Published on *The National Law Review* https://natlawreview.com

Second UK Deferred Prosecution Agreement Has Implications for US Corporates

Article By:

Morgan, Lewis & Bockius LLP

“Innocent” US parent pays £6.25 million for UK subsidiary’s secret bribery.

On July 11, the U***K’s Serious Fraud Office (SFO)*** announced that it had secured its second *deferred prosecution agreement (DPA)*. The first DPA was secured in November 2015 when Standard Bank agreed to meet financial penalties of US$25.2 million. The second concerns an as-yet-unidentified UK company (referred to as “XYZ Limited” for purposes of the case) that secured a number of contracts in various parts of the world through bribery. The bribery was said by the judge to be “part of XYZ’s established business conduct” and that within XYZ it was “an accepted way of doing business.” The bribery took place over a period of eight years, and subterfuge and deception were employed to keep the truth secret from auditors and XYZ’s US parent.

Under the financial settlement approved by the court, XYZ agreed to pay a financial penalty of £352,000 and additionally disgorge profits of £6.2 million.

One of the most significant features of the financial settlement is that XYZ’s US parent (dubbed “ABC Companies LLC” for purposes of the case) has been made responsible for funding almost the entirety of the penalty. This is particularly striking considering that, as the judge observed, ABC was entirely unaware of XYZ’s behavior, was to be regarded as “innocent,” and conducted itself in a way described as “exemplary” after having become aware of what occurred. Moreover, ABC had been a concerned and well-intentioned parent since it first acquired XYZ in February 2000. It had provided support for annual budgeting, marketing, and product development, as well as support for long-term strategic planning. It provided supply chain and global sourcing resources and cost-saving services. It created and implemented a group-wide health and safety program and a group-wide compliance program.

Despite all that, ABC was left in a position of having to make a direct payment of just under £2 million (by way of returned dividends) and also having to provide support of almost £4.2 million to give XYZ the financial wherewithal to pay the balance of the penalty.

The financial cost to the “innocent” US parent of its subsidiary’s unseen criminality was, therefore, very high. Given the fact that ABC was specifically stated by the judge to be beyond any criticism, it is instructive to trace the steps that brought it such huge, and underserved, expense.

History of the Case

XYZ is a small to medium UK incorporated entity. It was acquired by ABC in 2000 at a time when there was no group-wide compliance in place. Between June 2004 and 2012, a small group of senior managers at XYZ were involved, through the use of in-country agents, in systematic bribery to secure contracts. In total, 28 contracts were found to be tainted, and these contracts had produced revenues of £17.25 million for XYZ—15 % of its income over the relevant period.

Payments were made to agents to provide the funds used for bribes that were additional to the agent's contractual entitlements. These payments were misdescribed in internal documentation in order to conceal their true nature—referred to as "special commission," "fixed commission," or "additional commission." Through the use of this subterfuge, the true nature of the payments was hidden from those outside the small group of senior managers responsible for the activity.

In late 2011, ABC sought to bring XYZ within its global compliance program. The activity created by the introduction of that program brought to light a number of suspicions about some of XYZ's foreign contracts. By August 2012, senior management at XYZ became concerned about what was being uncovered, to the extent that the employees responsible for what was being discovered were dismissed. On September 4, external counsel were instructed to conduct an investigation into contracts won after January 1, 2006. On October 2, the company's lawyers contacted the SFO to alert it that an unnamed client might be making a self-report. On November 13, the SFO was further informed that the unnamed client would make a self-report at the conclusion of an investigation currently being conducted. That self-report was made on January 31, 2013.

Using the information received, the SFO conducted its own criminal investigation. Simultaneously, the XYZ internal investigation continued with a much wider scope, resulting in two further reports to the SFO in 2013 and 2014.

The SFO took the view that, when taken together, the level of cooperation offered by XYZ and the support provided by ABC was of a quality and degree that enabled the SFO to offer an invitation to take part in discussions with a view to entering into a DPA. Those negotiations were successfully concluded, and the terms of the agreement were approved by the court on July 11, 2016.

Factors Leading to the Parent Company Contributing to the Financial Penalty

The XYZ case was considerably more complex than the Standard Bank DPA, which concerned a single (albeit high value) instance of bribery in Tanzania carried out by local bank officials. Standard Bank was, and is, a substantial international bank with all the financial and other resources that that brings. XYZ, in contrast, committed many offences of bribery in a number of countries over a period of eight years, events which resulted in part from a culture among senior managers of conducting business illegally. By way of additional contrast to Standard Bank, XYZ is an impecunious and relatively small business unable to meet any significant financial penalty without losing the ability to trade.

In approving the terms of the DPA, the judge noted that the level of penalty that would ordinarily follow such egregious criminality would have instantly put XYZ out of business.

The judge was of the view that causing XYZ to go into liquidation would achieve nothing, as no penalty could, in those circumstances, ever be paid. As such, he took the view that the public interest was best served by keeping the business alive so that there would remain a vehicle through which

the penalty could be paid. That left the practical issue of who was actually going to provide the funds to meet the penalty. In the final analysis, the parent was the only option, undeserving though it may be.

Penalty Calculation

The standard calculation of penalty in circumstances such as those in which XYZ found itself involves, firstly, identifying a starting sum, which is ordinarily the profits flowing from the contracts obtained through bribery. This figure is then increased by identifying aggravating features and applying a multiplier reflecting those aggravating features. When that figure is reached, it is then reduced by identifying and giving credit for mitigating circumstances. In the XYZ/ABC case, this exercise produced a figure of almost £16.5 million. Having arrived at this stage, there is then a further discount to reflect—not mitigation, but cooperation.

It was at this point in the exercise that the judge did something that was truly remarkable. The jurisprudence and official guidance surrounding this part of the exercise is that the discount to be applied at this stage should be such as to bring a company entering into a DPA into roughly the same position as it would have been in if it had been prosecuted and pleaded guilty. That would ordinarily produce a discount of 50%, being the maximum available to a company pleading guilty. In this case, the judge added an extra discount of approximately 17%, which would not have been available to a company being prosecuted, and which brought the final figure down to just over £6.5 million.

That was divided into a financial penalty imposed directly upon XYZ Limited of £352,000 (the amount agreed to be the limit of XYZ's ability to pay), with the balance being met both directly and through financial support of XYZ by ABC.

Significance of the Judgement

When assessing the impact of how the court approached both the mechanics of arriving at the final figure for the financial penalty, and the division of who would bear the burden of payment, it is important to have regard to the identity of the judge. The judge in this case was the same judge who approved the Standard Bank DPA, and it seems clear that he has taken on the mantle of shaping UK law in this area. Because no UK DPA can take effect without the express approval of the court, this is clearly going to be a situation where the law concerning the interpretation and application of the statutory framework is entirely judge-made.

The judge chosen to create this area of law is Sir Brian Leveson, President of the Queen's Bench Division of the High Court, normally referred to as the most senior judge in the country. As such, any directions or rulings on how the law is to be interpreted or applied that come from a judge as senior as he are, rightly, held in the highest regard and have the most weight attached to them in terms of precedent.

For Sir Brian Leveson P. to rule that, in a DPA, it is appropriate to award a discount for cooperation, which would not be available to a company pleading guilty in a prosecution, is an extremely powerful message. Before XYZ, it was the accepted wisdom among those who advise corporations that a company and its advisors approaching a decision as to whether or not to self-report (and look to enter into a DPA) or do nothing (and risk prosecution) would view that decision-making from the perspective that the financial penalty for either course was likely to be the same. This judgment has put an end to that approach, and it has demonstrated that there is now more to be gained by cooperation than was previously believed to be the case.

The judge expressed his approach in these terms: “A company’s shareholders, customers and employees are far better served by self-reporting and putting into place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile.”

For a long time, the SFO has been pursuing a policy of encouraging self-reporting, “dangling the carrot” of a potential DPA, an outcome that would not normally be available to those who did not self-report. For an equally long time, that metaphorical carrot has seemed more illusory than real.

With the court’s clear and obvious support for the SFO’s policy, and having created the precedent which gives the carrot reality, there is no doubt that those who advise corporations on matters of whether or not to self-report will need to adjust their thinking.

This is not, however, the only important issue to emerge from this DPA.

The fact that proceedings were brought against a subsidiary company is part of what is becoming a clear tactic by the SFO, namely to pursue a small company within a group, and through that means bring the larger and more powerful parent into the frame. It worked effectively with XYZ, causing ABC to become the major contributor to the financial penalty. It worked with Sweett, where an offshore subsidiary of a UK parent was prosecuted. On July 13, the SFO announced that it has begun proceedings for bribery against F H Bertling Ltd, a UK subsidiary within the Bertling Group, a German logistics and shipping multinational. It remains to be seen to what degree the parent becomes embroiled in that prosecution.

Lessons Learned

We have therefore in this judgement two important lessons: First, parent companies—even benign, concerned, and well-intentioned parents—need to know in detail what their subsidiaries are doing. Second, cooperation brings its own reward, and it seems that of all forms of cooperation, self-reporting brings the highest.

Copyright © 2025 by Morgan, Lewis & Bockius LLP. All Rights Reserved.

National Law Review, Volume VI, Number 203

Source URL:https://natlawreview.com/article/second-uk-deferred-prosecution-agreement-has-implications-us-corporates