

## Guilty As Charged? The Proposals for Deferred Prosecution Agreements in Ireland

The Law Reform Commission's Report on "Regulatory Powers and Corporate Offences" recommends the introduction of Deferred Prosecution Agreements in Ireland. Muireann Reedy looks at the Law Reform Commission's proposals and concludes that the introduction of Deferred Prosecution Agreements could be beneficial for all parties involved.

Deferred Prosecution Agreements ("DPAs") are agreements between a prosecutor and a corporate body (or other undertaking, such as a partnership) in which the prosecution agrees to dismiss a criminal charge if the corporate body fulfils specified obligations during a defined period. Any material breach of the DPA by the corporate body usually results in a prosecution for the offences involved. DPAs have been used by U.S. prosecutors for many years and were introduced on a statutory basis in the U.K. in the Crime and Courts Act 2013. In its Report on "Regulatory Powers and Corporate Offences" which was published in October (2018), the Law Reform Commission (the "LRC") recommends that DPAs should be introduced in Ireland.



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unincorporated bodies such as partnerships) but not to natural persons. This reflects the U.K. position but is different to the U.S. where DPAs can be entered into with individuals. The LRC also recommends that DPAs should only be available in respect of certain specified criminal offences that relate to serious economic crime, where the offending is sufficiently serious to warrant a prosecution on indictment. The LRC suggests that a DPA scheme could be available for offences under the Companies Act 2014, the Taxes Consolidation Act 1997, the Criminal Justice (Corruption Offences) Act 2018 and the Criminal Justice Act 2011, among others. The LRC notes that a corporate might be put off from providing evidence of misconduct if it is unclear whether it is likely to be offered formal DPA negotiations. It therefore recommends that if DPAs are introduced in Ireland, the DPP should be required to publish a clear and detailed Code of Practice. This would set out the circumstances in which the DPP would be likely to offer formal DPA negotiations and the type of

public interest consideration which might be taken into account by the DPP in deciding whether to initiate formal DPA negotiations. The LRC recommends that any DPAs approved by the High Court should be published in full on the DPP's website, except in exceptional circumstances. It also advocates for the publication of any breach, variation or termination of the agreement.

### Core Terms

While the LRC notes that terms and conditions of a DPA will be specific to an individual case, it suggests that the following core terms should be a feature of any DPA: (i) a Statement of Facts outlining the full extent of the corporate body's wrongdoing, including admissions; (ii) a time period after which the agreement will expire - if the body satisfies the terms of the DPA during the relevant period, the prosecution will be permanently discontinued at that point; and (iii) a financial penalty.

The LRC suggests that it should be possible to vary the terms of the DPA if compliance with its terms becomes impossible due to a change of circumstance. However it recommends that any variation would need to be approved by the High Court. The LRC also recommends that the DPA may be terminated if there is a

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### The LRC's Proposals

The LRC recommends that a statutory scheme of DPAs should be introduced in Ireland, under the control of the Director of Public Prosecutions (the "DPP"). The DPA scheme would be overseen by the High Court and judicial approval would be required before a DPA could come into effect. The LRC suggests that in deciding whether to approve a DPA, the High Court would consider whether the DPA would be "in the interests of justice" and whether the terms are fair, reasonable and proportionate. Interestingly, the LRC believes that any DPA scheme should only be available to corporate bodies (and other

serious breach of the DPA, or if the parties cannot agree a variation of the terms of the DPA. If either situation occurs, the LRC recommends that the prosecutor would have discretion to have the suspension of the indictment lifted.

### DPAs in the U.K.

As mentioned above, DPAs were introduced on a statutory basis in the U.K. in 2013 (the relevant legislation coming into effect in February 2014). To date (November 2018) the U.K.'s Serious Fraud Office has entered into four DPAs which have been concerned with bribery, corruption and false accounting. The largest financial penalty imposed to date under a DPA in the U.K. is the penalty of over £239million which was imposed on Rolls-Royce Plc for making corrupt payments to local agents to secure contracts in seven countries (as well as other matters). Aside from the financial penalty, the company was also required to pay over £258million in respect of disgorgement of profits, the costs of the

Serious Fraud Office and to complete a compliance programme.

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### Commentary

Prosecutors can often encounter difficulties when trying to prosecute companies for white collar crime for various reasons. These include the complexity of the underlying offence, difficulty in gathering sufficient evidence to attribute guilt to the company and a robust defence put forward by a high-calibre legal team which a well-resourced company can afford to hire. If DPAs are introduced in Ireland it

should prove beneficial for both the DPP and for corporates alike. In the right case it will lead to a more efficient resolution of matters, avoiding the need for costly and lengthy investigations. It may also encourage more self-reporting. The advantage for companies is the avoidance of a criminal conviction - this may be significant for entities which rely on public procurement as part of their business model, as in many jurisdictions a criminal conviction can result in mandatory debarment from public tenders, or impact on entities seeking regulatory approval. DPAs also result in a more certain outcome and gives companies a chance to try and control the narrative around their wrongdoing, through the publication of an agreed statement of facts. It remains to be seen as to whether the Government will adopt the LRC's proposals.

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