GOVERNMENT OF CANADA ANNOUNCES PUBLIC CONSULTATION REGARDING DEFERRED PROSECUTION AGREEMENTS (DPAS)

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The Government of Canada has recently announced that it will be conducting a public consultation regarding the possibility of adopting deferred prosecution agreements (DPA) as a new way of addressing corporate criminal liability in Canada. The public is invited to participate in this consultation and submit their views and recommendations by November 17, 2017.

DPAs have become an integral part of addressing corporate criminal liability in the United States and the United Kingdom and the Government of Canada is now considering whether such an alternative to criminal proceedings should be available in Canada. As part of its consultation, the Government is asking the public whether DPAs should become a tool for addressing corporate wrongdoing in Canada and enhancing the Integrity Regime currently in place and administered by Public Services and Procurement Canada.

In order to guide this discussion and orient submissions, the Government published a discussion paper identifying several themes and questions that should be addressed in submissions. The position paper can be found in here.

Those that wish to participate in the Canadian Government's public consultation regarding the adoption of DPAs in Canada can visit www.tpsgc-pwgsc.gc.ca.

Context

DPAs offer an alternative to traditional criminal prosecution. A DPA is a formal written agreement between the accused and the prosecution. Pursuant to a DPA, the alleged offender promises to cease all illicit behavior and agrees to cooperate and comply with a set of compliance terms in exchange of which prosecutors agree to suspend or defer prosecution against the accused. DPAs most often require an admission of guilt and the payment of a financial penalty by the accused. In some cases, an independent corporate monitor may be appointed to oversee and ensure the alleged offender's compliance with the terms of the DPA. If the accused breaches the terms of the DPA, prosecutors have the option to revive charges against the accused and proceed with the criminal prosecution that had been suspended. In such cases, the admission of guilt of the accused under the DPA can allow for accelerated proceedings and a prompt conviction.

Where the alleged offender is an organization, DPAs represent an interesting alternative to traditional criminal prosecution, as they allow them to avoid a criminal conviction that might lead to devastating direct or collateral consequences. On the other hand, DPAs allow governments to punish the accused more quickly and at a lesser cost, while incentivizing active disclosure and cooperation on the part of the accused. DPAs also allow prosecutors to impose corrective and compliance measures in order to prevent repeat offenses on the part of an organization's agents or employees.

DPAs around the world

The DPA process varies between jurisdictions. In the United States, where DPAs have been most extensively used, prosecutors can offer DPAs for most federal crimes, with very little exception. In the US, prosecutorial discretion in the DPA process is almost absolute and the role of the courts limited. In the US, DPAs are part of an ensemble of tools used as alternatives to traditional prosecution. DPAs are often used as one of two options along with what is commonly referred to as a "non-prosecution agreements" (NPA).

DPAs and NPAs are largely similar, and one of the main differences between them is that NPAs require no intervention from courts at all, which ultimately gives even more discretion to prosecutors. As part of the DPA process, charges are filed and then suspended based on the agreement, whereas under the NPA process, charges are only filed if the alleged offender contravenes the conditions of the agreement. Ultimately, NPAs offer an even lighter administrative load since they do not need to be processed by the court system.

For offences related to the *Foreign Corrupt Practices Act of 1977* (FCPA) the US Department of Justice (DOJ) has also launched a different program using a tool known as "declination letters". Declination letters are meant to encourage voluntary disclosure of offences and cooperation with the authorities. When the organization meets the disclosure, cooperation and remediation standards of the program, the DOJ will consider declining criminal prosecution against the organization pursuant to the "declination letter", provided that the organization has also disgorged all profits from the FCPA violations.[1]

Looking at the example of the United Kingdom now, it is easy to see that DPAs are available on a much more restrictive basis than in the US. DPAs are available only to organizations and only for certain listed offences. The courts also play a much greater role in the UK regime, where DPAs have to be approved by the courts and be made public. Only three DPAs have been entered into in the UK since their inception in 2013, but it is worth noting that their usage might increase in the coming years, as the Joint Head of Bribery and Corruption of the UK Serious Fraud Office recently stated that DPAs are the "new normal" "[f]or those that behave responsibly".[2]

The Canadian Government may choose to emulate one of these models, or perhaps develop a hybrid model adapted to the Canadian context. It is now reaching out to the public to seek input on the following questions:

- **Question 1** – In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?
- **Question 2** – For which offences do you think DPAs should be available and why?
- **Question 3** – What role do you think the courts should play with respect to DPAs?
- **Question 4** – What factors should to be taken into account in offering a DPA?
- **Question 5** – When would a DPA not be appropriate?
- **Question 6** – What terms should be included in a DPA?
- **Question 7** – What factors should be taken into account in setting the duration of a DPA?
- **Question 8** – Under what circumstances should publication be waived or delayed?
- **Question 9** – How should non-compliance be addressed?
- **Question 10** – When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?
- **Question 11** – How should compliance monitors be selected and governed?
- **Question 12** – What use should be made of compliance monitoring reports?
- **Question 13** – Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

Arguments in Favour of the Adoption of N/DPAs and Declination Letters in Canada

N/DPAs and declination letters can offer several advantages over a criminal trial. Criminal proceedings against organizations can be very costly and time consuming to the state, and there is no guarantee that the prosecution will be able to meet the criminal burden of proof to obtain a conviction. Criminal convictions can also have disastrous financial and reputational consequences on organizations, sometimes based on the wrongdoing of only one or a few individuals. Notably, a criminal conviction can result in a debarment from governmental procurement and public contracts.[3] Such a punishment can arguably constitute the equivalent of "corporate death penalty" for certain organizations whose business mainly derives from government contracts. Most importantly, uninvolved and innocent parties, such as employees, shareholders and communities often suffer indirectly from the conviction of the organization.

Since 2005, the DOJ entered into more than 400 corporate N/DPAs.[4] This significant increase could in part be due to the Enron scandal and to the collapse of the international accounting firm Arthur Anderson following its criminal conviction for obstruction of justice in 2002, which led to 28,000 jobs being lost (a conviction that was later overturned).[5] N/DPAs have been a remarkably effective tool for addressing corporate wrong-doing and securing substantial financial recoveries for the US Government while preserving the vitality of organizations.

Many organizations in the US have favoured self-disclosure and cooperation when faced with a government

enforcement action. N/DPAs are an important "carrot' to the "stick" of prosecution. The cooperation received from the organization will also benefit the prosecution in building its case against the individuals responsible for the misconduct by effectively identifying and prosecuting them.

Prohibition Orders Pursuant to Subsection 34(2) of the Competition Act

Prohibition orders are a unique remedy under the *Competition Act* ("Act") and are comparable in many aspects to NPAs and declination letters as they may be issued pursuant to subs. 34(2) of the Act without any requirements that prosecution for a substantive offence take place.

Pursuant to subs. 34(2), a superior court may prohibit the commission of a competition offence or the doing or continuation of any act constituting or directed toward the commission of the offence. The prohibition order may contain any condition the Court considers necessary to prevent the commission, continuation or repetition of the offence or any other conditions agreed to by the person and the Crown.

In fact, prohibition orders pursuant to subs. 34(2) of the Act without any prosecution for a substantive offence were commonly used in Canada, but have decreased recently.[6] Often, such prohibition orders are privileged to avoid the expense and opprobrium which a full scale prosecution and conviction would entail.

The cooperation, compliance and remediation obligations of NPAs and declination letters could also be contained in the terms of a prohibition order as well as the payment of a monetary penalty. Contravention of an order is punishable by a fine at the discretion of the court or by imprisonment for a term not exceeding five years.

Conclusion

With regard to the disadvantages of a prosecution, N/DPAs and declination letters are an interesting and flexible alternative to traditional court proceedings. In Canada, they would allow the Crown to bypass the traditional prosecution mechanism, while still fulfilling the objectives of criminal law by punishing and rehabilitating offending organizations.

By declining, non-prosecuting or deferring prosecution and allowing organizations to avoid conviction, N/DPAs and declination letters would likely incite further cooperation and self-reporting on the part of organizations doing business in Canada. At the same time, the voluntary payment of a financial penalty, the implementation of compliance measures and the threat of prosecution and conviction in the event of non-compliance could arguably discourage employees and agents of the organization from participating in further criminal behaviour. General deterrence could also be ensured by publishing the terms of such N/DPAs, including the amount of the penalty paid by the organization.

In the context of the upcoming public consultation, it can be argued that the Canadian Government's proposition to adopt DPAs does not go far enough, and that a wider range of tools should also be considered based on the US experience. Indeed, NPAs and declination letters used together with DPAs would only afford prosecutors more leeway and discretion when choosing to act against corporate crime and would help further alleviate the administrative burden of traditional forms of prosecution. In our view, Canada would greatly benefit from considering something similar to the US approach in dealing with corporate criminal liability.

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[1] https://www.justice.gov/criminal-fraud/pilot-program/declinations.
[2] https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce.
[3] Under the Ineligibility and Suspension Policy of the Government of Canada's Integrity Regime, a contractor may be debarred from government procurement for 10-year period where such contractor is convicted of or pleads guilty to certain criminal offences. The debarment period can be reduced to a 5-year period under certain conditions. Also, in the Province of Quebec, the Autorité des marchés financiers ("**AMF**") can refuse to issue or renew or can revoke a prior authorization to participate in public contracts (which is required for certain types of public contracts and public contracts involving expenditures of a certain amount, see: https://lautorite.qc.ca/en/other-amf-mandates/public-contracts/about-public-contracts/) where an organization has been found guilty of having violated economic crimes offences.
[4] F. Joseph Warin, Michael Diamant, Patrick Doris, Mark Handley and Melissa Farrar, "Gibson Dunn Offers Update on Non-Prosecution and Deferred Prosecution Agreements", The CLS Blue Sky Blog, January 10, 2017.
[5] Beth A. Wilkinson and Alex Young K. Oh, "The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary perspective", NYSBA Inside, vol. 27, No. 2, Autumn 2009, p. 9, online: http://www.paulweiss.com/media/1497187/pw_nysba_oct09.pdf.
[6] Between 2003 and 2009, twelve prohibition orders pursuant to subs. 34(2) were used as an alternative to a prosecution.

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.