

## UK Issues Guidelines for Deferred Prosecution Agreements

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### Introduction

Deferred prosecution agreements (DPAs) are now available in the United Kingdom as a means of resolving criminal investigations of certain serious economic crimes other than by guilty plea, trial or prosecutorial declination.<sup>1</sup> U.K. DPAs, which are the product of a lengthy preparation and public consultation period, are modeled after their U.S. analogues, although they carry some structural differences. Like the U.S. authorities, the U.K. authorities have promulgated prosecutorial standards for the use of DPAs. They also have issued sentencing guidelines for cases of fraud, money laundering and bribery, which allow penalties in DPAs and convictions by plea to be benchmarked against expected sentences after trial and conviction.

As in the U.S., a U.K. DPA is a voluntary and public agreement between the prosecutor and a corporate entity under which prosecution for alleged economic crimes is deferred during the period of the agreement. Charges are filed with the agreement and suspended. If the conditions of the agreement are satisfied, the action is dismissed without entry of a conviction or further ramifications to the defendant; if the conditions of the agreement are breached, prosecution may resume. Corporate entities, partnerships and unincorporated associations are eligible for DPAs, individuals are not. The U.K. government expects DPAs to be used primarily in matters in which corporations cooperate with government investigations.

**DPA Code of Practice for Prosecutors.** The DPA Code of Practice (DPA Code), published on February 11, 2014, is binding written guidance to prosecutors on when and how DPAs can be used, and supplements existing protocols, which consist of the Code for Crown Prosecutors,<sup>2</sup> the Attorney General's Guidance on Corporate Prosecutions,<sup>3</sup> the Attorney General's Guidance on Plea Discussions<sup>4</sup> and the Bribery Act Guidance.<sup>5</sup> The DPA Code contains:

- Criteria for eligibility of a particular enforcement proceeding for a DPA;
- Principles relevant to a decision to proceed with a DPA;
- Procedural guidance for the conduct of all stages of the DPA discussion process;
- Provisions to protect legal professional privilege; and
- Guidance on how to deal with termination of discussions or of an agreement and the initiation of prosecution.

1 Section 45 and Schedule 17 of the Crime and Courts Act 2013, available at <http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted>. A declination is known in the U.K. as a prosecution decision to take "no further action."

2 [https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf).

3 [http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_prosecutions](http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions).

4 [https://www.sfo.gov.uk/media/111905/ag\\_s\\_guidelines\\_on\\_plea\\_discussions\\_in\\_cases\\_of\\_serious\\_or\\_complex\\_fraud.pdf](https://www.sfo.gov.uk/media/111905/ag_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.pdf).

5 <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

U.K. authorities may offer a DPA following their determination that: (i) there is sufficient evidence that the entity has committed a covered offence; and (ii) a DPA would be in the public interest. Whether to offer a DPA is discretionary. The Codes provide guidance on whether to proceed with a DPA by referring to potentially relevant factors to be evaluated on a case-by-case basis, including:

- Timeliness of a company's self-reporting of potential wrongdoing;
- Quality of self-reporting and subsequent cooperation;
- Seriousness of the offence;
- Value of gain/loss from the improper conduct;
- Culpability of the company;
- Individual and corporate remediation prior to reporting;
- Harm caused to the victim; and
- Collateral effect that a criminal prosecution would have on innocent third parties.

**DPA Approval Process.** The U.K. judiciary has a significant oversight role in the DPA process. By statute, "after the commencement of negotiations" regarding a DPA "but before the terms of the DPA are agreed," the prosecutor must apply to the Crown Court for an initial, nonpublic declaration that "(a) entering into a DPA with a company is likely to be in the interests of justice, and (b) the proposed terms of the DPA are fair, reasonable and proportionate."<sup>6</sup> When the prosecutor and defendant entity "have agreed the terms of the DPA," the prosecutor again applies to the Crown Court for a final (and public) judicial declaration that the DPA is in the public interest and that its terms are fair, reasonable and proportionate. As a practical matter, it can be expected that the prosecutor and defendant entity will be incentivized to present a near-final DPA "package" to the court at the initial nonpublic hearings. The package would be composed of the DPA itself, an agreed statement of facts, details of the financial penalty, reparation proposals, mitigation including individual and corporate remediation, and a proposal for monitoring, if applicable. A panel of senior judges has been appointed to sit on DPA cases. Because the final ruling on the DPA is unappealable, it is expected that the process between initial and final hearing will involve rounds of negotiations and court appearances.

All documents presented to the court are subject to judicial scrutiny and evaluation; the agreement of the parties is not binding on the court, and government commentary suggests the judicial role is to guide the parties towards a lawful settlement but not to impose a settlement upon the parties. Given this process, it can be expected that, in most cases, the court will use the initial nonpublic hearing to signal which aspects of the DPA package should be further refined prior to final judicial approval. If upon the initial hearing the court concludes that it is not willing to approve a DPA on any terms, the court will likely make its view clear in the initial hearing and no DPA would be presented for final judicial approval.

Consistent with U.S. practice on DPAs and in response to the lack of transparency in certain historic Serious Fraud Office (SFO) enforcement proceedings, the final DPA will be published and approved in open court (as would any proceedings brought for breach of the DPA).<sup>7</sup>

**Unsuccessful Negotiations.** In the event that DPA negotiations are unsuccessful, factual evidence provided to authorities can be used in prosecution of the defendant entity. Statements made in furtherance of settlement negotiations, draft documents and materials created solely in furtherance

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6 Schedule 17 of the Crime and Courts Act 2013, Section 7.

7 See <http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>.

of the DPA would not be admissible in subsequent proceedings. Importantly, an invitation to enter DPA discussions is not a guarantee that a DPA will be offered at the conclusion of the discussion.

Significantly, the DPA Code and related prosecutorial guidance is enforceable against the prosecutor. Unlike in the U.S., prosecutorial decisions pursuant to the DPA Code can be challenged through judicial review proceedings brought by an aggrieved party. Accordingly, a putative defendant may be able to challenge a prosecutorial decision not to offer a DPA or to withdraw from negotiations in furtherance of a DPA. In addition, because of broad rules granting standing to third parties, it is conceivable that third parties — such as putative victims or public interest groups — could challenge a prosecutorial decision to offer a DPA.<sup>8</sup>

**DPA Sentencing Principles.** The U.K. Bribery Act and other U.K. legislation on economic crimes do not impose maximum limits on corporate criminal fines or provide guidance on applicable financial penalties. To establish a framework for consistent sentencing and provide benchmarks for negotiation of DPAs, the U.K. Sentencing Council has published offence-specific guidance for courts in cases of fraud, money laundering and bribery.<sup>9</sup> The guidance is a substantial departure from prior U.K. approaches to corporate sentencing practice but similar to U.S. sentencing guidelines provisions regarding organizational defendants.

Like U.S. proceedings, the U.K. sentencing exercise is structured to reflect culpability and harm by considering relevant factors that either aggravate or mitigate the seriousness of the offence. Culpability is demonstrated by the offending organisation’s role and motivation. Harm is calculated based on the money sum amount gained or the amount of loss avoided. For bribery, the harm is calculated as the gross profit “obtained, retained or sought” by corruption. For fraud and tax offences, harm normally will be the “actual or intended gross gain to the offender.” For offences of money laundering, the appropriate figure normally will be the “amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering program if this is higher.

The fine is the primary financial penalty and is intended through a multiplier system to be both punitive and deterrent. The court also considers other financial penalties including compensation or reparation to victims and confiscation of criminal assets (forfeiture).

## Conclusion

U.K. DPAs provide an important new option to resolve complex corporate criminal investigations. They stand on the middle ground between a plea of guilty (or trial) and full prosecutorial declination. The Sentencing Council has developed guideline principles so that a company can better calibrate the financial cost of a U.K. criminal settlement, whether by plea or by DPA. The first DPAs are likely to be challenging to negotiate and subject to intense court and public scrutiny. Because U.K. authorities likely will want initial efforts to reach a DPA to succeed, it can be expected that DPAs will be offered in matters that comfortably fit the “public interest” standard and that initial DPAs may have terms favourable to the prosecutor to satisfy the “fair, reasonable and proportionate” standard. Careful strategy and analysis will be important to establish the public interest of the DPA sufficient to achieve prosecutorial and judicial approval while still ensuring it provides sufficient advantages to a company to justify pursuing it.

<sup>8</sup> Judicial review is available to an aggrieved party where the prosecutor has acted in excess of their powers or unlawfully failed to act in accordance with guiding policy or governing protocol, and/or come to a “perverse” decision.

<sup>9</sup> Sentencing Council: Fraud, bribery and money laundering: corporate offenders Definitive Guideline effective from 1 October 2014, available at: [http://sentencingcouncil.judiciary.gov.uk/docs/Fraud\\_Definitive\\_Guideline\\_%28web%29.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Definitive_Guideline_%28web%29.pdf).