

Deferred Prosecution Agreements in the UK and their application to Jersey businesses

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What are Deferred Prosecution Agreements?

Deferred prosecution agreements (**DPAs**) are agreements reached under judicial supervision between a prosecutor and a potential corporate defendant relating to an economic crime. The DPA allows a prosecution to be suspended for a defined period provided that the corporate defendant meets certain conditions. These conditions may include payment of a financial penalty, payment of compensation and commitments to assist with the future prosecution of individuals. DPAs are likely to become an important addition to the UK prosecutor's toolkit in relation to corruption offences and other economic crimes.

DPAs have been available to US prosecutors for a number of years and have become increasingly common. Last month, for example, a US bank entered into a DPA with the DOJ under which it committed to pay \$1.7bn in penalties in recognition of Madoff-related AML failures.

DPAs in the UK

DPAs are available in the UK from 24 February 2014 for cases of fraud, bribery and other economic crime. Their use is subject to the Code of Practice issued jointly by the CPS and SFO on 14 February 2014.

Crucially, the evidential test for prosecutors before commencing the DPA process can be substantially lower than the "Full Code Test" which they need to apply before launching a prosecution.

The evidential test only requires that there is *"a reasonable suspicion based on some admissible evidence that the organisation has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further evidence...capable of establishing a realistic prospect of conviction in accordance with the Full Code Test."*

This is undoubtedly a lowering of the bar to sanctioning potentially offending businesses, and one which the UK Parliament implicitly accepts, as one of the reasons given in Parliament for the introduction of DPAs was the difficulty in securing convictions for economic crime. DPAs are intended to be quicker and cheaper.

Concerns have also been raised at whether DPAs will offer prosecutors the ability to circumvent the "*identification principle*", whereby the prosecution has to prove criminal intent on the part of those comprising "*the controlling mind and will*" of the organisation.

The principal safeguard built in to prevent abuse in the UK DPA regime is judicial oversight. Once the prosecutor has decided to exercise his power to enter into a DPA, a preliminary hearing is held in private before a judge who will consider whether this would be in the interests of justice. The judge will also consider whether the proposed conditions attaching to the DPA are fair, reasonable and proportionate. Once the prosecutor and company have agreed to a DPA, court approval is required for the DPA to take effect. The court rulings in relation to approval of the DPA will then be published (subject to any necessary protections).

Self reporting is key to the DPA concept, and the degree of proactive co-operation which a company provides to the prosecutor is one of the factors which prosecutors must take into account when deciding between prosecuting and agreeing a DPA. If a corporate does self report in the hope of avoiding prosecution, full disclosure is crucial, and failure to provide full disclosure can lead to termination of the DPA and any suspension of the indictment by the court, although any fines or penalties already paid under the DPA will not be recoverable.

Why are DPAs relevant to Jersey business?

DPAs may be relevant to any Jersey company which is liable to prosecution under the UK's Bribery Act 2010 (as to which see previous briefings). The Bribery Act's strict liability offence for failing to prevent bribery is tipped to become a core focus of the DPA regime. Investigating and prosecuting overseas corporates for corruption offences is priority for the SFO, particularly where the use of bribery by a foreign corporate (such as a Jersey company) has deprived an ethical UK corporate of a level playing field.

Given that the SFO intend to pursue overseas body corporates, Jersey directors should be aware that DPAs may be put forward by the SFO in cases where a Jersey company is faced with proceedings for failure to prevent bribery, even where there may not be enough evidence to launch a formal prosecution.

If directors come across a potential corruption offence within their business which may fall under the ambit of the UK Bribery Act, they will need to consider carefully the possibility of self reporting with a view to a possible DPA.

More generally, any Jersey companies which may fall under the ambit of the Bribery Act strict liability offence should regularly review and document the extent and effectiveness of their corporate compliance programme to mitigate against the risk of a breach occurring. Although the chances of a formal corporate prosecution may not increase with the introduction of DPAs, the chances of very expensive sanctions certainly have increased, as have the chances of prosecutions being brought against individuals, including company directors, on the back of information gathered pursuant to the DPA.

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