SEPTEMBER 28, 2017

Government of Canada Consults on Tools to Address Corporate Wrongdoing

Authors: John Bodrug, Alysha Manji-Knight and Stéphane Eljarrat

Many jurisdictions around the world have implemented frameworks to deter and address the consequences of criminal and quasi-criminal business practices by corporations. In an effort to ensure that Canada has the right tools to address corporate crimes, on September 25, 2017, the Canadian government launched a public consultation on the potential adoption of a deferred prosecution agreement (DPA) regime (DPA Regime) and possible modifications to the Canadian integrity regime (Integrity Regime) which can disqualify businesses from federal government contracts. The consultation period ends on November 17, 2017.

The government has prepared discussion materials for each of the DPA Regime and Integrity Regime. These discussion papers provide background on the regimes, outline the use of these enforcement tools in other jurisdictions and highlight key questions and considerations.

DPA Regime

A DPA is a voluntary agreement between an accused corporation and the responsible prosecution authority. A DPA suspends criminal prosecution of the corporation for a defined period of time. Under a DPA, the prosecution agrees to grant the corporation amnesty in exchange for the corporation's agreement to adhere to certain terms and conditions, the fulfilment of which will result in charges being withdrawn (and no criminal conviction) upon expiry of the DPA. Some of the more common requirements of a DPA are an admission of guilt, payment of financial penalties and/or reparation, reform of corporate policies and practices, and full cooperation with the government's investigation. If the corporation does not comply with the terms of the DPA, the charges may be reinstated and the corporation may be prosecuted and ultimately convicted.

A DPA regime aims not only to sanction criminal conduct and deter wrongdoing, but also to incentivize corporations to self-disclose wrongdoing and to encourage remediation and compliance. Given that investigations of corporate crimes often require significant time and resources, DPAs provide an alternative to address such conduct in an efficient and timely manner. DPAs may also help mitigate unintended consequences for innocent parties, such as blameless employees, customers, suppliers, investors and other stakeholders. In addition, DPAs can avoid disqualification in jurisdictions that prohibit corporate entities and their affiliates from participating in public procurement processes if they have been convicted of, or in some cases even charged with, certain types of offences.

Guided in part by the differences in the use of DPAs in various jurisdictions, the federal government's consultation materials include both high-level questions relating to the merits of a DPA Regime in Canada and more detailed questions, such as the factors that should be considered in offering DPAs to companies, how to address non-compliance with DPAs and whether DPAs should be publicly available. Some of the more important issues on which the government is seeking comment are the following:

- **For which offences should DPAs be available?** In the United States, DPAs are generally available for all federal crimes, whereas in the United Kingdom, DPAs are limited to specific economic crimes. The discussion paper references certain fraud, bribery and money laundering offences, but a broader range of offences under the *Competition Act* and certain tax statutes, for example, can provide grounds for debarment under the Canadian Integrity Regime.
- **What role should courts play with respect to DPAs?** Although increased involvement by the courts in a DPA regime may enhance transparency and public confidence, it may also introduce uncertainty about whether a DPA will be approved. The U.S. DPA regime

provides a limited role for courts (e.g., DPAs only have to be registered with, but not approved by, courts), whereas the U.K. regime requires court approval of DPAs.

- **What terms should be included in a DPA?** As noted above, although certain terms are common to DPAs, others terms may need to be customized on a case-by-case basis. Further, the legal effect and consequences of DPAs will need to be clarified, including the use that can be made of a DPA in other proceedings.
- **Under what circumstances should victim compensation be included as a term of a DPA?** In some jurisdictions, DPAs may require that the corporation compensate victims of the conduct or donate money to a charity or third party. The discussion paper invites comment on whether or under what circumstances DPAs in Canada should require victim compensation. This type of mechanism already exists in Canada in the context of conditional discharges under the Criminal Code for certain minor offences.

Read the full text of the DPA Regime discussion paper.

Integrity Regime

The Canadian Integrity Regime governs the qualification of suppliers to enter into procurement contracts and real property transactions with Public Services and Procurement Canada and a number of other federal departments and agencies. The Integrity Regime has been in place for just over five years and has already undergone several amendments since its inception in July 2012 (see our discussions of the July 2015 and May 2016 revisions to the Integrity Regime).

In its discussion paper, the government seeks comment on a number of possible enhancements and modifications to the Integrity Regime:

- **Should the duration of ineligibility and/or suspension be modified?** Over the past few years, numerous stakeholders have criticized the non-discretionary 10-year ineligibility period for suppliers convicted of certain offences as punitive, disproportional and inconsistent with international best practices. The government therefore seeks input on whether the debarment periods should be reduced or made discretionary, depending on the circumstances of the offence.
- **Should additional offences be included in the Integrity Regime?** Another possible change relates to the expansion of the regime to capture additional types of offences such as provincial offences, civil offences in foreign jurisdictions, and labour rights or environmental violations. Some jurisdictions consider certain conduct to be of a civil nature and, accordingly, offenders are not criminally punished. For example, in some European countries, bid-rigging can be treated as a civil offence (even though a supplier could be criminally punished in Canada for such conduct). The government is also considering extending the application of the Integrity Regime to include offences relating to social issues such as environmental infractions and labour rights violations. The prospect of extending the Integrity Regime to include such a broader range of additional offences raises significant issues, particularly if the mandatory debarment period is not simultaneously modified.
- **At what point should the government consider suspending a corporation for alleged wrongdoing?** Perhaps most significant, however, is the government's consideration of debarring suppliers before, or in the absence of, either formal charges or a conviction. To support this suggestion, the government cites practices in other jurisdictions, but such an approach would seem to ignore the rules of natural justice and could be subject to constitutional challenges in Canada. For example, a supplier under criminal investigation has the constitutional right to refuse to provide assistance to investigators and prosecutors. Particularly where a corporation is highly dependent on government contracts, it may have to abandon such rights if – in order to attempt to avoid debarment – the corporation is forced to answer criminal allegations before the prosecution has made its case in a criminal court.

Read the full text of the Integrity Regime discussion paper.

Implications

It is apparent from the consultation documents that the potential adoption of a DPA Regime and possible modifications to the Integrity Regime are intertwined. More specifically, broader scope and limited flexibility in the Integrity Regime could lead to significantly greater self-disclosure of corporate wrongdoing with a view to entering into DPAs to avoid debarment. However, the consultation materials are unclear on whether entering into a DPA would necessarily save a corporation from debarment.

Interested stakeholders have an opportunity until November 17, 2017 to provide comments and seek to influence new or revised policies on DPAs and the Integrity Regime.

Key Contact: John Bodrug