

International Bar Association Anti-Corruption Committee

Submission to the Canadian Government's Deferred Prosecution Agreements consultation: Expanding Canada's toolkit to address corporate wrongdoing

17 November 2017

• [Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?]

The IBA Anti-Corruption Committee ('the Committee') took note of the 'perceived advantages of [deferred prosecution agreements (DPAs)]' described in Canada's discussion paper for public consultation ('the discussion paper') and fully agrees with the assessment of Canada in this regard.

As a Party to the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention,¹ Canada is bound to actively enforce its foreign bribery offence. However, while the Corruption of Foreign Public Officials Act ('the CFPOA') came into force in 1999, only four concluded cases have resulted in a conviction to this day. The number of foreign bribery investigations have more than halved over the past

Note: This submission was prepared by Elisabeth Danon, Europe Regional Representative of the IBA Anti-Corruption Committee's Sub-Committee on Structured Criminal Settlements. The views in this submission do not represent the views of OECD member countries or member countries of the OECD Working Group on Bribery in International Business Transactions.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997



three years: the Annual Report to Parliament on Canada's Fight against Foreign Bribery reported 27 active investigations in 2014,² 12 in 2015 and 10 in 2016. The 2017 edition does not report the number of active foreign bribery investigations.

A DPA scheme, if properly designed and implemented, would encourage voluntary disclosure and facilitate the enforcement process as a whole. The *Niko Resources* ('Niko') case,³ while not a DPA, underlines the benefits of encouraging cooperation. On 24 June 2011, Niko pleaded guilty to violations of Section 3(1)(b) of the CFPOA. Niko agreed to pay a fine and victims surcharge. In addition, the company agreed to design and implement a compliance programme to detect and deter violations of the CFPOA. The plea agreement also required Niko to periodically report to the court and to the Royal Canadian Mounted Police.

Furthermore, the Committee believes that the absence of criminal conviction for alleged offenders would stimulate enforcement. The discussion paper rightly points out that a DPA scheme would mean that alleged offenders are not convicted (provided that they observe the terms of the DPA), and are therefore not debarred from contracting with the government. Currently, the Canadian Integrity Regime mandates automatic debarment for companies convicted of certain offences, including foreign bribery. When a company facing debarment is a major actor in the development of public infrastructures, the sanction can indirectly impact the public at large. The ability to impose sanctions on alleged bribe payers without a conviction would alleviate possible concerns regarding the impact of automatic debarment on public service and infrastructure.

For these reasons, the Committee strongly believes that a DPA scheme would intensify the fight against foreign bribery in Canada.

Additionally, the adoption of a DPA scheme should improve internal efficiencies for corporations – in the case of Niko, the company agreed to design and implement an extensive internal compliance system intended to detect and discourage further violations of the CFPOA. The adoption of a DPA scheme in Canada, along with a risk-based, extensive compliance system in the list of terms for DPAs, would significantly contribute to improving prevention detection and reporting of foreign bribery within corporate structures.

The Committee does not believe that adopting a DPA scheme would have disadvantages for Canada. However, it is essential that safeguards be implemented to

² Fifteenth, Sixteenth, Seventeenth and Eighteenth Annual Reports to the Parliament on the Fight against Foreign Bribery, available at: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng.

³ Agreed Statement of Facts between Her Majesty the Queen and Niko Resources Ltd., available at: www.osler.com/uploadedFiles/Agreed%20statement%20of%20facts.pdf.



ensure that the system is transparent and fair to all the stakeholders involved, including the victims.

• [Question 2: For which offences do you think DPAs should be available and why?]

For the reasons mentioned in answer to Question 1, the Committee believes that DPAs should apply, at a minimum, to offences committed under the CFPOA. More generally, DPAs could be used to resolve allegations of all serious financial and economic crimes, considering that such crimes are generally complex to detect and enforcement requires significant time and resources. Similarly to the United States, Canada could identify matters where DPAs are not appropriate and otherwise make them available to prosecutors for all financial crimes. In the US, a DPA cannot be used in matters involving national security or foreign affairs, matters where a public official has violated a public trust and prosecutions against an individual with two or more prior felony convictions.

While the Committee is not against the expanding the use of DPAs beyond the boundaries of financial and economic crime, Canada should be mindful of the resources and expertise needed to scale-up a newly designed DPA scheme to a broad range of criminal offences.

• [Question 3: What role do you think the courts should play with respect to DPAs?]

The extent of judicial scrutiny of DPAs has a direct impact on the legitimacy, transparency, and overall perception of the scheme by the business community and public as a whole. Although such scrutiny is rather limited in the US, the involvement of the court is a foundation of the DPA system in the United Kingdom. Under the Crime and Courts Act of 2013,⁴ the prosecution must obtain court approval to ensure that a DPA is in the interests of justice and that its proposed terms are 'fair, reasonable and proportionate'. Once the DPA is finalised, it can only be implemented if it receives approval from the judge during a final hearing.

When it comes to the role of the court, the Committee believes that the DPA system of the UK should serve as a model for Canada. The extent of judicial scrutiny and required court validation ensures that DPAs are validated by an independent party, rather than the very entity that has proposed to enter the DPA and negotiated its terms. This safeguard ensures that the process is fair and legitimate. In addition, granting a central

⁴ UK Crime and Courts Act 2013 c 22.



role to the court counters the risk that DPAs are perceived by the business community as a mere 'cost of doing business', a risk mentioned in the discussion paper as a potential disadvantage of DPAs. Court approval also conveys to the general public the notion that DPAs are not a gift made to companies. Indeed, where the proper safeguards are not in place, DPAs can be viewed as too lenient towards perpetrators of economic crimes – an 'easy way out' of prosecution. Granting a central role to the court would help mitigate this risk.

The Committee takes note of Canada's point that granting a central role to the court might deter voluntary disclosure. However, the Committee believes that having a solid balance of powers, as well as a fair and transparent process, would outweigh this risk. It can also be mitigated by properly communicating on the factors taken into account to offer a DPA and the elements that weigh in on the determination of the sanction.

• [Question 4: What factors should to be taken into account in offering a DPA?]

The Committee takes note of the factors mentioned by Canada in the discussion paper, and fully agrees that each should be considered by the prosecution in the decision to negotiate a DPA. The Committee also believes that the extent of savings incurred by the prosecutor's office as a result of the disclosure could be a factor to consider. Notwithstanding the above, the Committee recommends that Canada publish and circulate guidance eliciting the factors and criteria by which the prosecutor will invite an offender to negotiate a DPA.

• [Question 5: When would a DPA not be appropriate?]

As explained in answer to Question 2, there are certain cases where the matter at hand may render a DPA inappropriate (such as national security in the US for instance). On par with limited substantive matters, it is essential that a DPA be denied to an alleged wrongdoer who deliberately hid relevant material from the prosecution during the negotiation. Other factors, such as the reluctance to cooperate, failure to share incriminating facts in their entirety and waiting several weeks before disclosing, should be reasons to deny a DPA. Notwithstanding where Canada draws the line, the Committee believes that it is essential to convey the notion that a DPA is not systematically granted to alleged wrongdoers and certain behaviours might directly lead to a denial of a DPA.

• [Question 6: What terms should be included in a DPA?]



In light of the practices in the US and the statutory scheme in the UK, the Committee believes that a Canadian DPA scheme should include the following mandatory terms:

- 1. An agreed statement of facts, providing, among other elements, that the company admits to the conduct constituting the relevant offence(s);
- 2. the consequences of any breach of the DPA;
- 3. an expiry date; and
- 4. financial penalties.

Other terms in a Canadian DPA scheme may include the following:

- a guarantee that the information provided during any DPA negotiations is true and not misleading in any material manner;
- an obligation to cooperate in any ongoing or future investigations (in Canada or overseas) into the subject matter of the offending conduct;
- payment of compensation to any identified victim or group of victims;
- design and implementation of a compliance programme;
- prohibitions on the company and prosecutor to make public statements contrary to any agreed facts; and
- appointment of an independent experienced monitor.
- [Question 7: What factors should be taken into account in setting the duration of a DPA?]

In the UK, Section 5 of Schedule 17 to the Court & Crime Act of 2013 provides that a DPA must have an expiry date. While there is no such requirement for DPAs in the US, they often include an end term of three years.

The Committee believes that there should be some level of flexibility in fixing the duration of a DPA. Factors to determine the duration should include, without necessarily being limited to, the complexity of the case and extent of the remedial actions needed. However, the Committee believes that the rules governing DPA should provide for a maximum term and mandate that the duration of a DPA is included in its



terms.

• [Question 8: Under what circumstances should publication be waived or delayed?]

The Committee recommends that, as a rule, DPAs be published and readily accessible on the internet. While statements of facts for concluded foreign bribery cases are currently public, copies have to be requested in person from the court where they were filed.

As rightly explained in the discussion paper, publication is critical to uphold public confidence in DPAs as a valid criminal law enforcement mechanism. In addition, the Committee believes that publication and access to DPAs increases compliance among companies and individuals. First, access to DPAs contributes to greater transparency of the settlement system, specifically regarding the factors that weigh in during the negotiation, and terms of a DPA. By publishing DPAs and making them easily accessible, the settlement system becomes more comprehensible and predictable for companies and individuals, thus conveying additional certainty and encouraging self-reporting. Second, as the publication of DPAs increases awareness of the enforcement action among the general public, it plays as deterring role for companies and individuals to engage in corrupt conduct. The Committee strongly believes that the advantages of DPAs described in the discussion paper can only fully materialise if DPAs are published and easy to access.

Therefore, the Committee recommends that, subject to a confidential process for negotiating a DPA and to limited circumstances where publication would prejudice the administration of justice or ongoing legal proceedings, the terms of all DPAs should be published.

• [Question 9: How should non-compliance be addressed?]

A breach of a DPA in the UK and US may result in additional financial penalties, the resumption of a criminal prosecution and use of evidence obtained during DPA negotiations against the company. The Committee recommends that where a company or individual breaches a DPA, it receive one formal notice to remedy the breach within a nominated period of time. If the breach is remedied, the terms of the DPA should continue. However, if the breach remains un-remedied, criminal prosecution should resume and proceed in the normal manner. Furthermore, the information and documents exchanged during the DPA negotiation process may be used against the company in the prosecution.



• [Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?]

It is in the public interest to preserve the right against self-incrimination and to uphold the obligation of the Prosecutor to discharge the criminal burden of proof. A DPA scheme should not undermine this fundamental tenet of criminal justice. Furthermore, rules regarding the use of information shared by the company during the negotiation process should not serve to deter companies from disclosing wrongdoing and volunteering information. It is essential to the effectiveness of a DPA process, that companies are encouraged to fully co-operate in a DPA negotiation, by ensuring adequate safeguards against self-incrimination, follow-on litigation, or exposure to other third party liabilities. In the Committee's opinion, the following positions should apply:⁵

- all negotiations between a company and the prosecutor relating to a DPA should be and remain confidential, not to be disclosed to any third party;
- if a DPA is concluded and further breached or terminated other than in compliance with its terms and expiry, material and information held by the prosecutor may be used by the prosecutor against the company (and any other person only on a derivative basis and not as constituting any admission by that other person) in any subsequent criminal or civil proceeding;
- if a DPA is not concluded and negotiations for a DPA cease (for whatever reason), material and information held by the prosecutor may not be used by the prosecutor against the company (or any other person) and all material provided on a voluntary basis must be either destroyed or returned to the company;
- all material and information held by the prosecutor supplied to it on a voluntary basis or otherwise by the company for the purposes of negotiating a DPA should not be accessible by regulatory agencies or other third parties for the purpose of bringing civil proceedings against the company (or any other person); and
- these conditions and the permitted use of any information or documents provided by a potential offender seeking to negotiate a DPA should be clearly set out in the supporting legislation to ensure enforceable rights

⁵ The Committee adheres to its prior position in its *Submission to the Australian Attorney General's Department on Considerations of a Deferred Prosecution Agreement Scheme in Australia*, dated 2nd May 2016 at p.24.



for the return of such material exist.

• [Question 11: How should compliance monitors be selected and governed?]

In Europe and the US, appointed monitors tend to be senior members of the legal community, generally from private law firms experienced in the relevant types of serious commercial crime. Monitors can also be drawn from auditing and/or consulting firms or be individuals who have relevant expertise. It is important to ensure that appointed monitors are free from any potential conflicts of interest. While it is a matter for the prosecutor and the company to draft the DPA so that it carefully sets out the role and reporting obligations of a monitor, the Committee recommends that the power to appoint and supervise an independent monitor be given to the court. The monitor's mandate and scope of work, as well as a clear reporting framework to the company and the appropriate agency, should be outlined at the outset of the monitoring process. The Committee also believes that making a monitor's final report public should be considered, in order to enhance the transparency of the process.

• [Question 12: What use should be made of compliance monitoring reports?]

The Committee recommends that monitor's reports be received and examined by either the Federal Coordination Centre (FCC) of the RCMP, in the framework of the International Anti-Corruption Programme, or Public Prosecution Service of Canada (PPSC). This would mean that the FCC and/or PPSC would have to be tasked with staff equipped to act as the oversight authority. The reports should be the principal source to determine whether a company is fulfilling its obligations under a DPA.

• [Question 13: Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?]

It is critical that the victims are granted standing to be heard in any DPA negotiation process and that the rights of the real victims are properly protected with mechanisms to enforce payment, should a company breach a DPA. Additionally, considering the fact that victims of corruption can be complex to identify, a DPA scheme should include the possibility to require the company/natural person to make financial donations to third parties. As an example, in the UK, the Deferred Prosecution Agreements Code of Practice provides that the financial term of a DPA may include 'donations to charities which support the victims of the offending'. With these considerations in mind, the Committee recommends that a Canadian DPA scheme include the following features:

⁶United Kingdom Serious Fraud Office and Crown Prosecution Service. Deferred Prosecution Agreements Code of Practice, available here: https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf



- 1. funds raised by way of fines, penalties and/or the disgorgement of profit should be allocated not simply to Canadian revenue, but to specific uses to promote the ongoing funding of serious financial crime cases;
- restitution orders in favour of the victim (subject to a victim properly declaring its losses to the satisfaction of the prosecutor and the court);
- 3. standing for a victim to make submissions to the prosecutor and to the court in relation to any proposed DPA (in terms of restitution orders);
- 4. flexibility for the court to make restitution orders in its discretion including any orders in favour of a third party; and
 - 5. orders requiring the full (indemnity) costs of the investigators and prosecutors to be paid by the company;
- 6. a discretion permitting the court to make orders directing that any restitution amount (or any part of it) be used in any manner directed by the court (for example, funding public whistleblower services, whistleblower advocates or use of funds to resource ongoing serious financial crime investigation and prosecutions).