KING & SPALDING: TRANSATLANTIC BUSINESS CRIME AND INVESTIGATIONS COLUMN

King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

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THE TESCO ACQUITTALS AND GROWING PAINS FOR THE UK DPA: WHAT, IF ANYTHING, CAN WE LEARN FROM THE US?

The recent acquittal of the Tesco executives following the deferred prosecution agreement (DPA) agreed between Tesco Stores Limited and the Serious Fraud Office (SFO) illustrates tensions stemming from unique features of the UK's approach to DPAs. If not managed effectively, going forward this could result in unfair treatment of individual defendants and call into question the integrity of corporate DPAs in the absence of individual convictions. In this context, we consider the different approach taken by the US, where DPAs have been employed for over 15 years and have a well-trodden history, and the UK, where DPAs are a newer development and are clearly still experiencing growing pains.

US approach

DPAs and non-prosecution agreements (NPAs) are common tools used by US prosecutors to bring enforcement actions against large corporations and their employees. Between 2003 and 2018, the Department of Justice (DOJ) entered into 500 corporate DPAs, with a high of 102 DPAs in 2015.

Under a DPA, the prosecutor formally charges the defendant, but agrees to defer prosecution for a defined time period in exchange for the defendant's compliance with the terms of the agreement. If the defendant complies, at the end of the established time period the prosecution will drop the charges. Common requirements under a DPA include:

- Full co-operation with the prosecutor's investigation.
- Acceptance of responsibility.
- Restitution.
- In the case of a corporation, internal remediation such as the creation of a compliance program and engagement of an independent monitor.

If the defendant breaches the DPA, the prosecutor may proceed to trial using the admissions in the DPA and other evidence obtained during the co-operation period. NPAs function similarly to DPAs, except the prosecutor does not file formal charges.

Once the prosecutor and defendant agree to a DPA, a federal judge must formally approve the agreement (no such formal approval is required for an NPA). Having filed charges, the prosecutor must obtain a ruling from a district court allowing the prosecution to be deferred without violating the Speedy Trial Act. Despite this requirement, in practice, judicial involvement in the DPA process is extremely limited, and most courts treat this ruling as merely a formality.

Following the 2015 Yates Memorandum's emphasis on the culpability of individuals, DPAs often have been coupled with indictments of individual wrongdoers, but pursuit of such indictments is not required for a DPA. In fact, DPAs and NPAs do not always identify individuals responsible for the conduct at issue. For example, in 2017, Banamex USA entered into a DPA with the DOJ for violations of the Bank Secrecy Act, but the DPA did not mention specific individuals, instead explaining generally the actions of the corporation's employees.

Even if a corporate DPA mentions specific individual conduct, the prosecutor will not necessarily prosecute the named individual(s). As the US Attorney's Manual states, "regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals" (*section 9-28.210A*). In other words, a federal prosecutor must approach the charges against the corporation and the individuals within that corporation as two separate inquiries. That said, a corporate DPA may contain a provision that requires the corporation to co-operate with the government's investigation into individual culpability. Alternatively, the DPA may specifically contemplate and defer individual indictments. For example, in 2018, the DOJ entered a DPA with Cultural Resource Analysts, Inc (CRA) that deferred prosecution for "CRA, its officers, employees, and/or agents".

It is also possible for a DPA to mention specific individuals who are separately indicted and later acquitted of charges. For example, in 2009, a global investment bank entered into a DPA with the DOJ for "conspiring to defraud the United States by impeding the Internal Revenue Service (IRS)". Around the same time, an executive at the bank was indicted for his role in managing a part of the business that allegedly evaded IRS reporting requirements. He was acquitted of the charges in 2014 after the jury found that he had no knowledge of the scheme to evade US taxes.

UK approach

Schedule 17 to the Crime and Courts Act 2013 (CCA 2013) established DPAs as a method of resolving corporate criminal matters, and prosecutors began using DPAs in 2014 (NPAs do not exist in the UK). Like their US counterparts, UK DPAs are an agreement that the prosecutor will suspend prosecution of the defendant if the defendant complies with certain conditions for a set time period. A DPA may require a defendant to:

- Co-operate with the prosecutors' investigation or industry-wide investigations.
- Prohibit certain activities.
- Impose financial reporting obligations.
- Require compliance enhancements or impose a corporate monitor.

Despite these similarities between the two regimes, however, there are several key technical differences between US and UK DPAs:

- In the UK, DPAs are available only to corporate entities; individuals cannot enter into DPAs to resolve criminal proceedings.
- DPAs are available only for certain fraud and dishonesty offences specified in Schedule 17 to the CCA 2013, including but not limited to offences under the Financial Services and Markets Act 2000, the Bribery Act 2010, the Fraud Act 2006 and the Proceeds of Crime Act 2002.

- While UK DPAs are similar to US ones in that they too require judicial approval, the degree of judicial involvement in the UK far exceeds that observed in the US. The parties must first attend a preliminary hearing to obtain a declaration from the court that the DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable, and proportionate. Following the declaration, the parties must agree on a written statement of facts and submit it along with the terms of the agreement to the court for approval.

Tesco DPA

The most recent UK DPA is the Serious Fraud Office (SFO) DPA with Tesco under which Tesco agreed to pay £129 million in fines and an additional £3 million in investigation costs to resolve charges of accounting fraud. Although Tesco entered into the DPA in April 2017, the individuals upon whose conduct the case for Tesco's corporate liability relied recently were acquitted of all charges on a "no case to answer" ruling.

This judicial acquittal raises questions about the fairness of the DPA process with respect to individuals named in the agreement, as well as the integrity of the DPA itself.

Impact on named individuals

On the same day as the acquittal of the third Tesco individual defendant, the SFO published the full Tesco DPA. The agreement makes numerous statements attributing wrongdoing to these individuals who are identified by name. These statements are starkly at odds with the individuals' judicial acquittals, but their place in the public record is no less permanent. Although the court has found the evidence against the Tesco individuals to be so weak as to fail even to constitute a case against them, public perception may (and likely will) be shaped by the detailed assertions of their wrongdoing in the DPA.

Tesco is the latest example of how the SFO's treatment of individuals in DPAs has evolved since their initial introduction. In the Standard Bank DPA, the SFO confirmed that it did not intend to prosecute any individuals, however, the Statement of Facts identified (some by name, some by job title) individuals, some of whom then complained that they had been publicly implicated without having an opportunity to answer the allegations against them.

In the later Rolls Royce DPA, the Statement of Facts was released in January 2017, however, the DPA referred to individuals only by generic terms such as "RR employee" and not by name. This is presumably because the SFO was, at the time, still contemplating the prosecution of individuals and was being careful not to prejudice any future proceedings. Moreover, should any future prosecutions against individuals fail, there would not be a publicly available Statement of Facts which erroneously implicates them in criminal wrongdoing. In any event, the SFO announced on 22 February 2019 that no individuals will be prosecuted in the Rolls Royce case.

The contrasting approach in the subsequent Tesco DPA, concluded by a different division of the SFO, suggests a lack of consistency within the SFO (as it was then constituted) on how to handle identification of individuals in DPAs.

Despite the detrimental impact the publication of the DPA is likely to have had on the acquitted Tesco individuals, they had no control over the decision to publish the agreement, much less over the actual content of the agreement or the decision to enter into the agreement in the first place. The unfairness of this paradox, viewed in the light of the inconsistent approach taken by the SFO to date, suggests a need for an SFO policy decision on the issue. A sensible potential solution would be to follow the Rolls Royce model of not naming individuals in an identifiable way; another possible option is to create an avenue for named individuals to formally register their objection to the statements made in the DPA or to seek to have the DPA amended.

Strength of the DPA

The acquittal of the Tesco individuals also raises questions about the soundness of the DPA itself. The issue stems from the general theory of corporate criminal liability in English law, which requires proof of criminal responsibility at the level of senior officers constituting the "directing mind and will" of the company. This concept is known

as the identification principle and is derived, perhaps ironically, from the 1972 case of *Tesco Supermarkets Ltd v Nattrass [1972] c 153.*

Pursuant to the identification principle, corporate criminal liability in the present situation hinged on the culpability of individual defendants who could be said to be the "directing mind and will" of Tesco. However, given their subsequent acquittal on non-technical grounds (the court found that essential elements of the case against relevant individuals were missing), one can rightly ask questions about the disconnect between those acquittals and the basis on which the DPA was previously agreed. In other words: if the directors lacked the requisite criminal responsibility, then what corporate liability was being deferred by way of the DPA?

However, for a company entering into a DPA there are commercial and risk management drivers alongside the pure legal analysis. Companies will undoubtedly give much weight to the risk and cost of engaging in a potentially expensive, long-lasting and reputation-damaging investigation and trial. The fact that a DPA is contingent on the company fully disclosing its (perceived) criminal liability and co-operating with the SFO's investigation makes the risk of discordance between a successfully agreed DPA and the ultimate acquittal of individual defendants a very real possibility.

By contrast, in the US, corporations are considered "persons" capable of committing crimes. If any employee or agent of the corporation commits a crime, the corporation may be held liable under the doctrine of *respondeat superior*. To hold a corporation criminally liable for the actions of its employee or agent, an employee or agent must commit the criminal act while working within the scope of their employment. Although the DOJ has emphasised in recent years that prosecution of guilty individuals should take precedence over the prosecution of corporations, the principles in the Thompson Memorandum suggest that bringing criminal charges against a corporation is the only "fair and effective way" to address a corporate culture that has become corrupt. Because of this theory of corporate criminal liability in the US, corporate DPAs do not generally rest on the conduct of individual defendants, but rather, on the corporation's compliance culture.

Conclusion

Although there are several similarities between US and UK DPAs, certain differences between the two countries' approaches are responsible for the current growing pains in the UK system surrounding treatment of individuals in DPAs. The inapplicability of DPAs to individuals coupled with a theory of corporate criminal liability that hinges on the culpability of senior individuals creates an environment in which a scenario like that in Tesco (wherein prosecutors resolve the corporate case with a DPA only to have that same case crumble at trial against the individual defendants) can occur.

As the SFO enters into more DPAs over time, it will no doubt develop a more consistent and careful approach with respect to anonymisation of references to individuals to minimise these types of problems in the future.

EU TO NEGOTIATE WITH US ON LAW ENFORCEMENT ACCESS TO CROSS-BORDER DATA; THE COPO BILL BECOMES LAW; AND WHERE DOES THIS LEAVE THE UK POST-BREXIT?

With the global ubiquity of social media, webmail, messaging services and apps, access to cross-border evidence in other jurisdictions has never been more essential to criminal investigations. According to the European Commission (Commission), more than half of all criminal investigations today require access to cross-border electronic evidence (*European Commission: Press release: Security Union: Commission recommends negotiating international rules for obtaining electronic evidence*). But the digitalisation of our lives and borderless nature of communications create challenges for law enforcement who need access to evidence located abroad. The traditional method for obtaining evidence located overseas (the Mutual Legal Assistance (MLA) Treaty) is often too slow and cumbersome, causing law enforcement agencies to wait on average ten months to obtain electronic evidence. While alternative channels of direct co-operation have developed with certain US-based service providers, who hold much of the electronic evidence relevant to EU investigations, their co-operation is voluntary and limited to non-content data. And in terms of reciprocal requests by US authorities to service providers in the EU, many member states currently prohibit national telecommunications providers from responding directly to requests from foreign authorities.

In an effort to tackle this, the Commission announced on 5 February 2019 that it is recommending engaging in negotiations with the US on cross-border rules that will make it easier and faster for law enforcement authorities in both the EU and US to obtain electronic evidence from service providers based in the EU/US. Notably, the negotiating mandate proposed by the Commission aims to shorten the time period for law enforcement authorities to supply the requested data to ten days, as well as to ensure reciprocal rights for all parties and guarantee strong safeguards on data protection and privacy rights. On the latter issue, the Commission has said that privacy and data protection will be essential to any agreement, and personal data may only be processed in accordance with the General Data Protection Regulation (GDPR) ((EU) 2016/679), the EU's E-Privacy Directive (*2002/58/EC*), and the Data Protection Directive for Police and Criminal Justice Authorities (*(EU) 2016/679*).

As we reported in our *August 2018 column*, the UK has already introduced a legislative framework to enable the domestic implementation of any international co-operation agreements it negotiates with third countries regarding access to electronic evidence: the Crime (Overseas Production Orders) Bill. This received Royal Assent on 12 February 2019 and is now an Act of Parliament (COPO Act). In brief terms, the COPO Act will enable a UK investigating agency (like the SFO) to obtain a UK court order that will compel a company in a foreign country (like an internet service provider in the US) to produce specified electronic data to it for the purposes of an investigation. The UK court order may be served directly on, and will be effective against, the US company without the involvement or supervision of any US authority or court, thus sidestepping the inefficiencies of the traditional MLA process.

Both the COPO Act and the Commission's announcement this month come after the US adopted the CLOUD Act in March 2018 to amend the Stored Communications Act of 1986 to clarify that US service providers are obligated to comply with US orders to disclose data regardless of where such data is stored. Most significantly, the CLOUD Act allows the US government to enter into agreements with foreign governments on access to data held by US service providers and vice versa. It seems that foreign governments are keen to take them up on the offer.

With the UK already negotiating separately with the US, the interesting question in the spotlight is: how will evidence and data be exchanged between the EU and UK after Brexit? The UK has an existing level of co-operation with the EU that is unparalleled and clearly beyond a typical third country. Indeed, in its February 2017 Brexit White Paper, the government stated that the UK was "starting from a position of strong relations with EU member states, where we have been at the forefront of developing a number of EU tools which encourage joint working across the continent to protect citizens and our way of life". While the consensus seems to be that continuing UK co-operation with the EU is invaluable, it remains to be seen how exactly the UK's unique position (vis-à-vis both the EU and the US) will play out after Brexit.