CLIENT UPDATE

DEFERRED PROSECUTION AGREEMENTS IN THE UK: DRAFT CODE OF PRACTICE PUBLISHED

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On the 26th June 2013, the UK's Solicitor General, Oliver Heald QC PM declared that the "Governments's aim is to implement [DPAs] in February 2014." The next day the Director of the Serious Fraud Office ("SFO") and Director of Public Prosecutions ("DPP"; together "designated prosecutors") published a draft Code of Practice on DPAs ("the Draft Code") for consultation. The closing date for responses is the 20th September 2013. Debevoise has recently published an article on the substance of DPAs.[1]

The underlying legislative provisions implementing the DPA regime – Schedule 17 of the Crime and Courts Act 2013 ('the Act') - makes the Code on DPAs ("the Code") a requirement in order for the DPA regime to be able to be brought into force. The Draft Code is therefore an important step in meeting the government's stated objective of providing prosecutors with this additional tool by early next year.

The Act provides that the Code must contain guidance on "the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case" and "the disclosure of information by a prosecutor to [the corporate] in the course of

[1] http://www.debevoise.com/files/Publication/c2384244-10bd-4356-9168-9812213ef43a/Presentation/PublicationAttachment/23c6b305-b0d3-4aa8-8e04-e4e9fee5b8b2/FCPA_Update_May2013.pdf

negotiations for a DPA and after a DPA has been agreed." The Act envisages the Code to contain guidance on a wider range of procedural aspects and the Draft Code does.

WHEN WILL A DPA BE DEEMED APPROPRIATE?

The Draft Code proposes that the prosecutor apply a two stage test to determine whether to invite a corporate to enter into negotiations with a view to concluding a DPA:

The evidential stage

The Draft Code proposes that a prosecutor has to be satisfied (and record) that there is, either, (a) sufficient evidence to provide a realistic prospect of conviction in all the circumstances (the so-called "Full Code Test" applicable to Crown prosecutors generally), or, (b) at least a:

"reasonable suspicion that the commercial organisation has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test."

If either of the two evidential thresholds is passed, the prosecutor must then consider the public interest.

The public interest stage

At this stage, the prosecutor must consider whether "*the public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with [the suspect] in accordance with the criteria set out …*" The Draft Code makes it very clear that the decision to invite a corporate to commence negotiations with a view to concluding a DPA is a discretionary decision. A corporate offender *"has no right to be invited to negotiate a DPA."* The proposed criteria set out are therefore to be seen as guides the exercise of a very wide discretion, not a list of obligatory considerations.

The Draft Code sets out a number of suggested non-exhaustive criteria. These include the statement that *"[t]he more serious the offence, the more likely it is that prosecution will be required in the public interest"*, indicators of seriousness being the monetary value of the offending, harm to victims and third parties, and the effect on financial markets and trade. The Draft Code specifically enjoins prosecutors to consider the seriousness of the relevant offending in countries other than the UK.

The Draft Code also sets out proposed additional public interest factors in favour as well as against prosecution. Factors in favour include the offending being *"part of the established business practices of the company"* and that it occurred *"at a time when the company had an ineffective corporate compliance programme."*

Proposed factors against prosecution (i.e. in favour of a DPA) include a genuinely pro-active approach and engagement with the authorities when the suspected offending is discovered, the existence of an effective corporate compliance programme, and significant changes in the company since the time of the offending.

Of particular significance, however, is the Draft Code's insistence on the corporate's cooperation in the prosecution of the individuals responsible: The corporate

"*must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution.*"

DISCLOSURE

The Draft Code starts from the premise that "*[i]n principle, [the corporate] should have sufficient information to play an informed part in the negotiations.*" However, given the consensual nature of the DPA process *"the purpose of disclosure is … to ensure that negotiations are fair"* and in particular *"the prosecutor should ensure that the suspect is not misled as to the strength of the prosecution case."*

The Draft Code proposes that prosecutors consider "r*easonable and specific requests for disclosure*" and, further, that the outcome of such requests will depend on what the corporate "*chooses to reveal to the prosecutor about its case in order to justify the request*."

THE CONTENT OF THE DPA

The Draft Code sets out the proposed approach for prosecutors to the terms of a DPA. These, it is suggested, uncontroversially, should be "*fair, reasonable and proportionate.*" The Draft Code indicates that corporates should expect three financial requirements: a fine, compensation for victims, and the payment of the prosecutor's costs in investigating the relevant offending. Three aspects of the Draft Code are worthy of particular attention:

The statement of facts

Although a corporate will not be required formally to admit guilt in relation to offences

charged in the eventual indictment, the statement of facts must "*give full particulars relating to each alleged offence*". Crucially, it is proposed that it be a requirement for the statement of facts to include "*details of any financial gain or loss, with reference to key documents that must be attached*." The particular significance of this is the evident link with the draft sentencing guidelines for corporate offences of bribery, fraud and money-laundering, also published on the 27th June 2013, which make this figure the basis for calculating the appropriate level of the fine to be imposed by a sentencing court.[2]

The financial penalty

In making the harm figure a required term of the DPA, the Draft Code will make it easier for the court that has to approve the negotiated DPA, and the public at large, to verify that the financial penalty satisfies the requirement in the Act that it be "*broadly comparable to a fine that the court would have imposed upon [the corporate offender] following a guilty plea.*" However, the Draft Code states that "*[t]he extent of the discretion available when considering a financial penalty is broad*."

Monitors

The Draft Code's lengthy proposed provisions on monitors indicate that the designated prosecutors are attracted by the prospect of using this instrument "*to assess and monitor [the corporate's] internal controls and advise of necessary compliance improvements that will reduce the risk of future recurrence of the conduct subject to the DPA.*" It is proposed that corporates have considerable say in the identity of any monitor and, of course, that it be responsible for the costs of the monitoring programme.

If one has been appointed, the Draft Code indicates that the monitor should be consulted, where necessary, prior to discontinuance of the suspended criminal proceedings when the DPA has run to term.

ANALYSIS

Although it lays down proposed guidance on procedure (approval applications, breach proceedings, variation and termination), the Draft Code does not set out any procedure for how designated prosecutors will deal with approaches by corporates that wish to engage in DPA negotiations. The implicit signal is that prosecutors will remain unwilling to give a company comfort as to the outcome of a self-reporting process. On the other hand, a corporate could approach a prosecutor with the results of an internal inquiry which satisfy

[2] http://www.debevoise.com/clientupdate20130701a/

or even exceed the relatively low threshold for passing the evidential stage of the proposed "DPA appropriateness-test", i.e. material that raises a "reasonable suspicion" of offending. There is nothing in the Draft Code which would prevent a prosecutor from finding that she/he does not need to undertake any further investigations in order to satisfy the evidential stage. However, even in those circumstances, the prosecutor would still need to make such inquiries as are necessary for her/him to establish where the balance of public interest lies.

The only comfort in this regard is the clear indication to corporates that pro-active and open engagement with the investigative process, in relation not only to itself but also its officers and directors, will be a strong public interest factor favouring a disposal by DPA rather than formal prosecution. In this context, it should be noted that it is a common feature of US DPA or plea negotiations for prosecutors to encourage corporate suspects to waive privilege in relation to communications with its legal advisers which could provide evidence in a prosecution against the officers responsible for the offending in question. The Draft Code's explicit warning to corporates that withholding material which could assist in the investigation and prosecution of such individuals would be an important factor in favour of prosecution may signal that a similar approach is contemplated by UK prosecutors.

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Please do not hesitate to contact us with any questions.

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