

CLIENT UPDATE

DEFERRED PROSECUTION AGREEMENTS ENTER INTO FORCE IN THE UK

LONDON

Lord Goldsmith QC
phgoldsmith@debevoise.com

Karolos Seeger
kseeger@debevoise.com

Matthew Howard Getz
mgetz@debevoise.com

Robin Lööf
rloof@debevoise.com

From today, Deferred Prosecution Agreements (“DPAs”) are available in the UK¹ in respect of offences whenever committed. The legal basis for DPAs is found in section 45 of and Schedule 17 to the Crime and Courts Act 2013 and the relevant judicial procedure can be found in a new Part 12 of the Criminal Procedure Rules.² The guidance for prosecutors in relation to DPAs is found in the DPA Code of Practice, published jointly by the Director of the Serious Fraud Office (“SFO”) and the Director of Public Prosecutions (“DPP”) on 14 February 2014 (“the Code”).

THE DPA - AN OVERVIEW

A DPA is an agreement between a prosecutor and a suspect the prosecutor is considering prosecuting for one or several of a range of specified offences falling within the broad category of “financial or economic crime”.³ In exchange for the ultimate abandonment of the prosecution by the prosecutor, the suspect agrees to comply with set conditions within a specified time-frame.

¹ Paragraph 2 of The Crime and Courts Act 2013 (Commencement No. 8) Order 2014, bringing into force section 45 and Schedule 17 of the Crime and Courts Act 2013.

² Inserted by The Criminal Procedure (Amendment No. 2) Rules 2013 (S.I. 2013/3183).

³ DPAs are available in respect of offences found in The Theft Act 1967, the Customs and Excise Management Act 1979, the Forgery and Counterfeiting Act 1981, the Companies Acts 1985 and 2006, the Value Added Tax Act 1994, the Financial Services and Markets Act 2000, the Proceeds of Crime Act 2002, the Fraud Act 2006, and the Bribery Act 2010.

PARTIES TO A DPA

DPAs can only be entered into between legal persons (*i.e.* not individuals) and either the DPP or the Director of the SFO. Further prosecutors can be designated by ministerial order.

THRESHOLD CONDITIONS FOR ENTERING INTO A DPA

In the Code, the Directors of the prosecuting agencies make it clear that *“an invitation to negotiate a DPA is a matter for the prosecutor’s discretion” and that “it will only be in specific circumstances deemed by their Directors to be appropriate that they will decide to offer a DPA instead of pursuing the full prosecution of the alleged conduct”*.

Formally, the Code establishes a two-stage test to be applied by prosecutors when determining whether a DPA would be a possible disposal of alleged criminal conduct: an evidential test and a public interest test.

The evidential test

The evidential test is satisfied if there is either sufficient evidence as to provide a realistic prospect of conviction, or a reasonable suspicion based on some admissible evidence that the corporate in question has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable time to provide a realistic prospect of conviction.

The public interest test

The public interest stage is satisfied if *“[t]he public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with [the corporate]”*. The Code sets out indicative lists of factors in favour and against prosecution which prosecutors *“may take into account when deciding whether to enter into a DPA”*.

In addition to the general seriousness of the offence, factors in favour of prosecution include the offending being *“part of the established business practices of the company”, that it occurred “at a time when the company had an ineffective corporate compliance programme”, and that the offending caused a “[s]ignificant level of harm ... directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments”*.

On the other hand, 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. The Code specifies that the co-operation expected *“will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents”*.

TERMS OF THE DPA

The DPA must contain a statement of facts relating to the alleged offence(s). The statement of facts does not have to contain formal admissions of guilt but the corporate will have to admit the contents and meaning of key documents referred to in the statement of facts.

The DPA must fix a term for its operation and will also include a list of the requirements the defendant has to fulfil and, often, deadlines for compliance. Although the terms of a DPA are a matter for negotiation, the Code states that a financial order, the payment of the costs of the prosecutor, and *“co-operation with an investigation related to the alleged offence(s)”*, *“will normally be terms of a DPA”*. Potential additional requirements of a DPA include compensation of victims, disgorgement of profits, and monitoring.

The Act provides that the financial penalty in a DPA *“must be broadly comparable to the fine that a court would have imposed on [the defendant] on conviction for the alleged offence following a guilty plea”*. Under the Sentencing Council guideline on the sentencing of corporates guilty of fraud, bribery and money laundering⁴, which can be expected to be used as a basis for negotiations in most DPAs, a financial penalty should be determined by taking into account the corporate’s level of culpability and the amount of harm caused. The prosecutor will have to justify the level of the financial penalty to the Crown Court when seeking approval for the DPA.

The Code makes clear that investigations *“related to the alleged offence(s)”* include, in particular, investigations with a view to the potential prosecution of individuals.

⁴ See Debevoise Client Update *“Definitive UK sentencing guideline for corporate offences published”*, 4 February 2014, available at: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=d0117d0d-fc10-4227-aa69-c87aaf6651a0>

PROCEDURE

The Act provides for tight judicial control over the process leading to the adoption of DPAs. The government made it clear in its consultation on the Act that this level of control by the courts is in accordance with UK constitutional tradition and necessary to promote public confidence in DPAs.

This will be achieved through two levels of Crown Court approval: first, at an early stage in negotiations, the prosecutor must obtain the court's approval of the acceptability of a DPA in the specific case. Second, the final DPA must be approved by the Court, which must state its reasons for doing so. Both application hearings will in principle be in camera but a decision approving a DPA must be handed down in open court. At both stages, the Crown Court has to satisfy itself that a DPA in the instant case is "*in the interests of justice*", and that the terms of the DPA are "*fair, reasonable and proportionate*".

A DPA only enters into force after the final judicial approval. At that point the prosecutor must, subject to certain exceptions, publish it as well as the rulings following both hearings approving the DPA.

DISCLOSURE

The Code starts from the premise that 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 Code enjoins prosecutors to consider "*reasonable and specific requests for disclosure*" and, further, that the outcome of such requests may depend on what the corporate "*chooses to reveal to the prosecutor about its case in order to justify the request.*"

OPERATION OF THE DPA

Under the cover of a DPA, criminal proceedings are formally started but immediately suspended and the defendant becomes subject to the various requirements. If the defendant fails to comply with any requirement imposed by the DPA, the prosecutor may bring non-compliance proceedings before the Crown Court.

If non-compliance is established, the Crown Court can terminate the DPA, which will allow for the resumption of the suspended criminal proceedings.

If the defendant has complied with the terms of the DPA to the prosecutor's satisfaction, at the end of the stipulated period the prosecutor will give notice to the Crown Court that she/he does not wish the proceedings to continue. This prevents the institution of fresh criminal proceedings against the defendant for the offence(s) covered by the DPA. The prosecutor must also, subject to certain exceptions, publicise the discontinuance as well as details of the defendant's compliance with the DPA.

The terms of a DPA can be varied if objectively unforeseen circumstances intervene which mean the defendant is unable to comply with its requirements. Such variations must be approved by the Crown Court.

APPEALS

There is no statutory right of appeal against any of the decisions set out above. That means that challenges are limited to those decisions susceptible to judicial review.

FAILED DPAS AND SUBSEQUENT PROSECUTIONS

If DPA negotiations fail, or the court fails to approve it, and the proposed DPA never enters into force, evidence of such negotiations is in principle only admissible in any subsequent criminal proceedings if the defendant seeks to contradict it. However, this protection only extends to documents "*created solely*" for the purposes of the DPA negotiations; nothing prevents a prosecutor from using pre-existing documents (typically e-mails) disclosed by a corporate during DPA negotiations, though of course most such documentation would be subject to compulsory disclosure in the event a prosecutor invoked section 2 of the Criminal Justice Act 1987.

If, on the other hand, the DPA did enter into force but was then terminated, the information contained in the statement of facts will be legally binding on the defendant.

CONCLUSION

Government and prosecutors hope that DPAs will make UK white-collar crime enforcement much more effective, particularly when dealing with large, often multinational, corporate offenders.

There are three factors which will be of particular relevance to those advising corporates contemplating approaching a prosecutor to seek to negotiate a DPA.

First, the comfort of early judicial approval of the acceptability of individual DPAs; second the principle of confidentiality until judicial approval of the final agreement; and third, the

predictability of outcome and, therefore, the ability better to prepare for and manage the financial fall-out from the misconduct.

At the same time, although a successful DPA will result in an absence of a criminal conviction, it can still have serious consequences for the company concerned. For example, though it will not lead to mandatory disbarment, a concluded DPA is likely to be a factor in public procurement processes.

Finally, corporates and their legal representatives need to be mindful that the prospects of a disposal by DPA depend very much on their conduct from the start and throughout the self-reporting process. In addition to the formal evidential test, the Code makes it clear that a corporate under investigation will only be invited to negotiate a DPA where the prosecutor is satisfied that *“the full extent of the alleged offending has been identified”*. Full and frank disclosure will therefore be key; not only must a corporate have reported everything of relevance, it must also make sure that the prosecutor believes that it has.

* * *

Please do not hesitate to contact us with any questions.

February 24, 2014