions doubtless have the effect of deterring misconduct, for employees who are foolish enough to engage in corrupt activity they virtually assure that significant evidence will be there for regulators to find when they undertake inspections.[25]

Finally, apart from the risks under the FCPA and related civil and criminal laws, financial institutions subject to supervision by one of the principal banking regulators, *i.e.,* the U.S. Federal Reserve Bank, the Office of Comptroller of the Currency, or the FDIC, may find that FCPA-related violations can have unforeseen collateral consequences in the current regulatory environment. Regulators with the authority to grant or deny approval to mergers and acquisitions, for example, may seek to delay those decisions or worse if a supervised financial institution has lax controls, including controls that ought to be reasonably calibrated to prevent bribery.[26]

III. Conclusion

If true – and the dual DOJ and SEC prosecutions in the BANDES matter are still at the earliest stages and the allegations have yet to be tested – the allegations made in the BANDES prosecutions are an unfortunate indicator of the lengths to which some will go to reap riches from financial transactions involving the public sector. Companies and individuals who interact with foreign officials in this economic realm would do well to take note and to assure themselves that compliance systems, including regular risk assessments, training, auditing, monitoring, and discipline, are properly addressing anti-corruption risks among the many other risks facing the financial sector.

Sean Hecker
Andrew M. Levine
Steven S. Michaels

Sean Hecker and Andrew M. Levine are partners, and Steven S. Michaels is a counsel, in the firm's New York office. They are members of the Litigation Department and the White Collar Practice Group. The authors may be reached at shecker@debevoise.com, amlevine@debevoise.com, and ssmichaels@debevoise.com. Full contact details for each author are available at www.debevoise.com.
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24. *See* 17 C.F.R. § 240.17a-4; *see also* SEC Rel. No. 2002-173, SEC, NYSE, NASD Fine Five Firms Total of $8.25 Million for Failure to Preserve Email Communications (Dec. 3, 2002), http://www.sec.gov/news/press/2002-173.htm.

25. Indeed, financial regulators including FINRA and the New York Superintendent of Insurance, have repeatedly announced that FCPA compliance is a target area for review during the periodic examinations conducted by those financial sector regulators. *See* Paul R. Berger & Bruce E. Yannett, *et al.*, "New York State Superintendent of Insurance Calls for FCPA Compliance," *FCPA Update,* Vol. 1, No. 1 at 4-5 (Aug. 2009), http://www.debevoise.com/files/Publication/3143fa0a-ebbb-4dff-a8e1-28b53eb18152/Presentation/PublicationAttachment/842874c6-e886-4a04-89b4-28e58f03e031/FCPA_Update_August09v12.pdf. *See also* Paul R. Berger & Bruce E. Yannett, *et al.*, "FINRA Reminds Members of FCPA Compliance Obligations," *FCPA Update,* Vol. 2, No. 8 at 15-16 (Mar. 2011), http://www.debevoise.com/files/Publication/d263dadf-70e8-4bbd-b543-00fafbae8044/Presentation/PublicationAttachment/d375ac45-c0ac-461e-b512-30828ec23109/FCPAUpdateMarch2011.pdf.

26. *See, e.g.,* 12 U.S.C. § 1842(c)(2) (requiring the Federal Reserve Bank to consider financial and managerial factors in approving banking acquisitions); *accord,* Bank Merger Act, 12 U.S.C. § 1828(c) (requiring the same financial and managerial factors be considered in respect of transactions covered by the Act).

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