TRANSPARENCY INTERNATIONAL UK
fighting corruption worldwide

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Friday, March 9th 2018

Dear David

I am writing on behalf of Transparency International UK (TI-UK) with reflections and recommendations regarding the use of Deferred Prosecution Agreements in the light of recent cases.

As you know, we have consistently supported the principle of DPAs, on the basis that they will be a useful additional tool for UK prosecutors, and as long as they do not become a soft option for those guilty of corruption. We recognise and welcome the recent progress made by the SFO under your leadership.

However, there is a clear danger that a discounted DPA settlement will, perversely, encourage corrupt acts if companies come to see the fines as a calculable cost of doing business that can be factored into a risk-reward analysis.

It is not our intention to focus in this letter on the rights and wrongs of individual cases, but to draw from them some general principles that we feel are applicable to the use of DPAs in the UK. You will be aware from our previous public statements that, in the absence of individual prosecutions relating to Rolls Royce, we are not yet convinced that the interests of justice have been served in that specific DPA.

We understand that in the early DPAs there will be a certain amount of trial and error as a system is developed that clearly works in the interests of justice. Like others, we feel that the initial DPAs have been imperfect in places, and we hope that all those involved will be looking to learn from the lessons of those early cases to tighten and improve the system in future.

1. Priorities

Four areas we feel should be addressed as a priority are:

1.1. Individual prosecutions must be pursued irrespective of the decision to award a DPA. There is a concern that using DPAs as a 'disposal decision' will reduce the likelihood of individual accountability and therefore deterrence.

1.2. Victim impact should be a core consideration in the decision to award a DPA both for the prosecutor and the court. Our suggestions elaborated below include victim champions, victim impact statements or reports, use of expert witnesses and financial compensation as part of the DPA.

1.3. Transparency and independence in investigative decision making must be enhanced when a DPA is under consideration to ensure confidence in the administration of justice. We have concerns surrounding the independence of the investigative/prosecutorial decision making process which could undermine confidence in the Roskill model. There is a danger (both real

and perceived) of inappropriate collusion, intended or otherwise. There are also concerns about political interference with charging decisions. To maintain public confidence in this, greater transparency is needed during the investigative phase.

1.4. The calculations in several areas are shrouded in secrecy, and should be far more transparent. This affects assessments of both the seriousness of the crime and the penalty, and so it is anomalous that they are secret.

2. Areas of specific concern relating to DPAs concluded to date

Outlined below are a number of specific areas in which we feel there need to be changes and improvements.

2.1. Transparency

Overall, the DPA process is still unnecessarily and unhelpfully opaque. The result is that it is not possible for external observers to assess whether the interests of justice have been served, or whether a settlement is in the public interest, or what alternative courses might have been taken - quite apart from preventing those with a legitimate interests, particularly victims, from having any input to the process.

2.1.1. Transparency over individual prosecutions. Taking the corruption offences as a whole, it is only possible to assess whether the interests of justice have been served when both companies and individuals have been punished. It is clear that if corruption has occurred, individuals must be involved, both actively and complicitly. Punishing senior individuals is the best possible deterrent to others. The intent to punish senior individuals should be placed at the core of a DPA strategy, for example with regard to evidence-gathering and assessment about the extent of the company's cooperation. Within the DPA documents, there should be an indication as to whether individuals are being investigated, an approximate number, whether company employees and/or external parties and the level of seniority. We do not agree with the SFO's previous argument that revealing such details would compromise the investigations. Clearly, some details would compromise an investigation and should not be revealed; however it is not uncommon during criminal investigations, particularly high profile ones, for the number of suspects under investigation to be published along with their sex, age and location. The SFO's default position should be to disclose as much is practically possible, and not to assume it should reveal nothing at all.

2.1.2. Transparency over the impact and nature of debarment. In the Rolls Royce case, the potential impact on the company of debarment appeared to be a significant factor in the decision not to prosecute. However, the figures cited were extremely vague, the markets listed did not seem to tally with TI's own assessment of the respective debarment regimes, and the detail was so high level that this crucial aspect of the settlement is shrouded in mystery.

2.2. Calculations

In most of the numbers presented by the SFO, it is not possible to discern how they have been calculated, and therefore to make any kind of assessment about whether the interests of justice have been served. We believe that calculations and their basis should be fully transparent, and that this can be achieved without compromising the investigative process or commercial confidentiality.

2.2.1. Advantage or 'gross profit'. The size of the fine - which is the DPA's principle means of punishment and deterrent - flows from the calculation of the advantage. Without transparency over how the advantage has been calculated, it is not possible to assess whether a sufficient fine has been applied, and therefore whether the DPA passes the public interest test. As TI has previously argued for example, in our submission to the Sentencing Council - the advantage gained from a corrupt transaction is seldom limited to that single transaction. It may flow, for example, from underwriting sales of a new product line which would otherwise be commercially unviable, or through generating free cashflow which can then be used for M&A activity which enhances the company's value.

2.2.2. Cost of the 'harm'. Likewise, the nature of the harm is seldom limited to the harm caused by a single transaction. Professor Paul Collier's expert witness statement in the Mabey Bridge case usefully summarised the harm that can, for example, accrue from a corrupt

official building a fortune from a corrupt transaction and using the proceeds to fund a political campaign which places corruption at the heart of a key ministry. Once the harm is properly calculated, it is also possible to calculate appropriate levels of compensation, which should be separate from the fine.

2.2.3. Cost of Debarment. Having reviewed the detail revealed in Court of the Rolls Royce case, we substantially disagree with the assumptions presented of the cost of debarment. However, until the basis and means of calculation are public, the SFO is simply asking the public to accept in blind faith that the figures it has itself received from the offending company are correct.

2.3. External input

The process at present gives the unfortunate impression that the SFO appears in court almost as the advocate for the offending company. One reason for this is that there has been little scope given to outlining the impact on victims and the nature of the harm.

2.3.1. Victims. While acknowledging that it is often hard to pin down the victims of a corrupt act or a series of corrupt actions, there are real victims of these crimes. They should be much more at the forefront of the SFO's thinking in such cases. Independent experts - perhaps a retained panel of advisers - would be able to advise on this area, as would in-house experts or an in-house 'champion' if they were sufficiently trained. At least, the prosecution case, and ideally the judgement, should give greater acknowledgement to the victims with a victim impact statement or report.

2.3.2. Harm. Closely related to the question of victims, we believe that the extensive harm done by corruption should be front and centre of the SFO's understanding, and that this needs to be understood and articulated in a far more sophisticated way. There is clearly a role for experts in this, whether in-house, or external experts.

2.4. Process

2.4.1. Company in court. In the Rolls Royce case, neither a senior executive from the company, nor the company's defending counsel, was physically present in court. This reinforced the impression that the DPA is a relatively painless escape for a company guilty of criminal conduct, whose executives are able to avoid judicial and public scrutiny. We believe that the most senior officers of the company should be required to appear in the court, as offenders, at such hearings.

2.4.2. Monitors. Unlike the use of monitors in the US, the UK seems to be largely avoiding them. This has given, in the Rolls Royce case, an unfortunate situation in which the company's own self-appointed, long-standing monitor, Lord Gold, is effectively the guarantor to the court and the public that the company is improving its anti-corruption procedures and culture. We do not believe that in such circumstances a company should be able to mark its own homework; if the SFO is not going to appoint monitors, it needs to establish how an independent procedure can be created which enables the public to be reassured that changes at the company are both undertaken and sustained - a usual condition of a DPA.

3. Additional areas of wider concern around the use and application of DPAs.

In addition to the specific areas outlined above and resulting from our analysis of recent cases, we have identified five areas of wider concern around DPAs. These are:

3.1. Companies that are too big to prosecute, or where the SFO's assessment of the national interest leads to a DPA instead of a prosecution. Pressure will inevitably increase on the SFO in certain political environments and due to Brexit. It is important that the SFO retains a robust defence of the proper application of the rule of law and does not give way to political expediency.

3.2. Levels of discounting. We are very concerned by the fact that the discounting threshold has already been unilaterally reduced to 50%, from 30%, with no obvious rationale. While we understand that there needs to be some sense for a company that there is a net advantage to proceeding with a DPA, there is also a danger that introducing both certainty and leniency

pushes companies into the territory of a risk-reward calculation. We are also concerned that there will be ever-increasing discounting. This would pitch the DPA as a tool for transgressing, but cooperative, corporates to achieve easy and relatively painless closure on difficult issues, rather than fulfilling the intentions of the legislation.

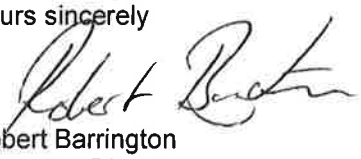
3.3. No immunity for individuals, or companies for past offences that subsequently come to light. The process is sufficiently opaque that it is not possible for external observers to determine whether effective immunity (by whatever mechanism) has been granted to a company or individuals. We strongly believe that granting of effective immunity should not be a trade-off for a company's cooperation. In the case of individuals, it should be clearly understood that there is an expectation the company will provide full access to and evidence on any individuals, however senior, for potential investigation and prosecution. In the case of the company, it is irrational to believe that a clean line can be drawn under all past offending as part of a DPA. The history of global bribery cases demonstrates that they can be well hidden and it can be years before they come to light. Given that the penalty is calculated on the basis of the advantage, it is possible that additional advantage would come to light, and therefore an additional penalty is required.

3.4. Self-reporting. We fully understand the argument that exemplary cooperation which leads to reporting of cases that investigators might not otherwise have found, is in some ways equivalent to self-reporting. However, the message the SFO has sent out is that self-reporting is no longer necessary to qualify for a DPA. If this is the case, it begs the question of what any company should self-report. In fact, our experience of informal conversations is that a number of corporate lawyers believe self-reporting to be a bad idea and do not advise their clients to do it. We believe the SFO needs to find a mechanism for restoring the incentive to self-report.

3.5. When has a DPA been breached? It is noteworthy that Rolls Royce had previously concluded a DPA with the US Department of Justice, and yet still qualified for a new DPA. It would be useful to have clarification of what the SFO understands as a breach of a DPA and what the consequences would be.

I would be very happy to talk through the contents of this letter, elaborate on the points made, or produce supplementary information should it be helpful. Finally, I would like to reiterate the offer made at our meeting last year that our in-house experts on debarment should participate in a roundtable discussion with your own team to raise awareness of debarment regimes globally, and how they do and do not work. We feel this could be an extremely useful exercise.

With kind regards,
Yours sincerely



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