SFO serious fraud office

CPS

Deferred Prosecution Agreements Code of Practice

Crime and Courts Act 2013

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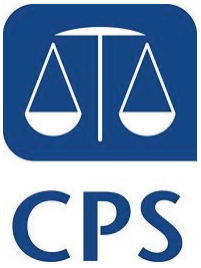

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Introduction

This Deferred Prosecution Agreement Code of Practice ("DPA Code") is issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 ("the Act").

Prosecutors should have regard to this DPA Code when:

i. Negotiating Deferred Prosecution Agreements ("DPAs") with an organisation ("P") whom the prosecutor is considering prosecuting for an offence specified in the Act;

ii. Applying to the court for the approval of a DPA;

and

iii. Overseeing DPAs after their approval by the court, in particular in relation to variation, breach, termination and completion.

1. Whether a Deferred Prosecution Agreement is a possible disposal of alleged criminal conduct

1.1. A DPA is a discretionary tool created by the Act to provide a way of responding to alleged criminal conduct. The prosecutor may invite P to enter into negotiations to agree a DPA as an alternative to prosecution.

1.2. In order to enter a DPA the prosecutor is to apply the following two stage test. Prosecutors must be satisfied and record that:

EVIDENTIAL STAGE

i. Either:

a) the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied or, if this is not met, that

b) there is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.

And

PUBLIC INTEREST STAGE

ii. The public interest would be properly served by the prosecutor not prosecuting but instead entering into a DPA with P in accordance with the criteria set out below.

1.4 The Prosecutor should first consider whether the test in paragraph 1.2 i a) is met. If it is not met consideration may be given to the test under paragraph 1.2 i b).

1.5 For the purposes of 1.2 i b) a reasonable time period will depend on all the facts and circumstances of the case, including its size, type and complexity.

1.6 If a DPA is considered appropriate by the relevant Director, having determined that either limb of the evidential stage is met, and that the public interest is best served by entering into a DPA, the prosecutor will (where the court approves the DPA) prefer an indictment. The indictment will however then immediately be suspended pending the satisfactory performance, or otherwise, of the DPA.

1.7 In cases where neither limb of the evidential stage can be met by the conclusion of any DPA negotiations and it is not considered appropriate to continue the criminal investigation, the prosecutor should consider whether a Civil Recovery Order is appropriate. Attention is drawn to the Attorney General's guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002, issued 5 November 2009.

2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

NEGOTIATIONS

2.1 An invitation to negotiate a DPA is a matter for the prosecutor's discretion. P has no right to be invited to negotiate a DPA. The SFO and the CPS are first and foremost prosecutors and it will only be in specific circumstances deemed by their Directors to be appropriate that they will decide to offer a DPA instead of pursuing the full prosecution of the alleged conduct. In many cases, criminal prosecution will continue to be the appropriate course of action. An invitation to enter DPA discussions is not a guarantee that a DPA will be offered at the conclusion of the discussions.

2.2 Where the prosecutor is satisfied that:

i. either the evidential stage of the Full Code Test in the Code for Crown Prosecutors is met, or there is a reasonable suspicion based upon some admissible evidence that P has committed an offence;

ii. the full extent of the alleged offending has been identified;

and

iii. the public interest would likely be met by a DPA,

then the prosecutor may initiate DPA negotiations with any P who is being investigated with a view to prosecution in connection with an offence specified in the Act.

2.3 When considering whether a DPA may be appropriate the prosecutor will have regard to existing Codes of Practice and Guidance, in particular:

i. The Code for Crown Prosecutors;

ii. The Joint Prosecution Guidance on Corporate Prosecutions ("the Corporate Prosecution Guidance");

iii. Bribery Act 2010: Joint Prosecution Guidance ("the Bribery Act Guidance");

iv. The DPA Code.

2.4 Where either limb of the evidential stage is passed, the prosecutor must consider whether or not a prosecution is in the public interest. The more serious the offence, the more likely it is that prosecution will be required in the public interest. Indicators of seriousness include not just the value of any gain or loss, but also the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade. The impact of the offending in other countries, and not just the consequences in the UK, should be taken into account.

2.5 Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence, which includes the culpability of P and the harm to the victim.
A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution.

2.6 In applying the public interest factors when considering whether to charge, seek to enter a DPA or take no further criminal action the prosecutor undertakes a balancing exercise of the factors that tend to support prosecution and those that do not. This is an exercise of discretion. Which factors are considered relevant and what weight is given to each are matters for the individual prosecutor. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Decisions will be made on an individual case by case basis.

2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

2.7 Prosecutors should have regard when considering the public interest stage to the UK's commitment to abide by the OECD Convention on "Combating Bribery of Foreign Public Officials in International Business Transactions" in particular Article 5. Investigation and prosecution of the bribery of a foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

2.8 The prosecutor should have regard to the public interest factors set out in the Code for Crown Prosecutors. In addition the following non-exhaustive factors will be of relevance in deciding whether a prosecution is appropriate or not in order to satisfy the public interest:

2.8.1 Additional public interest factors in favour of prosecution

i. A history of similar conduct (including prior criminal, civil and regulatory enforcement actions against P and/or its directors/partners and/or majority shareholders). Failing to prosecute in circumstances where there have been repeated or serious breaches of the law may not be a proportionate response and may not provide adequate deterrent effects.

ii. The conduct alleged is part of the established business practices of P.

iii. The offence was committed at a time when P had no or an ineffective corporate compliance programme and it has not been able to demonstrate a significant improvement in its compliance programme since then.

iv. P has been previously subject to warning, sanctions or criminal charges and had nonetheless failed to take adequate action to prevent future unlawful conduct, or had continued to engage in the conduct.

v. Failure to notify the wrongdoing within reasonable time of the offending conduct[1] coming to light.

vi. Reporting the wrongdoing but failing to verify it, or reporting it knowing or believing it to be inaccurate, misleading or incomplete.

vii. Significant level of harm caused directly or indirectly to the victims of the wrongdoing or a substantial adverse impact to the integrity or confidence of markets, local or national governments.

2.8.2 Additional public interest factors against prosecution

i. Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.

ii. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against P and/or its directors/partners and/or majority shareholders; The prosecutor should contact relevant regulatory departments (including where applicable those overseas) to ascertain whether there are existing investigations in relation to P and/or its directors/partners and/or majority shareholders;

[1] For what is reasonable see paragraph 2.9 below

2. Factors that the prosecutor may take into account when deciding whether to enter into a DPA

iii. The existence of a proactive corporate compliance programme[2] both at the time of offending and at the time of reporting but which failed to be effective in this instance;

iv. The offending represents isolated actions by individuals, for example by a rogue director;

v. The offending is not recent and P in its current form is effectively a different entity from that which committed the offences – for example it has been taken over by another organisation, it no longer operates in the relevant industry or market, P's management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending;

vi. A conviction is likely to have disproportionate consequences for P, under domestic law, the law of another jurisdiction including but not limited to that of the European Union, always bearing in mind the seriousness of the offence and any other relevant public interest factors;[3]

vii. A conviction is likely to have collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders.

2.9 With respect to the "Additional public interest factors against prosecution", at paragraph 2.8.2 i. above:

2.9.1 The prosecutor in giving weight to P's self-report will consider the totality of information that P provides to the prosecutor. It must be remembered that when P self-reports it will have been incriminated by the actions of individuals. It will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted. P must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution.

2.9.2 The prosecutor will also consider how early P self-reports, the extent that P involves the prosecutor in the early stages of an investigation (for example, in order to discuss work plans, timetabling, or to provide the opportunity to the prosecutor to give direction and where appropriate commence an early criminal investigation where it can use statutory powers in particular against individuals).

2.9.3 The prosecutor will consider whether any actions taken by P by not self-reporting earlier may have prejudiced the investigation into P or the individuals that incriminate P. In particular the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Internal investigations which lead to such adverse consequences may militate against the use of DPAs.

2.10 The Bribery Act Guidance provides factors tending in favour of or against prosecution in respect of each offence under the Bribery Act 2010. In doing so it refers to the Code for Crown Prosecutors, the Corporate Prosecution Guidance and unique considerations appropriate to the particular bribery offence being considered. A prosecutor in considering the public interest under the Code for Crown Prosecutors in respect of a bribery offence must therefore also consider the current Bribery Act Guidance offered in respect of the particular offence under consideration.

[2] The prosecutor may choose to bring in external resource to assist in the assessment of P's compliance culture and programme for example as described in any self-report.

[3] Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is mandatorily excluded from participation in public contracts within the EU. Discretionary exclusion may follow in respect of a conviction for a criminal offence.

3. Process for invitation to enter into negotiations

3.1 If the prosecutor decides to offer P the opportunity to enter into DPA negotiations, it will do so by way of a formal letter of invitation outlining the basis on which any negotiations will proceed.

3.2 That letter will constitute the beginning of the DPA negotiation period, which period will end on either the withdrawal of one or both parties from the process, or the approval/ refusal by the court of a DPA at a final hearing. Neither party will be obliged to give reasons for withdrawal from negotiations. However in the event of withdrawal from negotiations by the prosecutor it will ordinarily be appropriate to provide P with the gist of the reasons for doing so. In some instances this may not be possible without prejudicing the investigation.

3.3 All parties should keep in mind that DPAs are entirely voluntary agreements. The prosecutor is under no obligation to invite P to negotiate a DPA and P is under no obligation to accept that invitation should it be made. The terms of a DPA are similarly voluntary, and neither party is obliged to agree any particular term therein. The Act does not, and this DPA Code cannot, alter the law on legal professional privilege.

3.4 DPA negotiations must be transparent. The prosecutor must:

i. Ensure that a full and accurate record of negotiations is prepared and retained. It is essential that a full written record is kept of every key action and event in the discussion process, including details of every offer or concession made by each party, and the reasons for every decision taken by the prosecutor. Meetings between the parties should be minuted and the minutes agreed and signed;

ii. Ensure that the prosecution and P have obtained sufficient information from each other so each can play an informed part in the negotiations;

iii. Ensure that documentation and any other material relevant to the matters the prosecutor is considering prosecuting is retained by P for any future prosecution;

iv. Ensure that the proposed DPA placed before the court fully and fairly reflects P's alleged offending; and

v. The prosecutor must not agree additional matters with P which are not recorded in the DPA and not made known to the court.

THE LETTER OF INVITATION

3.5 In order to initiate the DPA negotiations, the prosecutor will first send P a letter containing:

i. Confirmation of the prosecutor's decision to offer P the opportunity to enter into DPA negotiations;

ii. A request for confirmation of whether P wishes to enter into negotiations in accordance with the Act and this DPA Code; and

iii. A timeframe within which P must notify the prosecutor whether it accepts the invitation to enter into DPA negotiations.

UNDERTAKINGS

3.6 Where P agrees to engage in DPA negotiations, the prosecutor should send P a letter setting out the way in which the discussions will be conducted. This letter should make undertakings in respect of:

i. the confidentiality of the fact that DPA negotiations are taking place;

ii. the confidentiality of information provided by the prosecutor and P in the course of the DPA negotiations.

3. Process for invitation to enter into negotiations

3.7 In doing so the undertaking will make clear:

i. the use which may be made by the prosecutor of information provided by P pursuant to paragraph 13 of Schedule 17 to the Act;

ii. that the law in relation to the disclosure of unused material may require the prosecutor to provide information received during the course of DPA negotiations to a defendant in criminal proceedings; and

iii. that the information may be disclosed as permitted by law.

3.8 The letter should also include:

i. a statement of the prosecutor's responsibility for disclosure of material pursuant to this DPA Code;

ii. a warning that the provision by P of inaccurate, misleading or incomplete information where P knew or ought to have known that the information was inaccurate, misleading or incomplete may lead to a prosecution of P:

a. for an offence consisting of the provision of such inaccurate, misleading or incomplete information, and/or

b. for an offence or offences which are the subject of an agreed DPA; and

iii. the practical means by which the discussions will be conducted including appropriate time limits.

3.9 The prosecutor will require P to provide an undertaking:

i. that information provided by the prosecutor in the course of DPA negotiations will be treated as confidential and will not be disclosed to any other party, other than for the purposes of the DPA negotiations or as required by law; and

ii. all documentation or other material relevant to the matters the prosecutor is considering prosecuting is retained until P is released from the obligation to do so by the prosecutor.

3.10 In exceptional circumstances and where permitted by law the prosecutor may agree in writing to different terms regarding the confidentiality of information. Ordinarily the decision to vary confidentiality terms will be dealt with on a case by case basis at the point that the disclosure is considered. In deciding whether to make such an exceptional variation, for example in relation to a disclosure of information to third parties, the prosecutor will take into account that statutory and common law safeguards already exist in respect of disclosure of information to third parties.

3.11 Until the issues of confidentiality, use of and retention of information have been agreed to the satisfaction of both parties, and the agreement reflected in signed undertakings, the prosecutor must not continue with the substantive DPA negotiations.

4. Subsequent use of information obtained by a prosecutor during the DPA negotiation period

4.1 The use to which information obtained by a prosecutor during the DPA negotiation period may subsequently be put is dealt with at paragraph 13 of Schedule 17 to the Act. The use of any particular item is therefore governed by that legislation.

4.2 It is recognised that there is a balance to be struck between encouraging all parties to be able to negotiate freely, and the risk that P may seek knowingly (or when it should have known) to induce the prosecutor to enter into a DPA on an inaccurate, misleading or incomplete basis.

4.3 If P provides inaccurate, misleading or incomplete information where P knew or ought to have known that the information was inaccurate, misleading or incomplete, the prosecutor may instigate fresh proceedings against P for the same alleged offence in accordance with paragraph 11 of Schedule 17 to the Act notwithstanding any DPA that may have been approved.

4.4 There are two contexts within which information obtained by the prosecutor during the DPA negotiation period may subsequently be used.

i. Where a DPA is approved by the court under paragraph 8 of Schedule 17 to the Act the legislation provides (at paragraph 13 (1) and (2) of Schedule 17) that the statement of facts contained in the DPA may be used in subsequent criminal proceedings as an admission in accordance with section 10 of the Criminal Justice Act 1967.

ii. Where a DPA has not been concluded and the prosecutor chooses to pursue criminal proceedings against P, the material described in paragraph 13(6) of Schedule 17 to the Act may only be used in the limited circumstances described in paragraphs 13 (4) and (5) of Schedule 17 to the Act.

4.5 Apart from the material described at paragraph 13(6) of Schedule 17 to the Act, there is no limitation on the use to which other information obtained by a prosecutor during the DPA negotiation period may subsequently be put during criminal proceedings brought against P, or against anyone else (so far as the rules of evidence permit).

4.6 By way of non-exhaustive example, if the DPA negotiations fail the following types of document provided to a prosecutor in those negotiations would be available to be used by the prosecutor subject to the rules of evidence in a subsequent prosecution of P:

i. pre-existing contemporary key documentation such as contracts, accountancy records including payments of any kind, any records evidencing the transfer of money, emails or other communications etc. provided to the prosecutor by P;

ii. any internal or independent investigation report carried out by P and disclosed to the prosecutor prior to the DPA negotiation period commencing;

iii. any interview note or witness statement obtained from an employee of P and disclosed to the prosecutor prior to the DPA negotiation period commencing;

iv. any document obtained by the prosecutor at any time obtained from any source other than P; and

v. any information obtained by the prosecutor as a result of enquiries made as a result of information provided by P at any time.

5. Unused Material and Disclosure

5.1. Negotiations to enter into a DPA will necessarily take place prior to the institution of proceedings and the statutory disclosure rules will therefore not be engaged at this early stage.

5.2. P should have sufficient information to play an informed part in the negotiations. The purpose of disclosure here is to ensure that negotiations are fair and that P is not misled as to the strength of the prosecution case. The prosecutor must always be alive to the potential need to disclose material in the interests of justice and fairness in the particular circumstances of any case. For instance, disclosure ought to be made of information that might undermine the factual basis of conclusions drawn by P from material disclosed by P. A statement of the prosecutor's duty of disclosure will be included in the terms and conditions letter provided to P at the outset of the negotiations.

5.3. Consideration should be given to reasonable and specific requests for disclosure by P. Where the need for such disclosure is not apparent to the prosecutor, any disclosure may depend on what P chooses to reveal to the prosecutor about its case in order to justify the request.

5.4. The investigator's duty to pursue reasonable lines of inquiry in accordance with the CPIA 1996 Code of Practice is not affected by the introduction of DPAs or the application of this Code. What is reasonable in each case will depend upon the particular circumstances.

5.5. Before the final DPA hearing the prosecutor must obtain from the investigator enquiring into the alleged offence or offences information that will enable the prosecutor to make a written declaration to the court, as required by Criminal Procedure Rule 12.2 (3) (b), namely that:

i. the investigator enquiring into the offence or alleged offences has certified that no information has been supplied which the investigator knows to be inaccurate, misleading or incomplete; and

ii. the prosecutor has complied with the prosecution obligation to disclose material to the defendant.

5.6. To satisfy (ii) above, the prosecutor should request that the investigator provide written certification to the prosecutor that any material retained by the investigator which may satisfy the test for prosecution disclosure as outlined in this DPA Code has been drawn to the attention of the prosecutor.

5.7 Where a DPA is approved by the court and a bill of indictment is preferred upon entering into a DPA, the CPIA will apply. However, the immediate suspension of the indictment will have the effect of immediately suspending with it the disclosure obligations imposed. The statutory disclosure obligations and standard directions providing time limits for compliance will only apply if the suspension is lifted in the event of termination of the DPA and the prosecution of P.

5.8 The disclosure duty of the prosecutor as outlined in this DPA Code is a continuing one and the prosecutor must disclose to P any material that comes to light after the DPA has been agreed which satisfies the test for disclosure above.

6. Statement of facts

6.1. The application must include a statement of facts which must:

i. give particulars relating to each alleged offence;

ii. include details where possible of any financial gain or loss, with reference to key documents that must be attached.

6.2. The parties should resolve any factual issues necessary to allow the court to agree terms of the DPA on a clear, fair and accurate basis. The court does not have the power to adjudicate upon factual differences in DPA proceedings.

6.3. There is no requirement for formal admissions of guilt in respect of the offences charged by the indictment though it will be necessary for P to admit the contents and meaning of key documents referred to in the statement of facts.

6.4. In the event that P is prosecuted for the alleged offence addressed by a court approved DPA, the statement of facts would be admissible against P in accordance with section 10 of the Criminal Justice Act 1967 in any subsequent criminal proceedings.

7. Terms

7.1. A DPA may include a broad range of terms, some of which are detailed in a non-exhaustive list in paragraph 5(3) of Schedule 17 to the Act.

7.2. The prosecutor and P are required to agree the terms of a DPA[4] which are fair, reasonable and proportionate. What terms are fair, reasonable and proportionate, including the length of the DPA, will be determined on a case by case basis. The terms may consist of a combination of requirements and it will normally be fair, reasonable and proportionate for there to be a financial penalty. It is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation. Paragraph 5 of Schedule 17 to the Act suggests that a possible term of a DPA is the recovery of the reasonable costs of the prosecutor in relation to the alleged offence or the DPA. The prosecutor should ordinarily seek to recover these costs, including the costs of the investigation where they have been incurred by the prosecutor.

7.3. The basis of the DPA and its terms will be explained in an agreed written application to the court.

7.4. The terms must set out clearly the measures with which P must comply. Clarity is important so P understands what is required. Further, in the event of breach of a term drafting ambiguity will complicate breach proceedings.

7.5. The terms must be proportionate to the offence and tailored to the specific facts of the case.

7.6. The DPA must specify the end date.

7.7. The following will normally be requirements of the DPA:

i. that the DPA relates only to the offences particularised in the counts of the draft indictment;[5]

ii. a warranty provided by both P and with P's consent, its legal advisers[6] that the information provided to the prosecutor throughout the DPA negotiations and upon which the DPA is based does not knowingly, contain inaccurate, misleading or incomplete information relevant to the conduct P has disclosed to the prosecutor.

iii. a requirement on P to notify the prosecutor and to provide where requested any documentation or other material that it becomes aware of whilst the DPA is in force which P knows or suspects would have been relevant to the offences particularised in the draft indictment.

7.8. The following will normally be terms of a DPA:

i. A financial order;

ii. The payment of the reasonable costs of the prosecutor;

iii. Co-operation with an investigation related to the alleged offence(s)[7].

[4] The length of a DPA will need to be sufficient to be capable of permitting compliance with other terms such as financial penalties paid in instalments, monitoring and co-operation with the investigations and trials into individuals.

[5] Prosecutors should not agree to a term that would prevent P from being prosecuted for conduct not included in the indictment even where the conduct has been disclosed during the course of DPA negotiations but not charged.

[6] The SRA Code of Conduct sets out in Chapter 5 the duties of a solicitor when conducting litigation or acting as an advocate. There are obligations on a solicitor:

a. Not to attempt to deceive or knowingly or recklessly mislead the court [O5.1],

b. Not to be complicit in any other person deceiving or misleading the court [O5.2], and

c. Where relevant to inform their client of circumstances in which their duties to the court outweigh their obligations to their client [O5.4].

[7] For example in respect of individuals. The obligation would include the provision of material to be used in evidence and for the purposes of disclosure.

7. Terms

7.9. The suggested financial terms may include but are not confined to: compensating victims; payment of a financial penalty; payment of the prosecutor's costs; donations to charities which support the victims of the offending; disgorgement of profits. There is no requirement to include all or any of these terms all of which are a matter of negotiation with P and subject to judicial oversight. The following should be noted:

i. A late payment may constitute a breach of the DPA leading to breach and termination. It may however be appropriate to make provision for short delays pursuant to paragraph 5 (5) of Schedule 17 to the Act requiring the payment of interest on any payment(s) not paid by the date agreed and specify the rate that applies[8].

ii. Where payment of a donation, compensation, financial penalty and/or costs is an agreed term of the DPA, the starting point should be that monies are ordered to be paid within seven days of the final hearing and this should be a standard term unless not fair, reasonable or proportionate.

iii. Where a financial penalty is to be imposed, the figure agreed must approximate to what would have been imposed had P pleaded guilty (see section 8).

iv. There should be a transparent and consistent approach to the setting of a financial penalty that is analogous to the sentencing framework for setting fines so the parties and the court will know before they enter into the process what the appropriate starting point is.

v. Financial penalties and disgorgements of profits will be paid to the prosecutor and then passed to the Consolidated Fund. Charitable donations and compensation will be paid by P directly or through an intermediary agreed by the parties and approved by the court as part of the DPA. P will provide confirmation and supporting evidence to the prosecutor of this as required.

7.10 Other terms that may be agreed might include:

i. prohibiting P from engaging in certain activities.

ii. financial reporting obligations.

iii. putting in place a robust compliance and/or monitoring programme.

iv. co-operation with sector wide investigations.

MONITORS

7.11 An important consideration for entering into a DPA is whether P already has a genuinely proactive and effective corporate compliance programme. The use of monitors should therefore be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate.

7.12 A monitor's primary responsibility is to assess and monitor P's internal controls, advise of necessary compliance improvements that will reduce the risk of future recurrence of the conduct subject to the DPA and report specified misconduct to the prosecutor.

7.13 Where the terms require a monitor to be appointed it is the responsibility of P to pay all the costs of the selection, appointment, remuneration of the monitor, and reasonable costs of the prosecutor associated with the monitorship during the monitoring period. In assessing whether a term of monitoring may satisfy the statutory

[8] The rate should ordinarily be not less than the rate of interest payable on post judgment debts at the date when the DPA is approved

test the prosecutor should give consideration to the costs of such a term as these may be relevant.

7.14 P shall afford to the monitor complete access to all relevant aspects of its business during the course of the monitoring period as requested by the monitor. Any legal professional privilege that may exist in respect of investigating compliance issues that arise during the monitorship is unaffected by the Act, this DPA Code or a DPA.

7.15 As part of the DPA negotiations P should provide the prosecutor and the court with details of three potential monitors, including relevant qualifications, specialist knowledge and experience; any associations the monitor has or has had with P and/or associated companies and/or person(s) or any named companies or person(s) that feature in the DPA to avoid any conflict of interest; and an estimate of costs of the monitorship.

7.16 P should indicate their preferred monitor with reasons for the preference.

7.17 The prosecutor should ordinarily accept P's preferred monitor. However where the prosecutor considers there to be a conflict of interest or that the monitor is inappropriate, or does not have the requisite experience and authority, they may reject the proposed appointment. Similarly the court may register its dissatisfaction with the selection by not approving the proposed term.

7.18 Where monitorship is proposed to be a term of a DPA, before the DPA is approved the monitor will be selected, provisionally appointed, the terms of the monitorship agreed by the parties to the DPA, a detailed work plan for the first year (to include the method of review and frequency of reporting to the prosecutor) and an outline work plan for the remainder of the monitoring period agreed with the monitor including provisions or limits as to costs. The monitor's report should include a breakdown of his proposed costs, and on what matters costs are incurred.

7.19 Terms of the DPA should include the length of time the monitors should be appointed. Provision should however be made in the DPA that if the monitor is satisfied that P's policies are functioning properly such that there is no need for further monitoring, the monitor may inform the prosecutor who will, subject to being satisfied through discussion with the monitor that the monitor's views are reasonable, agree to the termination or suspension of the monitor's appointment. Conversely the DPA should provide that, if the monitor and the prosecutor agree that P has not, or it appears will not by the end of the monitoring period have successfully satisfied its obligations with respect to the monitor's mandate, the term of the monitorship will be extended provided that no extension exceeds the length of the DPA.

7.20 Monitors' reports and associated correspondence shall be designated confidential with disclosure restricted to the prosecutor, P and the court, save as otherwise permitted by law.

7.21 No two monitoring programmes will be the same, given the varying facts and circumstances of each case including the nature and size of P. Terms included in the monitor's agreement may include, but are not limited to, ensuring that P has in place[9]:

i. a code of conduct;

ii. an appropriate training and education programme;

iii. internal procedures for reporting conduct issues which enable officers and employees to report issues in a safe and confidential manner;

[9] These policies and procedures are not intended to provide an indication of what can amount to adequate procedures under s. 7 Bribery Act 2010.

iv. processes for identifying key strategic risk areas;

v. reasonable safeguards to approve the appointment of representatives and payment of commissions;

vi. a gifts and hospitality policy;

vii. reasonable procedures for undertaking due diligence on potential projects, acquisitions, business partners, agents, representatives, distributors, sub-contractors and suppliers;

viii. procurement procedures which minimise the opportunity of misconduct;

ix. contract terms between P and its business partners, subcontractors, distributors, and suppliers include express contractual obligations and remedies in relation to misconduct;

x. internal management and audit processes which include reasonable controls against misconduct where appropriate;

xi. policies and processes in all of its subsidiaries and operating businesses, and joint ventures in which it has management control, and that P uses reasonable endeavours to ensure that the joint ventures in which it does not have management control, together with key subcontractors and representatives, are familiar with and are required to abide by its code of conduct to the extent possible;.

xii. procedures compatible with money laundering regulations;

xiii. policies regarding charitable and political donations;

xiv. terms related to external controls, e.g. procedures for selection of appropriate charities;

xv. policies relating to internal investigative resources, employee disciplinary procedures; and compliance screening of prospective employees;

xvi. policies relating to the extent to which senior management takes responsibility for implementing relevant practices and procedures;

xvii. mechanisms for review of the effectiveness of relevant policies and procedures across business and jurisdictions in which P operates;

xviii. compensation structures that remove incentives for unethical behaviour.

7.22 In designing a monitoring programme regard should be had to contemporary external guidance on compliance programmes[10].

[10] At the time of publishing guidance can be found in the Ministry of Justice Bribery Act 2010: Guidance to help commercial organisations prevent bribery, the OECD Good Practice Guide on Internal Controls, Ethics and Compliance, the BS 10500 Anti-Bribery System Standard, the US Sentencing Commission's Federal Sentencing Guidelines Manual, in particular its guidance on effective compliance and ethics programmes, and the guidance on corporate compliance programmes in the US Department of Justice's Principles of Federal Prosecution of Business.

8. Financial Penalty

8.1. The prosecutor represents the public interest, and should assist with the identification of appropriate terms by drawing the judge's attention where possible and relevant to the following information:

i. any victim statement or other information available to the prosecutor as to the impact of the alleged offence on the victim;

ii. any statutory provisions relevant to the offender and the offences under consideration;

iii. any relevant Sentencing Council Guidelines and guideline cases; and

iv. the aggravating and mitigating factors of the alleged offence under consideration.

8.2. Such information where available and relevant should form part of the agreed written application to be provided to the court at the final hearing.

8.3. Any financial penalty is to be broadly comparable to a fine that the court would have imposed upon P following a guilty plea.[11] This is intended to enable the parties and courts to have regard to relevant pre-existing sentencing principles and guidelines in order to determine the appropriate level for a financial penalty in an individual case. This should include consideration of P's means and where compensation is appropriate, this should be given priority over a penalty.

8.4. The extent of the discretion available when considering a financial penalty is broad. The discount for a guilty plea is applied by the sentencing court after it has taken into account all relevant considerations, including any assistance given by P. The level of the discount to reflect P's assistance would depend on the circumstances and the level of assistance given, and the parties should be guided by sentencing practice, statute and pre-existing case law on this matter. A financial penalty must provide for a discount equivalent to that which would be afforded by an early guilty plea. Current guidelines provide for a one third discount for a plea at the earliest opportunity.

8.5. To be considered as voluntary and therefore mitigating, co-operation should be over and above mere compliance with any coercive[12] measures.

[11] Schedule 17, Paragraph 5 (4).
[12] Such as notices under s.2 (1) Criminal Justice Act 1987 issued by the Serious Fraud Office

9. Preliminary hearing(s)

9.1. The Criminal Procedure Rules make provision for the contents of the application[13].

9.2. The prosecutor should contact a court designated to approve DPAs in order to request a listing and in doing so provide a realistic time estimate for a preliminary hearing.

9.3. The draft proposed application and any supporting documents must be submitted on a confidential basis to the court before the preliminary hearing.

9.4. The application must explain why the agreement is in the interests of justice and fair, reasonable and proportionate. In so explaining the prosecutor must address issues such as concurrent jurisdiction, on-going and/or subsequent ancillary proceedings, any conduct outwith the scope of the DPA which P has disclosed to the prosecutor but which does not form part of the draft indictment on account of the test at paragraph 1.2 above not having been satisfied.

9.5. Consideration should be given at the preliminary hearing to additional relevant issues such as timing of subsequent hearings.

9.6. The appropriate manner and timing of a preliminary hearing will vary on a case by case basis, and the court may adjourn a preliminary hearing if it requires more information about the facts or terms of a proposed DPA before it can make the full declaration under paragraph 7(1) of Schedule 17 to the Act.

10. Application for Approval

10.1. The Criminal Procedure Rules make provision for the contents of the application for final approval[14]. They further provide that an application for final approval should be sought as soon as practicable once the court has made a declaration under paragraph 7(1) of Schedule 17 to the Act and the parties have settled the terms of the DPA.

10.2. The basis of the DPA and its terms will be explained in an agreed written application accompanied by the proposed final terms of the DPA, agreed case statement with any supporting documents and the prosecutor's confirmation of which evidential test has been met. These documents must be submitted to the court on a confidential basis before the application for approval.

10.3. Issues germane to whether the DPA is in the interests of justice and its terms being fair, reasonable and proportionate such as concurrent jurisdiction, on-going and/or subsequent ancillary proceedings, must also be addressed by the prosecutor in the application for approval.

10.4. The application for approval of the DPA may be in private. This is likely to be almost always necessary as the prosecutor and P will be uncertain as to whether the court will grant a declaration under paragraph 8 (1). For the parties to make an application in open court which was refused might lead to the uncertainties and destabilisation that private preliminary hearings are designed to avoid.

10.5. The court may adjourn an application for approval if it requires more information about the facts or terms of a proposed DPA before it can make the declaration under paragraph 8(1) of Schedule 17 to the Act.

[13,14] Crim PR 12

11. Declaration in Open Court

11.1. If a DPA is approved, the court must make a declaration to that effect along with reasons in an open hearing[15].

11.2. Once the declaration has been made in open court the prosecutor will, unless prevented from doing so by an enactment or by an order from the Court, publish on its website:

i. the DPA;

ii. the declaration of the court pursuant to paragraph 8 (1) of Schedule 17 to the Act with the reasons for making such a declaration;

iii. the declaration of the court pursuant to paragraph 7 (1) of Schedule 17 to the Act with the reasons for making such a declaration; and

iv. if appropriate, any initial refusal to make such a declaration with reasons for declining.

11.3. Immediate publication may be prevented by any enactment or order that postponement is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings. P's offence and the sanctions provided for in the DPA will be made public as soon as it is safe to do so.

[15] See paragraph 154.4 in respect of listing

12. Breach of a DPA

12.1. Paragraph 9 of Schedule 17 to the Act deals with the situation where P is, or is believed by the prosecutor to be, in breach of a term of a DPA that has been approved at a final hearing.

ALLEGING AND PROVING BREACH OF A DPA

12.2. If, prior to the expiry of the DPA, it is believed that P is in breach of it, where possible the prosecutor should ask P to rectify the alleged breach immediately. In cases of minor breaches, it may be possible for a solution to be reached efficiently in this way, without the need for either an application under paragraph 9 of Schedule 17 to the Act or a variation of the DPA under paragraph 10 of Schedule 17 to the Act. The prosecutor will nevertheless still be required to publish details of the breach pursuant to paragraph 9 (8) of Schedule 17 to the Act. The prosecutor should also notify the court of any such developments.

12.3. If the prosecutor is unable to secure a satisfactory outcome in this way, it may apply to the court seeking a finding that P is in breach of the term as alleged, and explaining the remedy it seeks as a result. The question of whether or not there has been a breach of a term is to be judged on the balance of probabilities. The successful party may seek its costs of an application under paragraph 9 of Schedule 17[16].

12.4. If the court finds that P is in breach of a term of the DPA it may invite the parties to agree a suitable proposed remedy. If agreement can be reached, that proposed remedy must then be presented to the court by way of an application in accordance with paragraph 10 of Schedule 17 to the Act. The court will approve the variation only if that variation is in the interests of justice and the terms of the DPA as varied are fair, reasonable and proportionate. It is anticipated that this mechanism should generally be used to rectify relatively minor breaches of a DPA where the parties have been unable to agree a remedy without the involvement of the court.

TERMINATION FOLLOWING BREACH OF A DPA

12.5. Where the alleged breach is more material or the parties are unable to agree a suitable remedy or the court does not approve a proposed remedy, the court may order that the DPA be terminated. If the court makes such an order the DPA shall cease to take effect from that point onwards, and the prosecutor may apply to have the suspension of the indictment covered by the DPA lifted in accordance with paragraph 2 of Schedule 17 to the Act.

12.6. Where a DPA has been terminated in this way, P is not 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 (for example the costs of a monitoring programme). The prosecutor may seek from P the costs of an application under paragraph 9 of schedule 17 to the Act[17].

[16] [17] Crim PR 76.1 (c)

12. Breach of a DPA

POST TERMINATION PROCESS

12.7. Should the DPA be terminated it will be usual for the prosecutor to apply for the suspension of the indictment to be lifted and P to be prosecuted. The application to lift the suspension need not be made at the time that the DPA is terminated.

12.8. The lifting of the suspension would reinstitute criminal proceedings. Given the manner in which the earlier investigation was concluded and/or the passage of time since the DPA was concluded the prosecutor may not be in a position to commence criminal proceedings immediately. Further investigation and preparation may be needed in order for the prosecutor to be trial ready.

12.9. Before re-opening proceedings, the prosecutor must be satisfied that the Full Code Test under the Code for Crown Prosecutors is met in relation to each charge. The court will have been informed at the final hearing if the original charge was pursuant to the second limb of the evidential stage at paragraph 1.2 i b) above, in which case the prosecutor will now need to be satisfied that the more stringent evidential stage of the Full Code Test is met. Furthermore the public interest position will need reassessing in light of the breach.

12.10. If the prosecutor requires time before being in a position to re-open proceedings the court should be informed of the prosecutor's proposed course of action and then kept informed of progress.

13. Variation of a DPA

13.1. Paragraph 10 of Schedule 17 to the Act deals with the situation where it becomes necessary to vary the terms of a DPA that has been approved.

13.2. There are two possible situations in which variation may be necessary.

i. The first is where a breach has occurred in respect of which the prosecutor has applied under paragraph 9 of Schedule 17, and the court has invited the parties to agree a solution to that breach, which the court then has to consider whether to approve.

ii. The second situation is where a breach has not yet occurred, but, absent the variation, is likely to. A variation in this category will only be approved by the court if it arises from circumstances that were not, and could not have been, foreseen by the prosecutor or P at the time that the DPA was agreed[18]. What circumstances a court considers to be adequate in these types of cases will have to be decided on a case by case basis. Variation of a DPA is not a mechanism that exists for mere convenience or efficiency. A DPA is a serious sanction for criminal conduct and will have been approved by the court on that basis. In the vast majority of cases the terms of a DPA that are approved at a final hearing should be strictly complied with in their entirety, failing which P risks prosecution.

13.3. In both situations, it is the prosecutor that must apply to the court to seek a declaration that a variation is acceptable. P does not have a right to apply to the court for a variation; it may only ask the prosecutor for a variation.

13.4. If a variation is approved, the court must give its declaration to that effect in an open hearing. Costs of an application under paragraph 10 of Schedule 17 to the Act may be sought[19].

[18] Paragraph 10(1)(b) of Schedule 17 to the Act
[19] Crim PR 76.1 (c)

14. Discontinuance

14.1. On expiry of the DPA, the prosecutor should give notice to the court that it does not want proceedings to continue, in accordance with paragraph 11(1) of Schedule 17 to the Act.

14.2. Where considered necessary, consultation with the investigator and any monitor should take place prior to discontinuance.

14.3. Discontinuance notices should be sent to the court as soon as practicable after the decision to discontinue, and copies should be sent to P and the investigator.

14.4. The notice should state:

i. The effective date of discontinuance;

ii. The offences to be discontinued;

iii. Confirmation that the DPA has expired.

14.5. A DPA will ordinarily expire on the date specified in the agreement. However, this will not always be the case, and prosecutors should be aware of the various circumstances under paragraph 11 of Schedule 17 to the Act in which a DPA is to be treated as having or not having expired.

14.6. No notice of discontinuance is needed where the court terminates the DPA: see paragraph 11(5)(b) of Schedule 17 to the Act.

14.7. In contrast to discontinuance under the section 23A of the Prosecutions of Offences Act 1985, once proceedings are discontinued under paragraph 11(1), fresh proceedings against P for the same offence may not be instituted unless the conditions specified in paragraph 11(3) of Schedule 17 to the Act (provision of inaccurate, misleading or incomplete information by P) are satisfied.

15. Applications in Private

15.1. Where an application in private is contemplated all parties should consider whether the hearing can be heard in public as a starting point and if not, whether as much as possible of the hearing can be heard in public.

15.2. An application for a private hearing might be made for example where it is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings.

15.3. The court will not identify the parties to a private application.

15.4. Where the application to approve the DPA is in private it would be normally appropriate for reasons of transparency and open justice for the parties to request the court to delay the making of a declaration approving a DPA in open court so that a listing might be publicised in the normal manner.

15.5. All communications with the court in respect of a DPA will be confidential and the use of secure email should be the preferred means to maintain confidentiality.

16. Publishing decisions and postponement

16.1. Transparency remains a key aspect of the success and proper operation of DPAs, and accordingly Schedule 17 of the Act requires in prescribed circumstances the prosecutor to publish on its website orders made by the court or decisions made by the prosecutor.

16.2. All requirements to publish under this section are subject to any enactment or order of the court under paragraph 12 of Schedule 17 to the Act preventing such publication from being made.

16.3. There is no requirement to publish a conclusion reached by a prosecutor alone that no breach has in fact occurred so that no application to the court has been made.

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