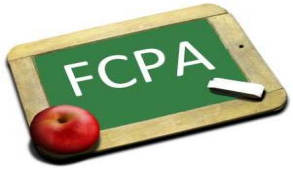

July 23, 2012

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This letter responds to the Ministry of Justice's ("MoJ") request for consultation regarding deferred prosecution agreements (DPAs) (Consultation Paper CP9/2012).

While the MoJ's DPA proposal concerns a variety of economic crimes, it is probable that a significant percentage of DPAs, if implemented, will be used to resolve Bribery Act enforcement actions as has happened in the U.S. where a significant percentage of DPAs and related non-prosecution agreements (NPAs) have been used to resolve Foreign Corrupt Practices Act ("FCPA") enforcement actions. Given that my primary area of expertise is the FCPA and related anti-corruption laws and initiatives including the Bribery Act, I confine my comments to potential application of DPAs to resolve Bribery Act prosecutions.

To begin, I applaud the MoJ for its wholesale rejection of non-prosecution agreements ("NPAs") to resolve allegations of corporate criminal activity. Like the MoJ, I agree that such resolution vehicles, which are a prominent feature of the U.S. criminal justice system including in FCPA enforcement actions, are not suitable given the lack of transparency in such agreements including the lack of judicial oversight. I can only hope that the U.S. Department of Justice sees the wisdom of your decision and likewise abolishes such agreements as I have advocated.

I also applaud the MoJ for insisting, should there be DPAs in the U.K., "that there should be judicial involvement from an early stage whereby the proposed DPA is considered at a preliminary hearing before it returns for final judicial approval." As noted by the MoJ's consultation paper, U.S. style DPAs lack such a feature.

I am concerned however that in its consultation paper the MoJ relies upon several unfounded assertions when discussing use of DPAs in the U.S. For instance, the consultation paper asserts, as if a fact, that such vehicles have been "successfully adopted" in the U.S. and that such vehicles "support an existing culture of self-reporting of serious economic crimes."

If "successfully adopted" means that such vehicles has resulted in an increase in enforcement actions, then yes I agree with the MoJ's statement. After all, it is not surprising that the more options an enforcement agency has (beyond the traditional two options of prosecuting and not prosecuting) the more enforcement actions that will result. Yet, I submit that a factor in determining success ought to be quality of the enforcement action and whether an enforcement agency theory of prosecution, if subjected to judicial scrutiny and an adversarial proceeding, can meet its high burden of proof. This element of "success" is missing from U.S. style resolution vehicles replaced with a system whereby entering into such a resolution vehicle is often merely a cost/benefit exercise for a company often divorced from the law and relevant facts. I've called this dynamic "the façade of enforcement" and I urge the MoJ to place greater importance on quality, not quantity, in assessing "success."[1]

Moreover, the MoJ asserts, as if fact, that such resolution vehicles "support an existing culture of self-reporting of serious economic crimes" in the U.S. While empirical data is lacking as to the frequency of voluntary disclosures of improper conduct during this era of frequent U.S. use of NPAs and DPAs, antidotal evidence and comments from various experts suggest that a high percentage of corporate conduct that could implicate criminal laws is not reported to the enforcement agencies. I submit that one factor driving this dynamic is that companies and its counsel have come to realize that the enforcement agency will not be diligent and complete in its application of law to facts and its consideration of mitigating facts because the enforcement agency will never have to prove its enforcement theory to anyone other than itself. In short, U.S. alternative resolution vehicles ought not be viewed as a successful or desirable export.

Regardless of the divergent views one may have as to the "success" of alternative resolution vehicles in the U.S. and whether such vehicles support a culture of self-reporting, my primary concern with the U.K. looking to the U.S. for support in considering DPAs is the material differences between U.K. and U.S. corporate criminal liability, including in the bribery context.

Under the U.S. principle of *respondeat superior* a business organization can face criminal liability based on the acts of <u>any</u> employee or agent to the extent the individual's conduct was in the scope of their duties and was intended to benefit, at least in part, the organization. U.S. adoption of alternative resolution vehicles largely developed out of a sense of injustice when this principle was applied to organizations based on isolated conduct or conduct that occurred despite the organization's good faith compliance efforts.[2] Unlike the ease in which a business organization can be subject to criminal liability under U.S. law, as the consultation paper itself notes, organization criminal liability under U.K. law is very difficult to prove and "depends on establishing that the 'directing mind and will' of an organization was at fault." In short, U.S. adoption of DPAs was largely a function of general circumstances not present under U.K. law.

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[1] See Mike Koehler, "The Façade of FCPA Enforcement," Georgetown Journal of International Law, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517; Prepared Statement of Professor Mike Koehler Before the Subcommittee on Crime and Drugs of the United States Senate Committee on the Judiciary – "Examining Enforcement of the Foreign Corrupt Practices Act," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739134.

[2] See U.S. Attorneys Manual, 9-28.000 Principles of Federal Prosecution of Business Organizations.

Moreover, U.S. use of alternative resolution vehicles in the FCPA context implicates specific circumstances not present in the Bribery Act. As the consultation paper itself notes, the Bribery Act is a unique law in that it already provides in Section 7 a unique offense to hold organizations liable that fail to adopt adequate procedures to prevent bribery. Although many, including myself, have called for the FCPA to be amended to include such a compliance defense, the FCPA currently does not contain such an exception.

In conclusion, I pose the following questions the MoJ should consider during its consultation process. Why does a law with an adequate procedures defense require the third option of a deferred prosecution agreement (the first two options being prosecute vs. not prosecute)? If a corporate has adequate procedures, but an isolated act of bribery nevertheless occurs within its organization, the corporate presumably would not face prosecution under the Bribery Act. This seems like a just and reasonable result and there is no need for a third option in such a case. On the other hand, if a corporate does not have adequate procedures (thus demonstrating a lack of commitment to anti-bribery compliance) and an act of bribery occurs within its organization, it presumably would face prosecution under the Bribery Act. This seems like a just and reasonable result. Does a third option really need to be created for corporates who do not implement adequate procedures? I submit the answer is no and urge the MoJ to reject use of DPAs in the Bribery Act context.

Sincerely,

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