CORPORATE
NPA AND DPA

All in the nuance

Overcoming misguided criticism regarding their level of transparency and punitive character, NPAs and DPAs have proven essential and efficient enforcement tools

Several of this century's larger corporate enforcement agreements, with penalties in the billions and hundreds of millions of dollars, have been resolved through non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs), inviting public scrutiny into how these agreements are negotiated and policed. On the one hand, the relatively balanced and nuanced resolutions they provide to complex allegations have brought tremendous benefits to enforcement agencies and companies alike by incentivising good corporate behaviour, self-disclosure as potential violations arise, extensive cooperation with government investigations, effective management of prosecution resources, and meaningful remediation. On the other, certain detractors have alleged that there is inadequate transparency into how NPAs and DPAs are negotiated and overseen, and that the tools are insufficiently punitive. These are important considerations, but an examination of the origins of these agreements and how they have come to be used by US enforcement agencies (as well as, increasingly, their counterparts abroad) show that the benefits substantially outweigh the negatives, and that the Department of Justice (DoJ) – by far the most prolific user of these agreements – has taken steps to address concerns raised by the public.

Key attributes

NPAs and DPAs are two kinds of voluntary, pre-trial agreements between a company and the government, most frequently DoJ. They are an alternative to criminal guilty pleas (and, in the case of NPAs, criminal charges) – or to lengthy, time-consuming and resource-intensive criminal trials – that are designed to avoid the severe consequences, both direct and collateral, that convictions can have on a company, its shareholders, its employees, and other stakeholders. Though NPAs and DPAs differ procedurally – a DPA, unlike an NPA, is formally filed with a court along with charging documents – both usually require an admission of wrongdoing, payment of fines and penalties, cooperation with the government during the pendency of the agreement, and substantial remedial efforts.

NPAs and DPAs, which have been used more and more widely in the corporate context in the last 30 years, are valuable tools in the enforcement agency arsenal that have been used for individual prosecutions for decades. A slow trickle of corporate NPAs and DPAs with DoJ began organically in the early 1990s, particularly in cases where, at the time of resolution, the companies entering into the agreements had already made substantial changes to their corporate compliance cultures, self-reported improper

1 MINUTE READ

NPAs and DPAs are essential resolution tools that have evolved to meet the challenges and nuances of modern corporate criminal enforcement.
Although some detractors have questioned the growing use of these agreements, the concerns they raise are short-sighted and fail to account for the rigours of prosecutorial charging decisions, the severe collateral harms that corporate prosecution can impose on innocent third parties, the steep hurdles that companies must clear to achieve an NPA or DPA, as well as the basic fact that many enforcement actions could not proceed but for the extreme corporate self-evaluation, cooperation, and remediation these agreements incentivise.

activities, and taken material steps toward remediation of identified misconduct. This trickle turned into a more regular stream of agreements after a June 1999 memorandum by then deputy attorney general Eric Holder, which set forth certain principles of corporate prosecution and stated expressly that corporate non-prosecution may be appropriate in cases where certain cooperation and public interest conditions are met. As the use of NPAs and DPAs became more formalised thereafter, the numbers executed by DoJ exploded. A semi-annual study conducted by the authors' law firm, Gibson, Dunn & Crutcher, for example, identified 21 publicly-available NPAs and DPAs from 2000-2004; from 2005-2009, that number increased more than six times, to 128. Compared to some measures of corporate enforcement, however, NPAs and DPAs continue to take a back seat to more traditional enforcement action. A database maintained by the University of Virginia School of Law, for example, logged 775 corporate guilty pleas, acquittals, and convictions from 2000-2004 (a ratio of approximately one NPA or DPA to 37 alternative outcomes), and 919 such outcomes from 2005-2009 (a ratio of approximately one NPA or DPA to seven alternative outcomes). While the use of NPAs and DPAs as a percentage of corporate enforcement actions has grown in recent years, the average number of publicly available agreements has remained relatively steady since the early days of their adoption, with annual figures falling within a range of approximately 22 to 40 agreements each year since 2006.

Key considerations

Some critics have railed against NPAs and DPAs as soft alternatives to filed criminal charges that do not sufficiently punish bad corporate actors, but this short-sighted view discounts the rigorous process that prosecutors engage in to arrive at charging decisions. Particularly in high-profile and high-impact cases, charging decisions are made in a structured and principled way, founded in considerations of the public interest. In the US, prosecutors have always had broad discretion to decide whether to bring charges in both individual and corporate cases, and they almost always do so on the basis of more complete information than is available to the general public regarding a company's actions (or inactions), the sufficiency of available evidence – particularly as it relates to criminal intent, and the potential impacts of indictment. This is especially accurate in cases resulting in an NPA or DPA, which typically signal that a company has undertaken a comprehensive criminal internal investigation, highlighting any identified wrongdoing, and engaged in an open and meaningful dialogue with prosecutors that would not have occurred if the company had taken a more adversarial posture.

The US Attorney's Manual (USAM), the guiding text for federal prosecutors, provides detailed direction to prosecutors regarding how to treat corporate targets and requires a balanced analysis before charging decisions are made. At the outset, the USAM states that, in appropriate cases, elements such as industry-wide deterrence, specific deterrence, and the curbing of great public harm may counsel in favour of corporate indictment. It also, however, notes the 'serious[] harm[]' to 'innocent third parties who played no role in the criminal conduct' that can flow from corporate prosecutions when they affect 'blameless investors, employees, and others'. Other outsized collateral impacts of indictment might include suspension or debarment from government contracting, devastating reputational damage disproportionate to the alleged misconduct, and collateral use of the indictment and prosecution in civil litigation. On the extreme end of this argument lie cases like Arthur Andersen, for which indictment and prosecution operated as a corporate death sentence in 2002. Years later, a Supreme Court decision reversed Arthur Andersen's conviction, but at that point the damage was already done, and the company was defunct.

Prosecutors are therefore charged with engaging in a nuanced inquiry before offering or agreeing to NPAs or DPAs, and are expected to employ them only in appropriate cases. And there are hurdles to reaching a decision to offer an NPA or DPA: the USAM sets forth 10 rigorous factors that prosecutors should consider when making charging decisions, in addition to the factors relevant to leniency for individuals. These include:

- the nature and seriousness of the offence;
- the pervasiveness of the wrongdoing;
- whether the corporation has a history of similar misconduct;
- cooperation by the company in the investigation of corporate agents;
- the existence and effectiveness of the corporation's compliance program;
- timely and voluntary disclosure of wrongdoing;
- remedial actions taken;
- collateral consequences including impacts to shareholders, pension holders, employees, and the public;
- the adequacy of remedies such as civil and regulatory enforcement; and
- the adequacy of prosecution of individuals responsible for corporate malfeasance.

Far from making charging decisions in a black box, subject to the vagaries and whims of individual DoJ personnel, prosecutors therefore engage in a complex analysis and, particularly in the big-impact cases, run their recommendations up the chain of command before landing on a particular voluntary resolution demand. Often, this analysis falls in favour of indictment and trial, or seeking a guilty plea. Occasionally, it results in an NPA or DPA. And periodically, especially in high-value, complex cases, NPAs and DPAs are deployed as part of a suite of resolutions applied to various corporate arms of a larger corporate entity. In the Telia Company case concluded last year, for example, in which Telia and its Uzbek subsidiary were accused of anti-bribery violations, the parent company received a DPA, while the Uzbek subsidiary, which had engaged directly in the alleged conduct, pled guilty. In other cases, different corporate entities have received a mix of DPAs, NPAs and/or plea agreements, or multiple enforcement entities have used a single, joint DPA to resolve concurrent investigations. These tools are used flexibly to address the very different circumstances presented by each case, and the government's approach recognises that there is no one-size-fits-all remedy for entities with differing levels of culpability or harms inflicted on the public interest. It is entirely possible, for example, that in cases like Telia, if the government were restricted to either bringing charges or declining to prosecute, it would have been limited to prosecuting only the Uzbek subsidiary, without securing further remedial action and cooperation from Telia Company.

Flexibility is key in the deployment of NPAs and DPAs, and they have been used creatively over time to target specific corporate missteps or compliance deficiencies. In the Aibel Group DPA in 2007, for example, DoJ conditioned the DPA upon dramatic revisions to Aibel's compliance and governance structure, including the appointment of an independent executive board member, the establishment of a compliance committee, and the engagement of outside compliance counsel. In other cases, the government has extracted such terms from companies as agreements to cease participating in certain commercial markets, developing state-of-the-art security plans for communications infrastructure, and implementing worldwide corporate compliance program changes. More common

terms include the imposition of independent corporate compliance monitors and/or regular reporting and disclosure requirements, both of which allow the government to have continued, detailed oversight over company compliance operations and remedial action.

DoJ also has deftly employed the carrot of NPAs in particular as a unique incentive for achieving otherwise infeasible corporate enforcement goals. In 2013, for example, DoJ's tax division announced the programme for non-prosecution agreements or non-target letters for Swiss banks, under which Swiss banks that were not already under DoJ investigation were encouraged to self-disclose the commission of US tax-related or monetary transaction offences. In exchange for this disclosure, the sharing of detailed information regarding US-related accounts, the payment of (often steep) penalties, and the appointment of a third-party watchdog to ensure their compliance with the tenets of the programme, participating Swiss banks became eligible for NPAs. Response to the programme exceeded even the tax division's expectations, with more than 100 banks self-reporting, resulting in 78 NPAs that netted more than $1 billion in recoveries. Given the challenges inherent in Swiss banking secrecy and cross-border investigation and litigation, and the ever-present limitations of prosecutor time and public funds to investigate these offences, it is not overstating the impact of NPAs to say that it would have been impossible for DoJ to have achieved similar results without the programme.

Indeed, DoJ is keenly aware of its own limitations and the particular challenges inherent in investigating corporations, which raise a need to incentivise corporate cooperation in some cases; as the USAM notes, 'a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence . . . and in doing so expeditiously'. In the authors' experience (and as veterans of both private and public practice will recognise), this cooperation frequently involves not only turning over relevant documents and proffering detailed factual information obtained through privileged communications, but also synthesising facts for the government and presenting them in a comprehensive way that assists prosecutors with evaluating (and building) their cases. The alternative – bare-knuckled litigation involving lengthy and expensive discovery with no fact synthesis, as well as no self-disclosure – would be costly, time-consuming, and wearing for all involved.

Transparency and oversight

Several challenges have been raised in recent years to the ability of the public to access information relating to prosecutorial charging decisions and continued monitoring of company performance under DPAs, in particular. The most visible recent challenge came in the *United States v HSBC* case, in which a private citizen requested access to a corporate monitor report that HSBC had been required to prepare by a 2012 DPA. The trial judge initially issued a ruling requiring release of the report, but the Second Circuit subsequently blocked release on multiple grounds, chief among them that the trial court did not have discretion to release the document as part of its supervisory oversight of DPAs. This result echoed the D.C. Circuit's 2016 holding in the *United States v Fokker Services* case, in which the court overturned a trial judge's rejection of a DPA, opining that the judiciary could not second-guess DOJ's historical power to exercise discretion in making charging decisions.

Nevertheless, as NPAs and DPAs have become more common, DoJ has drafted them to increase transparency into its charging decisions. These agreements, which initially were only a handful of pages in length, now routinely approach or exceed 30 pages, and involve detailed recitations of fact (which companies expressly acknowledge, and that can be used against them in subsequent proceedings if they fail to meet the requirements of the NPA or DPA), as well as lengthy sections addressing the multiple factors weighing in favor of leniency. The 2017 Keppel Offshore & Marine DPA, for example, which was more than 50 pages in length, dedicated three pages to considerations weighing for and against leniency, and an additional 14 pages to detailing the company's continuing cooperation and reporting, financial penalty, and corporate compliance programme requirements. The statement of facts ran an additional 15 pages. DoJ has also adopted the practice of publishing detailed press releases discussing these factors. These elements not only accomplish some of the public airing of bad facts that also would be accomplished by a splashy trial or conviction, but also make plain the strenuous efforts that companies have to undertake and sustain to secure and successfully conclude an NPA or DPA.

Importantly, DoJ has shown that is not adverse to scrapping NPAs or DPAs and proceeding to prosecution if it finds that companies have failed to meet their requirements, or to extending their terms unilaterally if companies have not adequately performed by the time the agreements have run. Thus, the sound discretion that our governmental system has instilled in DOJ to investigate and prosecute crimes, and then to oversee compliance with any negotiated resolutions, is rigorously exercised.

The bottom line

Perhaps one of the greatest testaments to the efficacy of these agreements is that multiple foreign jurisdictions have begun adopting similar practices. Both the UK and France have already issued DPAs in high-profile anticorruption cases, and multiple other jurisdictions – Australia, Singapore, and Canada, to name a few – are moving in the same direction. US enforcement agency use of NPAs and DPAs has evolved over time, largely to the benefit of the agencies, investigated corporations, and the public alike. As their use has become more common, documentation of underlying charging decisions and relevant terms has become more rigorous, as has publication of specific facts detailing alleged misconduct. These alternative tools for resolving investigations provide critical flexibility to prosecutors to address complex criminal allegations against companies with precision and efficiency, while safeguarding the public interest by calibrating enforcement to consider innocent shareholders and employees, as well as the communities and other stakeholders relying on the continued vitality of otherwise good corporate citizens. NPAs and DPAs continue to evolve to meet the requirements of shifting enforcement priorities and are important tools in the corporate enforcement landscape.

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