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white collar lawflash

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# UK Deferred Prosecution Agreements Code of Practice Published

*The Serious Fraud Office has issued a code of practice for deferred prosecution agreements, which are now available as an alternative to conviction for certain white-collar offences in the UK.*

On 24 February, deferred prosecution agreements (DPAs) were introduced in the UK. They are available for a range of white-collar offences, including the main offences under the UK Bribery Act 2010. Prior to the introduction of DPAs, the Serious Fraud Office (SFO) and the Crown Prosecution Service (CPS) published a code of practice for the use of DPAs (the Code).[1]

DPAs provide prosecutors with a discretionary power, subject to court approval, to defer prosecution if an offending organisation agrees to certain conditions. Typical conditions include the payment of financial penalties, costs, and compensation to victims; disgorgement of profits; or cooperating with future prosecutions and investigations. If the offending organisation does not adhere to the conditions, the prosecution may continue.

## Why use a DPA?

DPAs allow organisations to avoid conviction. Defending criminal proceedings can be extremely costly and may cause significant reputational damage. Though still public, DPAs may not carry the same stigma as a criminal conviction.

In addition, in the EU, organisations convicted of a criminal offence cannot bid in tenders for public sector contracts. Under UK regulations, a company convicted of an offence involving corruption faces instantaneous and permanent debarment from public contracts. For some organisations, this alone may make DPAs an attractive option.

However, unlike leniency programmes elsewhere, DPAs do not provide immunity. Instead, DPAs impose the equivalent of criminal sanctions on offending organisations, and the Code states that financial penalties in a DPA "must provide for a discount equivalent to that which would be afforded to an early guilty plea". There does, however, appear to be some leeway in the Code for prosecutors to recognise cooperation and assistance with an investigation. The prospect of a reduced financial penalty may therefore also incentivise some organisations to negotiate a DPA.

## When will prosecutors agree to use a DPA?

The Code provides guidance on the circumstances in which prosecutors are more likely to enter DPAs.

The Code is clear that DPAs do not replace prosecution, stating that "the SFO and CPS are first and foremost prosecutors and [DPAs] will only be in specific circumstances deemed to . . . be appropriate". Instead, a prosecutor has discretion to invite a company to negotiate a DPA, and, even then, "an invitation to enter a DPA is

1. View the Code at http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf.

 

not a guarantee that a DPA will be offered at the conclusion of discussions". Even where the prosecutor supports a DPA, a two-stage court approval mechanism means that a court has two opportunities to block a DPA: first at a private hearing and then at a later hearing in public.

Organisations considering a DPA must weigh the likelihood of obtaining a DPA against the risks associated with satisfying a prosecutor and the court that a DPA is appropriate. Prosecutors will only enter into a DPA where public interest does not tend towards prosecution. Although a DPA is unlikely to be available for the most serious conduct, in many cases, deciding whether a DPA is in the public interest will be less clear cut. This means that an organisation seeking a DPA must promptly decide on a strategy when it discovers potential wrongdoing.

Failing to notify the SFO of wrongdoing within a reasonable time, or failing to verify an initial report, is unlikely to lead prosecutors to conclude that a DPA is in the public interest. By contrast, "genuinely proactive" cooperation with prosecutors will, at least, tend in favour of entering DPA negotiations. Examples of cooperation will include reporting further wrongdoing otherwise unknown to prosecutors, identifying relevant witnesses and disclosing their accounts, disclosing other relevant documentation and information, and, where appropriate, compensating victims. Factors preceding the wrongdoing, such as the existence of a proactive compliance programme and whether the organisation has a history of similar conduct, will also be relevant.

## Are DPAs a high-risk strategy?

Even where an organisation places itself in the best possible position to obtain a DPA, there is no guarantee that the prosecutor or the court will agree to one.

If DPA negotiations do not come to fruition, there is a significant risk that information provided to prosecutors will be used to assist in any subsequent prosecution. Although material prepared solely in connection with a DPA, or material that shows that DPA negotiations took place, cannot typically be used in a prosecution, failed DPA negotiations are likely to leave prosecutors with a rich pool of evidence from which to draw. Contemporaneous documents showing the extent and details of wrongdoing would, for example, be admissible as evidence in subsequent criminal proceedings. Accordingly, organisations that cooperate fully, yet fail to obtain a DPA, may find they have simply bolstered the prosecution's case against them.

Even where a DPA is agreed, risks remain. First, the terms of DPAs contemplate sanctions that are potentially more onerous than those that could be imposed following conviction. Organisations may, for example, be required to comply with substantial "sectorwide" investigations or to agree to undergo monitoring to assess an organisation's ongoing regulatory compliance. Such measures, which would not follow a conventional court process, are potentially expensive and time consuming and may be viewed as a continuing drain on organisational resources.

Second, where prosecutors believe an organisation has not complied with the terms of a DPA, they may apply to the court to continue with the prosecution. There is considerable scope for debate as to what might amount to compliance with some nonfinancial sanctions. It may, for example, be difficult to demonstrate conclusively that an organisation has complied fully with a DPA obligation to cooperate with a sectorwide investigation.

Where a DPA is lifted and prosecution continues, the statement of facts in the DPA will amount to a formal admission in criminal proceedings for the alleged offence. Consequently, where a DPA is breached, it will be almost impossible for an organisation to avoid conviction because it has admitted the offence in writing as part of the DPA agreement.

Third, even though an organisation has agreed to a DPA with UK prosecutors, prosecutors in other jurisdictions may not be willing or able to enter into an equivalent agreement. With this in mind, organisations may wish to be cautious about disclosing information and documents to UK prosecutors, particularly where information-sharing

 

mechanisms are in place with prosecution agencies in other jurisdictions.[2] Whilst a DPA may restrict reputational harm in the UK, information provided to obtain the DPA could conceivably bring about a prosecution elsewhere.

## Conclusion

The UK's Ministry of Justice hopes that DPAs will "bring more cases to justice, and secure outcomes, including restitution for victims, more quickly and efficiently".[3] Although the SFO has welcomed the addition of DPAs to "the prosecutor's tool kit",[4] the success of DPAs will depend on their use in practice. DPAs will typically be available only where an offending organisation discloses information and fully cooperates with prosecutors. Businesses are unlikely to do so unless they can be confident that prosecutors and the courts will engage with DPAs in a predictable way. Without some degree of certainty, DPA negotiations may often be shunned by corporate defendants as a volatile and high-risk strategy.

In some cases, however, a DPA may still be the best option. In light of the new Code, many organisations will wish to reconsider their antifraud and anticorruption policies in order to maximise the chances of obtaining a DPA, should the need arise. Should any wrongdoing become apparent, the decision to pursue a DPA should not be taken lightly or without fully considering the risks involved.

## Contacts

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2. The SFO, for example, has indicated that it will "exchange and identify relevant information about emerging international fraud and corruption threats with the business sector and [its] international partners". Serious Fraud Office, International Strategy, *available at* http://www.sfo.gov.uk/media/57517/international%20strategy.pdf.

3. UK Ministry of Justice Response to Consultation on DPA (23 Oct. 2013) (quoted in Deferred Prosecution Agreements Code of Practice – The Directors' Response to the public consultation, *available at* http://www.sfo.gov.uk/media/264627/dpa%20code%20of%20practice%20response.pdf).

4. Comments from David Green QC CB, Director of the SFO (14 Feb.) 2014, *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx.

 

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