UK Deferred Prosecution Agreements

On 14 February 2014, the Director of the Serious Fraud Office and the Director of Public Prosecutions (the Directors) published a Deferred Prosecution Agreements Code of Practice (Code). This followed the production of guidelines for the sentencing of corporate offences by the UK Sentencing Council in January 2014. These two developments were the remaining requirements to be put in place before the new deferred prosecution agreement (DPA) regime (see prior *Kirkland Alert*) could come into force. Accordingly, as of 24 February 2014, designated prosecutors now have the ability to enter into agreements with commercial organisations for the suspension of criminal proceedings against them in return for adherence by a corporate to a strict set of terms enshrined in a DPA. A DPA is capable of having a retrospective focus and thus can relate to conduct that took place prior to 24 February 2014. It should be noted that any such agreements will also be subject to scrutiny by specialist judges who will consider whether the proposed DPA is in the interests of justice and is otherwise fair, reasonable and proportionate.

DPAs will only be available at the sole discretion of prosecutors.

The Prosecutors' Code of Practice

The Code was introduced as a specific requirement of the Act and prosecutors are required to have regard to it in three distinct phases, namely when: (i) negotiating a DPA; (ii) applying to the court for approval of a DPA; and (iii) overseeing a DPA following its approval by the court and in particular in relation to its variation, breach, termination and completion.[1]

The Code is broken down into various sections, each dealing with a distinct part of the DPA process. While each section merits a thorough review, for present purposes we have focussed on those sections most likely to be of issue for corporates engaged in the DPA process.

1. Availability of DPAs

The first issue that becomes clear upon reading the Code is that the Directors envisage that criminal prosecution will continue to be the most appropriate way to deal with the majority of criminal corporate offending. DPAs will only be available at the sole discretion of the relevant prosecutors.[2] A corporate defendant therefore has no right to request the use of a DPA over a prosecution.

When considering whether a DPA is appropriate, prosecutors will be required to satisfy an evidential test and a public interest test. The evidential test requires the prosecutor to be sure that either:

(a) there is sufficient evidence to provide a realistic prospect of conviction; or

(b) there is a reasonable suspicion based upon admissible evidence that the corporate defendant has committed an offence.

The former test is the traditional evidential standard for instituting criminal proceedings in the UK. The latter has been introduced specifically to allow for DPAs in the context of a corporate self-report and internal investigation.

The public interest test requires the prosecutor to show that the public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA.[3]

2. Public Interest Factors to be considered when deciding to enter a DPA

In determining whether the public interest test has been satisfied, prosecutors are required to have regard to the Code for Crown Prosecutors (a document detailing public interest factors applicable to all types of crime). In addition, prosecutors are to consider two sets of additional and non-exhaustive lists of factors set out in the Code. The first list pertains to factors in favour of prosecution, while the second deals with factors against prosecution and therefore in favour of a DPA.

Factors in favour of prosecution include whether: (i) the corporate has a history of similar conduct; (ii) the conduct alleged is part of the corporate's established business practices; (iii) the corporate had no or an ineffective corporate compliance programme in place; and (iv) the corporate has reported the wrongdoing but has failed to verify the conduct and has reported it knowing or believing it to be inaccurate, misleading or incomplete.[4] Factors going against a prosecution include whether: (i) the corporate has been proactive in bringing the offending to the attention of the prosecutors, has done so in a timely fashion and has taken remedial action (such as compensating victims); (ii) the corporate has a lack of history of similar conduct; (iii) the corporate had in place a suitable compliance programme; and (iv) a conviction is likely to have disproportionate consequences for the corporate, under domestic law or the law of another jurisdiction, including the disbarment regime under EU law.[5]

Factors in favour of a DPA include whether a corporate has been proactive in bringing the offending to the attention of the prosecutors.

In discussing (i) above, the Code states that "considerable weight" may be given to this public interest factor. In doing so, the prosecutor needs to establish whether sufficient information about the operation and conduct of the corporate has been supplied so as to properly understand whether or not it is has been fully co-operative. The Code states that co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them during the internal investigation. Where appropriate, it will also require making witnesses available for interview and providing an internal investigation report and documents. In giving weight to a self-report, the prosecutor will look to determine whether a corporate has withheld any information which would jeopardise the effective investigation and prosecution of individuals. The prosecutor will also consider the timing of a

self-report and, in particular, the extent to which the corporate has given the prosecutor an opportunity to contribute to the scope, work plans and timetable of the internal investigation.

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3. Additional issues resulting from a DPA

Should a corporate defendant get to the stage where it is invited to participate in negotiations for a DPA, and the DPA is in fact approved, there are three key issues it should be mindful of: (i) the likely terms of the DPA; (ii) the way in which documents it has disclosed will be treated; and (iii) the consequences of breach of the DPA.

(i) Terms of the DPA

The Code sets out three terms which will "*normally*" be terms of a DPA: (i) a financial order; (ii) the payment of the reasonable costs of the prosecutor; and (iii) cooperation with an investigation related to the alleged offence(s).[6] The suggested financial terms are stated to include potentially: compensating victims; payment of a financial penalty; payment of the prosecutor's costs; donations to charities supporting victims of the offending; and disgorgement of profits. The Code also makes clear that any applicable sentencing frameworks are to be taken into account.[7] Accordingly, the guidelines recently published by the Sentencing Council in relation to "Fraud, bribery and money laundering: corporate offenders" (the Guidelines) are to be taken into account.

The Guidelines provide for a number of "steps" to be used in determining the appropriate sentence, steps three and four of which are most pertinent. Pursuant to step three, the court is required to analyse the culpability and harm of the conduct in question. Culpability is broken down into three categories, namely (A) to (C), which equate to high, medium and lesser culpability, while harm is determined by reference to the amount obtained as a result of the conduct.

High culpability is informed by reference to a number of non-exhaustive characteristics. These include: (i) where the corporate takes a leading role in organised, planned unlawful activity; (ii) the wilful obstruction of detection; (iii) conduct involving the coercion of others and; (iv) the corruption of local or national government officials or ministers. Factors deemed to be of lesser culpability include: (i) where, pursuant to section 7 of the Bribery Act 2010, some effort has been made by the corporate to put bribery prevention measures in place but where such are insufficient to amount to a defence to the relevant conduct; and (ii) the corporate plays a minor, peripheral role in unlawful conduct organised by others.

As regards harm, the relevant amount involved tends to differ according to the offence involved. By way of example, in relation to bribery, the appropriate figure is stated to be: (i) the gross profit from the contract obtained, retained or sought as a result of the offending; or (ii) as an alternative measure for offences under section 7 of the Bribery Act 2010, the likely cost avoided by failing to put in place appropriate measures to prevent bribery.

The Code rightly recognises that the use of monitors should be approached with care.

In accordance with step four, the harm figure as determined at step three is then multiplied by the relevant percentage figure representing the assigned culpability. The Guidelines provide for various multipliers, as follows:

Culpability Level				
Harm Figure Multiplier		**A**	**B**	**C**
	Starting Point	300%	200%	100%
	Range	250%-400%	100%-300%	20%-150%

The sums at issue can therefore be high, especially as the above table is only the starting point. Various additional factors can increase or reduce the level of financial penalty. In the context of DPAs, a reduction of one-third to the financial penalty will be available, recognising the comparable discount that is given for an early guilty plea in criminal cases.

It is clear from the Guidelines that the overall effect of the financial penalty should be to achieve: (i) the removal of all gain; (ii) appropriate additional punishment; and (iii) deterrence. Accordingly, the terms of any DPA, as regards the financial penalty element at least can be extremely burdensome to a corporate defendant.

The Code also contains provisions relating to the appointment of independent monitors as a term of any DPA. The Code recognises that one of the public interest factors in deciding on a DPA is the existence of a genuinely proactive and effective corporate compliance programme. Accordingly, the Code rightly recognises that the use of monitors should be approached with care and must always be fair, reasonable and proportionate to the facts of the case. In those cases where a monitor is to be appointed, the prosecutor should ordinarily accept the preferred candidate of the corporate (from a list of three also drawn up by the corporate). However, if the prosecutor considers that the preferred monitor has a conflict of interest or lacks the requisite experience or authority, then the choice of candidate may be rejected.

Once appointed, the monitor should be afforded complete access to all relevant aspects of the corporate's business during the period of the monitorship (with the exception of any legal professional privilege that may exist in respect of investigating compliance issues).

(ii) Use of documents

Save for a number of exceptions, there is no limitation on the use by the prosecutor of information obtained during DPA negotiations. This provision of the Code clearly has scope to be problematic for the corporate defendant as, in order even to get to the negotiation table, it will need to have disclosed a significant amount of confidential information in relation to the alleged conduct. The Code specifically provides that such information might include internal or independent investigation reports carried out by the corporate, and so questions about the consequences for legal professional privilege will have to be carefully considered. Clearly, this puts a corporate in a difficult position, not least because the prosecutor is able to use such material against the corporate if the DPA negotiations are unsuccessful.

With its combination of high financial penalties and tough consequences for breach, the new DPA regime will be anything but a "soft" option for the enforcement of corporate offending.

(iii) Breach of the DPA

Where a prosecutor suspects, prior to expiry of the DPA, that a corporate has breached the DPA, it is required to request rectification of the breach by the corporate.[8] If the prosecutor is unable to secure a satisfactory outcome in this way, the matter is then to be referred to the court for determination.[9] If the court finds there to have been a breach of the DPA, it may propose a way of remedying the breach.[10] However, where the breach concerned is deemed to be material, the court may order termination of the DPA. In such circumstances, the corporate will not be entitled to the return of any monies paid under the DPA prior to its termination or to any other relief for detriment arising from its compliance with the DPA up to that point. Furthermore, termination of the DPA would result in a lifting of the suspension of proceedings. The possibility of criminal proceedings would therefore be reinstated against the corporate.

Accordingly, breach of the DPA can have extremely serious consequences for corporates. As variation is unlikely to take place except in exceptional circumstances, negotiation of realistic terms with which the corporate will be able to comply is a paramount concern.

4. Conclusion

While there are clear benefits to the new DPA regime, it is also clear that not all corporates will necessarily benefit from it. Where alleged conduct is deemed to be particularly egregious, corporates are likely to continue to face the prospect of criminal prosecution. In addition, with its combination of high financial penalties and tough consequences for breach, the new DPA regime will be anything but a "soft" option for the enforcement of corporate offending. However, a DPA does present a potential alternative option for a corporate that is otherwise likely to face lengthy, difficult and unpredictable external investigations. In particular, multi-national organisations cooperating with enforcement agencies across jurisdictions may see a UK DPA as an important way of managing transnational exposure to the criminal law.

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1 See paragraph 6(1) of Schedule 17 of the Act.

2 See paragraph 2.1 of the Code.

3 See paragraphs 1.2 and 2.2 of the Code.

[4] See paragraph 2.8.1 of the Code.

[5] See paragraph 2.8.2 of the Code.

[6] See paragraph 7.8 of the Code.

[7] See paragraph 8.1(iii) of the Code.

[8] See paragraph 12.2 of the Code.

[9] See paragraph 12.3 of the Code.

[10] See paragraph 12.4 of the Code.

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