DEFERRED PROSECUTION AGREEMENTS: A LACK OF TRUST IN ANTITRUST DPAS?

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In this bulletin, as part of our ongoing series on Canada's deferred prosecution agreement ("DPA") program, we look again to the United States for potential enhancements to Canada's DPA program.

On May 7, 2020, the United States Department of Justice ("DOJ") announced a DPA resolving antitrust charges against Apotex Corp. ("Apotex"), a generic pharmaceutical company based in Florida.[1] The Apotex DPA is notable because until recently, the DOJ's Antitrust Division shied away from resolving antitrust felony charges with such agreements. The DOJ's gradual but clear shift towards increasing the availability of DPAs reveals potential lessons for Canada.

Antitrust DPAs

DPAs are prosecutorial tools to combat economic crimes such as fraud and bribery. In essence, they are contracts between prosecutors and corporate wrongdoers whereby charges are laid, stayed, and ultimately dropped if the corporate wrongdoer complies with applicable terms. While DPAs are widely considered to be a valid component of a comprehensive corporate crime fighting strategy,[2] Canada's Director of Public Prosecutions (the "Director") has not yet entered into a DPA.[3]

As discussed in our June 2019 bulletin, the DOJ's Antitrust Division has typically avoided DPAs for competition offences because DPAs were traditionally thought to undermine the amnesty available under the DOJ's Leniency Program.[4] It therefore came as a surprise to some observers when, five years ago, the DOJ permitted five major banks to enter DPAs in relation to competition offences.[5]

Last summer, the DOJ officially announced that it would allow prosecutors to resolve criminal antitrust investigations with DPAs in certain instances.[6] The DOJ's Antitrust Division specified, "prosecutors [may] proceed by way of a deferred prosecution agreement (DPA) when the relevant [f]actors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so."[7]

Since this July 2019 announcement, the DOJ has concluded four antitrust DPAs with generic pharmaceutical companies – the latest being Apotex – as a result of an ongoing investigation into price fixing, bid rigging, and

other anticompetitive conduct in the generic pharmaceutical industry.[8] In concluding these DPAs, the DOJ focused on the negative impact that a conviction would have for the company's internal and external stakeholders, stating,

> … a conviction (including a guilty plea) would likely result in …mandatory exclusion from all federal health care programs … for a period of at least five years, which would result in substantial consequences to the corporation's employees and customers … and … [the DPA] can ensure that integrity has been restored to [the company's] operations and preserve its financial viability while preserving the United States' ability to prosecute it should material breaches occur.[9]

The DOJ offered almost identical rationale for agreeing to an earlier DPA with another pharmaceutical company in March 2020.[10] In another case, the DOJ's rationale for agreeing to enter into a DPA with Kavod Pharmaceuticals LLC, formerly known as Rising Pharmaceuticals Inc. ("Kavod") included facilitating the timely resolution to Kavod's ongoing bankruptcy proceeding and liquidation.[11] This suggests the DOJ is prepared to consider impacts on innocent creditors as another economic reason for agreeing to enter into a DPA. The Apotex DPA is therefore only the latest example of the growing American acknowledgement that DPAs can hold corporate wrongdoers accountable while minimizing negative ripple effects for employees, customers, and other key stakeholders, including innocent creditors.

In any case, none of the above antitrust DPAs would have been possible in Canada because the Canadian DPA regime excludes the possibility of DPAs for offences under the *Competition Act*.[12] The rationale behind this exclusion is for similar reasons as the DOJ's historical aversion to antitrust DPAs: the Canadian Competition Bureau offers Immunity and Leniency Programs that can provide immunity for corporations that report an antitrust offence, as well as more lenient treatment for corporations that plead guilty and cooperate with investigations.[13] The availability of prohibition orders – which can have the same capabilities as DPAs – plays a role as well.[14] As evidenced by the growing numbers of antitrust DPAs abroad, it may be time for Canada to reconsider its position.

Lessons for Canada

In our February 2020 and March 2020 bulletins, respectively, we flagged that the political climate is likely a significant factor in Canada's caution with respect to DPAs and that international cooperation and economic considerations play legitimate, significant roles in effective DPA regimes. We further noted that Canada could reap significant benefits by following its fellow OECD signatories in adopting a less strict interpretation of the prohibition on considering economic interests when investigating and prosecuting foreign bribery charges.[15]

In a similar vein, it might now be time for Canada to consider loosening its prohibition against DPAs in relation to *Competition Act* offences. When considering seeking leniency from the Competition Bureau under the

Leniency Program, companies are left in a precarious position: plead guilty and accept the recommended sentencing, or go to trial and risk a conviction. In both situations, there is a conviction and the company loses its ability to participate in public contracts.

The Public Works and Government Services Canada's federal procurement "Integrity Framework" regulations bar companies convicted of offences such as fraud, bribery and extortion from bidding on public works contracts for ten years.[16] Debarment is a real concern for many companies. One need look no further than the high-profile Canadian example of SNC-Lavalin, where Prime Minister Trudeau cited the possibility of a ban from federal government work and the impact such a ban would have on Canadian employees when defending a DPA for the engineering firm.[17]

The mandatory guilty plea under Canada's Leniency Program thus operates as a disincentive for companies to accept leniency. A modest expansion of Canada's DPA program to allow Competition Act offences may alleviate this problem – it would hold corporate wrongdoers to account without needlessly punishing innocent corporate stakeholders by requiring a guilty plea (and likely debarment). While such an expansion may render the Leniency Program moot, there would be no impact on Canada's highly successful and important Immunity Program.[18]

Takeaways

Exactly how the Canadian DPA regime will work in practice remains far from clear. In the meantime, Canada should look to other jurisdictions to see how the program could be enhanced, and might consider broadening the circumstances in which DPAs are available to Canadian companies.

by Guy Pinsonnault, Jamieson D. Virgin and Eleanor Rock

[1] United States Department of Justice, *Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication* (May 7, 2020).
[2] See, for example, our prior discussions about how France and the United States use DPAs to hold corporate wrongdoers accountable: September 2019 bulletin and March 2020 bulletin.
[3] We summarized the Canadian regime in our July 2018 bulletin. See also s. 715.32 of the Criminal Code of Canada, RSC 1985, c C-46.
[4] United States Department of Justice, *Frequently Asked Questions* (2017).
[5] United States Department of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015).
[6] United States Department of Justice, *Assistant Attorney General Makan Delrahim Delivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement - Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (July 11, 2019).
[7] *Ibid*.

[8] Besides Apotex, the three companies are Heritage Pharmaceuticals Inc., Sandoz Inc., and Kavod Pharmaceuticals LLC (formerly known as Rising Pharmaceuticals Inc.).
[9] See Heritage Pharmaceuticals Inc. DPA, para 5; Sandoz Inc. DPA, para 5; Apotex DPA, para 5.
[10] See the Sandoz Inc. DPA
[11] United States Department of Justice, *Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations: Rising Pharmaceuticals Agrees to Pay Over $3 Million in Criminal Penalty, Restitution, and Civil Damages* (December 3, 2019).
[12] Competition Act, R.S.C. 1985, c. C-34 [*Competition Act*].
[13] Government of Canada, *Immunity and Leniency Programs under the Competition Act* (March 15, 2019).
[14] Pursuant to s. 34(2) of the *Competition Act*.
[15] To the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
[16] See generally: *Government of Canada, Government of Canada's Integrity Regime* (last modified November 7, 2019).
[17] See, e.g. Brewster, Murray, *SNC-Lavalin's legal woes are putting a $500M federal defence contract at risk* (CBC: March 28, 2019).
[18] For additional discussion about Immunity and Leniency Programs under the Competition Act, see our April 2019 bulletin.

a cautionary note