

# KIRKLAND ALERT

May 2013

## Deferred Prosecution Agreements Pass the UK Legislative Process

### *Summary*

The Crime & Courts Act 2013 (“the Act”) introduces into UK law the concept of deferred prosecution agreements (“DPAs”) for commercial organisations. DPAs are a law enforcement tool more commonly associated with US regulators such as the Department of Justice or the Securities & Exchange Commission. A DPA is a court-approved agreement between a designated prosecutor and relevant commercial organisation to suspend criminal proceedings for a defined period of time. The commercial organisation would be required to discharge various obligations during the period of suspension in order to secure a complete discontinuance of the relevant criminal allegation. A DPA is therefore an enforcement outcome falling short of a criminal conviction and thus avoids some of the problematic consequences of a conviction, such as issues of debarment pursuant to European Union procurement directives.

The Act received royal assent on 25 April 2013 and thus has successfully passed through the UK legislative process. The provisions relating to DPAs are likely to come into force in early 2014 following the publication of guidance by prosecutors on the general principles to be applied in reaching a decision to offer a DPA. During recent speeches the Director of the Serious Fraud Office (“SFO”) has indicated in broad terms the factors that he considers would make a DPA appropriate, principally the self reporting of historic conduct following a thorough internal investigation. It is anticipated that prior to the commencement date for DPAs the UK Sentencing Council will publish guidelines detailing appropriate fine levels in cases of corporate crime.

The introduction of DPAs will benefit corporates looking to secure finality particularly in cases that span both the US and UK. With the expected publication of guidance from prosecutors and the Sentencing Council, DPAs should provide a greater degree of certainty as to likely outcomes for organisations facing allegations of criminal conduct in the UK.

### *Designated Prosecutors, Relevant Commercial Organisations & Relevant UK Offences*

At the outset it is important to recognise that DPAs are only available to companies, partnerships and unincorporated associations and not to individuals. It is also important to note that the DPA regime will have retrospective effect and hence a DPA will, in due course, be available for historic allegations.

At present the Director of the Serious Fraud Office and the Director of Public Prosecutions are the only prosecutors designated as being able to enter into DPAs. The Act does however envisage other prosecutors being designated over time as it allows for additions to be made by order of the Secretary of State. The list of relevant of-

**A DPA is a court-approved agreement between a designated prosecutor and relevant commercial organisation to suspend criminal proceedings for a defined period of time.**

fences suggests that the Financial Conduct Authority may in future be so designated. The UK offences are drawn from the major economic crime statutes and key offences include six offences under the Financial Services and Markets Act 2000<sup>1</sup>, the five main money laundering offences under the Proceeds of Crime Act 2002<sup>2</sup>, three offences under the Companies Act 2006<sup>3</sup> and four offences under the Bribery Act 2010<sup>4</sup>.

**It is anticipated that the UK Sentencing Council will be producing guidelines on financial penalties for companies convicted of criminal offences and this should provide additional clarity as to appropriate fine levels in the UK.**

### *Content of a DPA*

A DPA will contain a statement of facts by the prosecutor relating to the alleged offence in question and will specify the expiry date after which the suspended criminal proceedings are withdrawn, as well as the requirements imposed upon the corporate, such as:

- a) To pay to the prosecutor a financial penalty. The level of this penalty will be broadly comparable to the fine that a court would have imposed (including the reduction of 1/3 that would normally be given as if there had been a guilty plea). It is anticipated that the UK Sentencing Council will be producing guidelines on financial penalties for companies convicted of criminal offences and this should provide additional clarity as to appropriate fine levels in the UK. At present, the leading sentencing remarks are from a UK Court of Appeal judge who indicated in a case of overseas corruption that the level of fines in the UK for such corporate offending should be comparable to those in the US;
- b) To disgorge profits, compensate victims and/or to donate money to a charity or other third party. The Proceeds of Crime Act 2002 provides the UK framework for identifying and confiscating property derived from unlawful conduct. The application of this Act to corporate crime can lead to surprisingly severe financial consequences. Accordingly, it will be important to manage this aspect of negotiations carefully in order to avoid harsh theories on criminal confiscation being unfairly applied to corporate conduct;
- c) To implement a compliance programme, make changes to an existing compliance programme or to the training of employees; this could include the appointment of an independent monitor as currently happens when the SFO reach a civil recovery or criminal resolution in corruption cases;
- d) To co-operate in any investigation of individuals related to the alleged offence; the consultation that preceded the introduction of DPAs recognised that it would not be appropriate to seek the waiver of legal professional privilege over qualifying material generated during the course of an internal investigation; and
- e) To pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

### *Court Approval*

The mechanism by which DPAs will be used is relatively simple. The starting point will be with the prosecutor who will decide whether the alleged conduct is such that

it engages one of the specified offences. If it does, and the prosecutor is of the view that a DPA is the most appropriate outcome, then they will commence negotiations with the respective corporate defendant. At this stage the UK process differs in material respects to the process in the US. In particular, there are two stages of judicial involvement, both before the terms of the DPA are finalised and after.

After the commencement of such negotiations but before the actual terms of the DPA have been agreed, the prosecutor must apply to the Crown Court for a declaration. The declaration will confirm that the DPA is both in the interests of justice and its proposed terms are fair, reasonable and proportionate to the level of offending. This initial hearing will take place in private.

If a declaration is granted the prosecutor is then able to agree the proposed terms with the corporate defendant. At this stage the prosecutor must again apply to the Crown Court seeking another declaration. This is largely in the same terms as the first declaration save that it seeks a declaration that the DPA is in the interests of justice and that the terms, rather than the mere proposed terms, are fair, reasonable and proportionate. This second hearing may be held in private but any declaration ultimately made has to be made in open court with the prosecutor having, amongst other things, to publish the DPA, the Crown Court's declaration and the judge's reasons for the declaration.

Once approved, the effect of a DPA is to automatically suspend proceedings brought against the corporate defendant by the prosecutor. During the period of suspension, all prosecutors are prevented from commencing proceedings against the corporate for the relevant offence/s. If the corporate fulfils the conditions of the DPA then at the expiry of the relevant time period the proceedings for the offence in question are discontinued. There is then a bar to any prosecution being reinstated unless it can be shown that inaccurate, misleading or incomplete information was provided to the prosecutor and that the corporate knew or ought to have known that the information was inaccurate, misleading or incomplete.

If, however, the court finds at a later date that the corporate has failed to comply with the terms of the DPA at any time, it has power to terminate the DPA. Importantly, a DPA may be varied should it later transpire that a variation is needed in order to avoid non-compliance due to circumstances that were not, and could not have been, foreseen by the prosecutor or the defendant at the time the DPA was agreed. Again, any such variations must be made public and published.

### *Prosecution Guidance*

The Act requires the designated prosecutors to produce guidance on the general principles that they will apply in determining whether to offer and/or enter into a DPA. The consultation on DPAs suggested that factors such as the nature and seriousness of the offence, the extent of action being taken in other jurisdictions, the likely impact on the commercial organisation and its financial health and the extent of cooperation and remediation would be taken into account. In recent speeches the Director of the SFO has sought to highlight the fact that self reporting is considered the right way to deal with allegations of corporate crime and that a DPA would allow a company to draw a line under the past and move on.

**If the relevant commercial organisation fulfils the conditions of the DPA then at the expiry of the relevant time period the proceedings for the offence in question are discontinued.**

## Commentary

The introduction of DPAs will allow for a clear legal framework in which to accommodate cases of self reporting and global resolutions for multinational organisations committed to using such outcomes in other jurisdictions. DPAs will allow for resolutions to criminal investigations that avoid the harsh consequences of European Union debarment directives. Finally, the intended publication of guidance from prosecutors and the UK Sentencing Council will provide further clarity about the circumstances in which DPAs will be available and the range of financial penalties that might accompany such an outcome.

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- <sup>1</sup> s.23 (contravention of the prohibition on carrying on of a regulated activity unless authorised or exempt), s.25 (contravention of restrictions on financial promotion), s.85 (prohibition of dealing etc in transferable securities without approved prospectus), s. 346 (provision of false or misleading statements to auditor or actuary), s.2 397 (misleading statements and practices) and s.398 (misleading the FSA)
- <sup>2</sup> s. 327 (concealing etc criminal property), s.328 (arrangements facilitating acquisition of criminal property), s.329 (acquisition, use and possession of criminal property) and s.330 (failing to disclose knowledge or suspicion of money laundering) and s.333A (tipping off)
- <sup>3</sup> s.658 (general rule against limited company acquiring its own shares), s.680 (prohibited financial assistance) and s. 993 (fraudulent trading)
- <sup>4</sup> s.1 (bribing another person), s.2 (being bribed), s.3 (bribing foreign public officials) and s.7 (failure of commercial organisations to prevent bribery)

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If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Chris Colbridge  
Kirkland & Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
[www.kirkland.com/ccolbridge](http://www.kirkland.com/ccolbridge)  
+44 20 7469 2010

Satnam Tumani  
Kirkland & Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
[www.kirkland.com/stumani](http://www.kirkland.com/stumani)  
+44 20 7469 2390

William J. Stuckwisch  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
[www.kirkland.com/wstuckwisch](http://www.kirkland.com/wstuckwisch)  
+1 (202) 879-5023

Harkiran Hothi  
Kirkland & Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
[www.kirkland.com/hhothi](http://www.kirkland.com/hhothi)  
+44 20 7469 2315

Sarah Klein  
Kirkland & Ellis International LLP  
30 St Mary Axe  
London EC3A 8AF  
[www.kirkland.com/sklein](http://www.kirkland.com/sklein)  
+44 20 7469 2106

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