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PERSPECTIVE

Why Corporations Should Rethink How They Evaluate Deferred Prosecution Agreements

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George Bernard Shaw is credited for observing that England and America are two countries separated by the same language. The same was said of our respective approaches to corporate law enforcement. Often they use similar nomenclature but adhere to different enforcement procedures and principles. But the differences have been narrowing, including in their respective use of deferred prosecution agreements (DPAs) to resolve corporate investigations. Recent high profile prosecution failures in each jurisdiction, arising from inadequacy of evidence or unacceptable disclosure delays, and judicial and (in the United States) legislative responses to these repeated snafus, also reveal a similar trend, compelling companies to scrutinize even more closely prosecutors' claims that they "have the goods" on employees that require a corporate deferred prosecution or plea.

Indeed, courts in recent U.S. and U.K. failed prosecutions against individuals have bluntly criticized either prosecutors' failures to turn over required evidence or the inadequacy of the prosecution evidence, as the basis for directed verdicts and dismissal of criminal charges. The recent collapse of the U.K.'s Serious Fraud Office (SFO) case against two former Serco executives, following a deferred prosecution agreement (DPA) with the company itself, is the most recent U.K. example. This pattern has become part of a systemic issue, affecting not only individual prosecutions but related corporate DPAs premised on prosecutors' claims of having sufficient evidence to merit those charges.

Two recent cases from New York federal courts—*Nejad* and *Morgan*—evince similar judicial frustration with prosecutorial unreadiness to meet their obligations in proving their cases, leading to outright dismissal of criminal prosecutions in both cases. Although U.S. DPAs did not precede those dismissed prosecutions, the government's failed prosecutions sprung from discovery errors that companies often do not have the opportunity to test once they are offered a DPA. Simply put, U.K. and U.S. companies and their counsel are well-advised to do all they can to evaluate and test the strength of the case against their employees and agents that may impel corporate settlements, and should not simply accept that prosecutors "have the goods" to prevail.

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Year	Company	U.K.: Prosecution of Individuals	Outcome	Other: Prosecution of Individuals	Outcome
2015	**Standard Bank**	No	N/A	Yes—Tanzania	Guilty
2016	**Sarclad**	Yes	Not Guilty	N/A	N/A
2017	**Rolls Royce**	No	N/A	Yes—U.S.	Guilty
2017	**Tesco**	Yes	Not Guilty	N/A	N/A
2019	**Serco**	Yes	Not Guilty	N/A	N/A
2019	**Guralp**	Yes	Not Guilty	Yes—U.S.	Guilty
2020	**Airbus**	Not at present	N/A	Not at present	N/A
2020	**G4S**	Charged–Awaiting trial	N/A	N/A	N/A
2021	**Airline Services**	Not at present	N/A	Not at present	N/A

U.K. Trends and Analysis

The recent collapse of the SFO's case against the former Serco Executives is not the first acquittal in recent years in SFO prosecutions against individuals. By way of background, there have been nine DPAs in the U.K. since 2015, some of which were followed by prosecution of individuals.

This data shows that:

- Four DPAs have been followed by U.K. trials of individuals. Those tried in the U.K. have been acquitted: two by order of the judge and two by juries after a full trial considering all the evidence.
- The case of Guralp resulted in acquittals of company employees by a jury in London after hearing of the evidence. On the same or similar facts, a jury in California convicted the intermediary used in that case.
- Three DPAs were followed by successful prosecutions of individuals outside of the U.K., namely in *Standard Bank*, *Rolls Royce*, and *Guralp*.
- Three former employees of *G4S* currently await trial.
- There are two cases where the SFO is yet to decide whether to charge individuals, namely *Airbus* and *Airline Services Limited*.

Brief Analysis Of the Acquittals

'Serco': In *Serco*, the collapse related to the SFO's failure to disclose material to the defense, which would have assisted the defense or undermined the prosecution's case. Because it was material that was obtained from the company, the SFO's non-disclosure of the material would not necessarily have impacted the company had it not accepted a DPA and instead went to trial. But the analysis is not that simple. Reporting suggests that the SFO conceded that its disclosure process was so flawed that it required a complete re-review, which would take months. In such circumstances, the company may have successfully argued that a trial against it could also not fairly proceed.

'Sarclad' and 'Guralp': Both *Sarclad* and *Guralp* were cases where the trials concluded with juries returning not guilty verdicts. Had these companies not accepted DPAs and been taken to trial, they too would have likely been acquitted, as the not guilty verdicts were in respect of the individuals who allegedly attributed guilt to the company. If the individuals were not guilty, then the company could not be.

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The case of *Guralp*, however, contains a twist. A parallel trial in the United States resulted in the company's intermediary being convicted, demonstrating that litigation can be uncertain.

'Tesco Stores'. In the *Tesco Stores* case, the individuals were tried twice. In the first trial, the jury was about to retire to consider their verdicts when one of the defendants

became ill and the trial abandoned. At a retrial, a different judge dismissed the case after having heard only the prosecution's case, finding there was no case for the defense to answer, which the company would have benefitted from too. Again, this case provides a lesson in the inconsistencies and risks of litigation.

U.S. Trends and Analysis

In the United States, courts are similarly scrutinizing prosecutions, and some courts have found that the government's failures to abide by its disclosure obligations are a basis for the dismissal of criminal charges. Two recent decisions from New York are prime examples of this trend.

'United States v. Nejad': In February, District Court Judge Alison Nathan granted the U.S. Attorney's Office's motion to vacate the jury verdict and dismiss the charges after a series of damning revelations concerning the government's repeated violations of its disclosure obligations prior to, during, and after trial. *United States v. Nejad*, 2021 WL 681427 (S.D.N.Y. 2021). After the government secured a jury conviction in March 2020 against the defendant, Judge Nathan uncovered that the prosecution had not only failed to turn over an important document until the midst of trial, but had affirmatively decided to "bury" the document among other information so as to obfuscate the exculpatory information within the document. *Nejad*, 487 F. Supp. 3d 206, 208 (2020). This egregious error was one example among the many "serious and pervasive issues related to disclosure failures" that occurred in this prosecution. Id. Judge Nathan condemned the actions of the prosecutors as "grave derelictions of prosecutorial responsibility" that were then "compounded … through a sustained pattern of refusing to fess up" and called upon the Department of Justice (DOJ) to conduct "a full investigation." *Nejad*, 2021 WL 681427, at *2, 4.

Judge Nathan's decision demonstrates that courts are willing to step in to ensure the integrity of the judicial system, including by dismissing cases or precluding evidence from prosecutions where the government does not comply with its disclosure obligations.

'United States v. Robert Morgan et al.': In *United States v. Robert Morgan et al.*, District Court Judge Elizabeth Wolford dismissed the indictment filed against four real estate professionals due to the U.S. Attorney's Office's failure to comply with its voluntary discovery obligations under Federal Rule of Criminal Procedure 16. 493 F. Supp. 3d 171, 199 (W.D.N.Y. 2020). In its decision dismissing the indictment, the court concluded that the government prosecutors "demonstrated a disturbing inability to manage the massive discovery in this case, and despite repeated admonitions from both this court and the Magistrate Judge, the government's lackadaisical approach has manifested itself in repeated missed deadlines," which ultimately led to the dismissal. Id. at 208. The court detailed the government's "significant missteps" in its management of electronic discovery, including its failure to provide custodian information and data processing issues that created "errors and inconsistencies" in the government's productions. Id. at 180, 211. The dismissal of the *Morgan* indictment suggests that the government may not always have a strong understanding of its discovery, especially at the early stages of an investigation or even after charges are filed, and the courts are unwilling to let the government's mishaps get in the way of an efficient prosecution. Gibson, Dunn & Crutcher represents Mr. Morgan in the case.

Similar concerns about prosecutors' inadequate discovery practices contributed to the recent U.S. Congressional enactment of the Due Process Protections Act, which seeks to fix "inadequate safeguards in Federal law" that often fail to ensure prosecutorial compliance

with disclosure obligations. See Pub. L. No. 116-182, 134 Stat. 184 (2020); 166 Cong. Rec. H4, 582-83 (Sept. 21, 2020) (statement of Rep. Jackson Lee). The Act amended Federal Rule of Criminal Procedure 5(f) to require district courts to issue an order at the first appearance "that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." Prosecutors face sanctions for failure to abide by the amended rule. Id.; see e.g., *United States v. Rodriguez-Perez*, 2020 WL 6487509, at *2 (S.D.N.Y. Nov. 4, 2020). This serves as yet another tightening of the previously loosely-enforced obligation on prosecutors to be fully ready for trial when they indict.

Lessons Learned

Corporate investigations in the United States and the U.K. almost invariably begin due to self-reporting. The self-disclosure analysis is a delicate one. These cases emphasize the importance of a considered evidentiary analysis focusing heavily on the prosecution's prospects of being able to prove the case. Even where legal requirements mandate self-reporting, or where doing so effectively is required because of a whistleblower or leak, a key part of the analysis—can the prosecution prove their case—should apply. Of course, a company may decide to settle even where the evidentiary case is wanting, because publicity, costs, business disruption, and effects on investor relations outweigh challenging the prosecution's demand for resolution. But DPAs can be onerous, routinely requiring monitorships and self-reporting. This has long been true in the United States and is increasingly so in the U.K., as the SFO director lauded its most recent DPA for having "*teeth.*" Indeed, many companies that do not cooperate with the SFO until the final stages of an investigation still resolve cases through DPAs, benefitting from penalty reductions similar to those who do.

Yet, the recent decisions in the *Nejad* and *Morgan* cases in the United States demonstrate consequential judicial action where the prosecution fails to adequately manage discovery. As individual defendants put the government to the test, cracks reveal that prosecutors frequently fail to get a strong handle on their discovery, leading to violations of disclosure obligations and potential arguments for dismissal or other relief. Moreover, these outcomes, and the Congressional amendment of Rule 5, reflect not only a judicial willingness to hold prosecutors accountable but also a legislative mandate to do so.

Companies face different reputational risks than individuals do when taking on the prosecution. But these cracks, both in the U.K. and the United States, suggest that companies should think critically about whether it is worth the risk to force the prosecution to prove the case against them. For many companies, it is assumed prosecutors will be able to prove their case against employees, publicly revealing the proof of the company's malfeasance without any way for the company to contest that evidence, thereby impelling the corporate decision to settle. As these prosecutorial failures mount and courts dismiss charges or render other sanctions, prosecutors can be expected, under proper pressure, to weaken in their adherence to the typical playbook of seeking corporate DPAs. Of course, these are delicate matters to test. But the specter that a company settles to a DPA and the employees who supposedly put them in harm's way prevail can also lead to a poor outcome, leaving companies to explain why they settled in the first place.

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