



ARTICLE

Deferred prosecution agreements: a solution to prosecuting backlog? South Africa

In this article FTI Consulting and Corruption Watch explore the pros and cons of deferred prosecution agreements.

85%

The FTI South Africa Q4 2020 Resilience Barometer found that 85% of South African business leaders expect an increase in corruption in 2021.

FTI Consulting South Africa and Corruption Watch recently co-authored an article titled 'Addressing Corruption in South Africa' in which we argued, *inter alia*, that consideration should be given to allowing criminal offenders to self-disclose and subject themselves to an administrative penalty to avoid criminal prosecution through the mechanism of **deferred prosecution agreements ("DPAs")**.

There can be no doubt that South Africa is battling a crisis of fraud and corruption. According to PwC's Global Economic Crime Survey published in 2020, 60% of organisations have experienced economic crime.¹

In February 2019, President Ramaphosa announced the establishment of a Special Investigating Unit ("SIU") Tribunal to expedite hearings of SIU cases, recover misappropriated state funds and investigate the conduct of state officials in connection with maladministration of the funds and corruption.²

The President also established the Investigating Directorate ("ID") in 2019 as an instrument in the fight against corruption.³ The ID will focus on the investigation of corrupt activities.

The Zondo Commission of Inquiry into State Capture has exposed the depths of state corruption and looting of the public purse. In May 2021, the Commission heard evidence that the total cost of the "Gupta state capture" to the state is approximately R50 billion.⁴

All this points to a wave of fraud and corruption matters breaking over the investigative and prosecution authorities. Will they be able to cope or are alternative solutions required?

<https://ftiresiliencebarometer.com/news/covid-19-resilience-barometer-south-africa>

¹ <https://www.pwc.co.za/en/publications/global-economic-crime-survey.html>

² <https://www.gov.za/speeches/president-ramaphosa-appoints-special-investigations-unit-tribunal-24-feb-2019-0000#>

³ <https://www.gov.za/speeches/president-lyric-ramaphosa-proclaims-ndpp-investigating-directorate-strengthen-fight-against>

⁴ <https://www.dailymaverick.co.za/article/2021-05-24-the-totalish-cost-of-the-guptas-state-capture-r49157323233-68/>

What is a Deferred Prosecution Agreement?

A DPA is a voluntary agreement between a prosecuting authority and an organisation in terms of which prosecution for an alleged offence (or offences) is deferred in exchange for the organisation agreeing to fulfil certain conditions such as full disclosure of incriminating facts, repayment of criminal proceeds, payment of a monetary penalty, implementation of a compliance policy, and assisting in the investigation of related matters. If the organisation fails to fulfil these conditions, the relevant prosecuting authority can resume prosecution of the organisation. DPAs are often used in the context of economic or financial crimes including fraud, bribery, and money laundering. While not currently recognised in South Africa, an argument for DPAs was made by the South African Law Commission where it canvassed DPAs and other similar ‘out of court settlements’ of criminal cases in its Sixth Interim Report on Simplification of Criminal Procedure (August 2002).⁵

The Commission found that the inclusion of out of court settlements in the criminal justice process in South Africa would be advantageous for various reasons including saving court resources, more efficient and expedient processing of cases, certainty of outcomes, promoting restorative justice, and protecting victims from publicity. DPAs are used as an alternative to traditional criminal justice processes in several other jurisdictions.

DPAs used internationally



It is recorded that DPAs originated in the US. Here, DPAs apply to both organisations and individuals. In at least in the last 20 years, the US Department of Justice’s approach to DPAs gave evidence to the notion instead of targeting individuals for corporate crimes, there was a new strategy to pursue corporations as well as individual with over 400 DPAs entered in a period between 2002 and 2016.⁶

This differs from the UK’s position where individuals cannot be offered a DPA. In the US, federal, state and country prosecutors and others authorised to enforce federal and state law have the power to enter into DPAs. In the UK, only “designated prosecutors” including the Serious Fraud Office (“SFO”) and the Director of Public Prosecutions have authority to enter into DPAs. There is a broad scope of offences for applicability of DPAs in the US – however, instances of national security are excluded. The UK has a schedule of offences for which DPAs may apply.

The UK’s SFO has concluded at least four DPAs, including one with Standard Bank in 2015.⁷ Under the SFO policy, a company will only be allowed to enter DPA negotiations if there is full cooperation with the SFO’s investigations. Under such agreements, penalties can include financial penalty, compensation to aggrieved parties, and continuing cooperation with investigations relating to prosecutions of individuals.



Australia’s Legal and Constitutional Affairs Legislation Committee has recommended the passing of the Crimes Legislation Amendment (Combating Corporate Crimes) Bill 2019, which would introduce a DPA regime.⁸ It is proposed that a DPA may require an organisation to cooperate with an investigation, pay a penalty, admit to agreed facts, or implement a compliance programme.



France has introduced ‘conventions judiciaire d’intérêt public’ (CJIPs), which are similar to DPAs and have specific conditions which are imposed.



From an African perspective, Kenya recognises DPAs as alternatives to traditional prosecution of certain economic crimes. The Office of the Director of Public Prosecution (“ODPP”) is authorised to enter into DPAs on the basis that there is sufficient evidence to prosecute the charge and that doing so would be in the public interest. The ODPP, or an appointed regulator or third party, monitors the organisation’s compliance with the agreed terms of the DPA.

There are numerous other jurisdictions which make use of different forms of DPAs which are not addressed above.

⁵ https://www.justice.gov.za/salrc/reports/r_prj73_intrep6_2002aug.pdf

⁶ <https://www.vistra.com/insights/us-vs-uk-deferred-prosecution-agreements-some-history-and-key-differences>

⁷ <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>

⁸ https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1920a/20bd099

Considering the potential benefits and pitfalls of DPAs

There are strong arguments for the benefits of introducing DPAs as a supplementary mechanism for combatting economic crimes:

BENEFITS

- A key benefit of introducing DPAs would be a more expedient way of processing economic criminal cases and in addressing the urgent corruption crisis, as well as alleviating or avoiding the backlog in cases. Criminal prosecutions can take years to build and investigate before equally lengthy trials even begin.
- There is an element of restorative justice in that it encourages self-reporting and truth-telling by perpetrators, and the reparations include not only monetary compensation but also compliance with an agreed set of governance policies, which can be rehabilitative.
- The conditions to the agreements will promote good governance of organisations.
- The framework could serve as a deterrent as perpetrators may fear being reported or 'whistleblown-on' by co-perpetrators who enter into co-operative DPAs.
- It could save taxpayers money by avoiding lengthy investigations, prosecutions, and trials.
- There is certainty from a prosecuting perspective as it ensures an outcome in the interests of criminal justice in instances where there may be insufficient or extremely complex evidence to successfully prosecute economic crimes.
- It could be an incentive for companies to self-report as there is less reputational damage and there is more certainty and expedience than being subjected to the reputational damage of a protracted investigation or ongoing litigation.

There are also potential areas of concerns to consider:

CONCERNS

- **The organisation may not comply with the conditions attached to the agreement.**

In this case, the conditions of the DPA would be breached and the perpetrator would be liable for prosecution. This would not trigger 'double jeopardy' as a DPA merely defers prosecution and does not constitute a 'non-prosecution agreement' (also known as an NPA). It is therefore not granting an immunity.

- **The public may feel that allowing DPAs would result in perpetrators not being brought to justice or being held sufficiently responsible for their crimes or having lesser penalties imposed.**

We would suggest that to ensure accountability, conditions and reparations should be applied according to a guideline schedule depending on severity and monetary value of the economic crime. While it may be perceived as a lesser punishment than a public criminal conviction, it is preferable to no conviction at all due to a gridlocked criminal justice system.

- **It conflicts with idea of 'no tolerance' of corruption and other economic crimes.**

We would argue that a 'no tolerance' principle does not currently exist and, to address and stop corruption, alternative methods need to be implemented to support the failing existing system to ensure perpetrators are held accountable.

- **There may be concerns that there will be a lack of judicial control of the system resulting in inconsistent application of the discretionary powers of prosecutors. This could be a result of poor implementation or corruption on the part of prosecutors who are persuaded to impose less stringent conditions in exchange for compensation. It could be argued that these risks already exist in the current criminal justice system.**

We would argue that the legislative framework allowing for DPAs should make provision for judicial oversight as well as a structured guideline on the applicability of DPAs (for certain crimes, for example) and the types of conditions and penalties which must be imposed depending on the severity of the crime.

DPAs in South Africa

While there are mechanisms available to the prosecution in South Africa to resolve criminal cases with corporate entities without a full criminal trial, they are limited.

The National Prosecuting Authority (NPA) Investigating Directorate Head, Advocate Hermione Cronje, says:

“There is certainly room to expand non-trial resolution options available to prosecutors in our efforts to advance accountability for state capture. A 2019 OECD study found that of the 890 bribery cases concluded under the Anti-Bribery Convention, close to 80% were resolved through non-trial resolution, suggesting a non-trial resolution regime is worthy of serious consideration in South Africa.”⁹

In order to effectively combat corruption, we need to begin to think creatively around ensuring accountability and redress in contexts where prosecutions may not be realistic due to the high burden of proof including challenges around having credible persons prepared to act as witnesses for the state.

We understand that that the NPA is exploring the use of non-trial resolution of cases and possibly of deferred prosecution DPAs agreements as it deals with the overwhelming number of corruption cases currently under investigation, but such initiatives require reform within the legal framework for the NPA to take forward this idea.

Using lessons learnt in comparative jurisdictions, if introducing DPAs into criminal law legislation, lawmakers should carefully consider the applicability of DPAs, the suggested conditions depending on the nature and financial impact of the crime, and the appropriate reparations.

There are few aspects which must be addressed if DPAs are to be introduced in South Africa:

- The overseeing body of this process should sit within the National Prosecuting Authority rather than the South African Police Service or the Hawks.
- An effective DPA regime would be dependent on the relevant authorities and law enforcement agencies supporting each other in the manner that the US Securities and Exchange Commission and Department of Justice, and the UK SFO and Financial Conduct Authority collaborate.
- DPAs should be applicable only to a certain class of economic or financial crimes contained in a schedule.

- The legislation introducing DPAs should include a guideline indicating the types of conditions applicable to certain types of offences.

Conditions to DPAs could include:

- Varying combinations of an admission of agreed-to facts
- Repayment of funds associated with the offence
- Payment of a monetary fine or penalty
- Implementation of compliance policies to prevent and detect future offences
- Imposition of reporting mechanisms
- Full cooperation with the prosecutor in ongoing related investigations
- Not committing the offence again

Some hypothetical examples:

- A Judicial Commission exposes allegations and facts regarding corrupt actions by entity A in obtaining contracts from state owned entity B. A DPA regime would enable entity A to self-report the conduct of members of the organisation and agree to the imposition of a penalty and offer assistance in the investigation of other persons involved in the commission of the offence.
- An investigative journalist exposes allegations of corruption on the part of government official A in the awarding of tenders to entities B, C and D. A DPA regime would enable entity D to self-disclose their criminal conduct and accept the imposition of a penalty and other terms and agree to assist in the investigation of all other involved parties.
- Company A's internal audit uncovers fraud by an authorised employee B which would implicate Company A in corrupt practices. A DPA regime would enable Company A to report the fraud and accept the appropriate penalty and other terms including providing all relevant information and co-operating with any investigations.

⁹ Directorate Head, Advocate Hermione Cronje provided this quote directly to FTI for the express purpose of inclusion in this article.

Conclusion

Certainly, we need to scrutinise the repercussions of the possible advantages and disadvantages of resolving criminal cases through non-trial resolution like DPAs before such a framework is introduced.

There would need to be stringent enforcement provisions to ensure there is no abuse of the system and that the processes work.

Enforcement provisions should include the creation of a compliance-monitoring system where offenders are required to either self-report or are subjected to compliance monitoring by an independent agent.

This will reduce the risk of corruption of the system and encourage efficiency of the supplementary criminal justice process.

NPA's Advocate Cronje feels that the debate should be taken to the South African Public.

“With a robust and carefully considered legal framework and a well-enforced compliance-monitoring system, the use of DPAs could have significant results in practically addressing economic crimes in South Africa and relieving the current investigative and prosecutorial backlog.”

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