

# DEFERRED PROSECUTION AGREEMENTS: THE CONTINUED USE OF DPAS IN THE ANTITRUST SPHERE IN THE UNITED STATES

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## Introduction

As part of our ongoing series on Canada's deferred prosecution agreement ("DPA") program, we have considered the use of DPAs in other jurisdictions, including in the United States of America, where we are seeing an increased use of DPAs in the antitrust sphere. In this bulletin, we look again to the United States, and discuss the [DPA](#) recently entered into by Argos USA LLC ("**Argos**") with the United States Department of Justice (the "**DOJ**").

## The Argos DPA

On January 4, 2021, the DOJ announced that it had charged Argos, a producer and seller of ready-mix concrete headquartered in Georgia, with participating in a conspiracy to fix prices, rig bids, and allocate markets for sales of ready-mix concrete between 2010 and 2016.[\[1\]](#)

Argos is the second company charged in this matter. On September 3, 2020, the DOJ announced that a federal grand jury returned an indictment against Evans Concrete, LLC and four individuals for their roles in a long-running conspiracy to fix prices, rig bids, and allocate markets for ready-mix concrete in Georgia.[\[2\]](#)

According to the charge filed in the US court, employees of Argos and other ready-mix concrete companies carried out the conspiracy by coordinating the issuance of price-increase letters to customers, allocating specific ready-mix concrete jobs in Georgia, charging fuel surcharges and environmental fees, and submitting bids to customers at collusive and non-competitive prices.[\[3\]](#)

The DOJ further announced a DPA resolving the one-count felony charge against Argos. Under the DPA, Argos agreed to pay a \$20 million criminal penalty based on the volume of commerce of at least \$83 million, admitted to participating in the charged conspiracy, and agreed to cooperate fully with the Antitrust Division's ongoing criminal investigation and prosecution of others involved in the conspiracy. Under the DPA, Argos has also agreed to maintain a compliance and ethics program designed to prevent and detect antitrust violations and that meets certain elements specified in the DPA, as well as to conduct periodic reviews and submit

annual reports to the division regarding the remediation and implementation of its compliance program.<sup>[4]</sup>

### **DPAs in the Antitrust Context**

As discussed in our [June 2020 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.<sup>[5]</sup> However, in July 2019, the DOJ officially announced that it would allow prosecutors to resolve criminal antitrust investigations with DPAs in certain circumstances.<sup>[6]</sup> The DOJ has subsequently concluded multiple antitrust DPAs with generic pharmaceutical companies as a result of an ongoing investigation into price fixing, bid rigging and other anti-competitive conduct in the generic pharmaceutical industry.<sup>[7]</sup>

In concluding the DPAs with the generic pharmaceutical companies, the DOJ focused on the negative impact that a conviction would have for the company's internal and external stakeholders. The DPAs state that "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." A guilty plea or a conviction would prevent these generic pharmaceutical companies from entering into contracts with government agencies, resulting in a wider impact on consumers and employees. Further, the exclusion of generic pharmaceutical companies from federal health care programs (in other words, the debarment of those companies), would inadvertently reduce competition, as it would remove companies from participating in the market. Reducing competition in this way would be contrary to the intentions and purposes of the competition legislation.

These significant considerations made with respect to the DPAs entered into with the generic pharmaceutical companies are notably absent from the Argos DPA.<sup>[8]</sup> In contrast, the Argos DPA, notes that the illegal conduct was limited to a small number of employees who joined Argos through an asset acquisition of another company in October 2011, after the conspiracy had already begun.<sup>[9]</sup> These employees worked in a local sales office. While Argos's management outside of this local sales office did not participate in or condone the conduct, the conduct – which Argos inherited by way of the asset acquisition – went on for approximately 5 years.<sup>[10]</sup>

The Argos DPA suggests a lack of transparency with respect to the considerations taken into account by the DOJ in entering into the DPA. While the potential for exclusion from federal health care programs for the generic pharmaceutical companies as a result of a guilty plea or a conviction and the significant consequences of such exclusion was clearly outlined in the DPAs entered into with the generic pharmaceutical companies, no such considerations or wide-ranging consequences appear to be at play in the Argos DPA. This lack of a transparency may create concerns going forward for the DOJ's Leniency Program.

### **Takeaways – Antitrust DPAs in Canada?**

In Canada, the federal *Competition Act* prohibits anti-competitive business activities, including conspiracies between competitors or potential competitors to fix prices, allocate markets or restrict output (such as price-fixing, market allocation or output restriction agreements) and bid-rigging.<sup>[11]</sup> Currently, one tool available to counter anti-competitive activity prohibited by the *Competition Act* is through the Competition Bureau's Immunity and Leniency Programs, which serve to uncover and stop anti-competitive activity prohibited by the *Competition Act*.

As mentioned in our [June 2020 bulletin](#), the Canadian DPA regime excludes the possibility of DPAs for offences under the *Competition Act*.<sup>[12]</sup> However, the DOJ's shift towards increasing the availability of DPAs in antitrust felony charges reveals lessons and insights into the potential for Canada to implement the use of DPAs for anti-competitive activities. The availability of DPAs for offences under the *Competition Act* could complement the programs already available through the Canadian Competition Bureau, such as the highly successful Immunity and Leniency Programs.<sup>[13]</sup>

The DOJ's expansion of DPAs to antitrust felonies may provide insight into the advantages and disadvantages to broadening the circumstances in which DPAs are available to Canadian companies. While Canada has not yet expanded the use of DPAs to competition offences, Canada can look to other jurisdictions for insight into ways to combat corporate crime.

[1] United States Department of Justice, [Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws](#) (January 4, 2021).

[2] United States Department of Justice, [Ready-Mix Concrete Company And Individuals Indicted For Fixing Prices And Rigging Bids In Violation Of Antitrust Laws](#) (September 3, 2020).

[3] United States Department of Justice, [Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws](#) (January 4, 2021).

[4] United States Department of Justice, [Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws](#) (January 4, 2021).

[5] United States Department of Justice, [Frequently Asked Questions](#) (2017).

[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] See United States Department of Justice, [Major Generic Pharmaceutical Company Admits to Antitrust Crimes](#) (March 2, 2020) and United States Department of Justice, [Sixth Pharmaceutical Company Charged In](#)

[\*Ongoing Criminal Antitrust Investigation\*](#) (July 23, 2020).

[8] See Argos USA LLC DPA at paragraph 5.

[9] LarfargeHolcim, [\*Lafarge sells its Cement and Concrete assets in the southeast United States for 760 MUSD\*](#) (May 12, 2011).

[10] See [\*Argos USA LLC DPA\*](#).

[11] *Competition Act*, RSC 1985, c C-34, ss 45-49. See also Government of Canada, [\*Immunity and Leniency Programs under the Competition Act\*](#) (March 15, 2019).

[12] *Competition Act*, RSC 1985, c C-34.

[13] Government of Canada, [\*Immunity and Leniency Programs under the Competition Act\*](#) (March 15, 2019). As noted by the Commissioner of Competition and the Director of Public Prosecutions, “[i]mmunity is an extraordinary grant by the Crown to forego prosecution, while leniency is a discretionary decision by the Crown to recommend a reduction of the sanctions to be imposed by a court. The PPSC and the Bureau recognize that it is in the public interest to offer immunity from prosecution or lenient treatment to a participant who is willing to terminate its participation in serious criminal activity under the [*Competition Act*] and to provide significant cooperation to an investigation.”

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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