CLIFFORD
CHANCE

Briefing note May 2013

Deferred prosecution agreements pass into law in the UK

The Crime and Courts Act 2013 (the Act) received Royal Assent on 25 April 2013. When they come into force, its provisions will make significant changes to the way crime involving corporates and senior executives is dealt with in the UK.

These include changes to the law governing extradition and the establishment of the National Crime Agency, which will take over the functions of the Serious Organised Crime Agency.

However, the most important development is the long awaited introduction of deferred prosecution agreements (DPAs) in the UK. For the first time, corporate organisations will be able to settle allegations of criminal activity without being prosecuted.

What are DPAs?

DPAs are agreements between prosecutors and corporate organisations that charges will be laid but not proceeded with provided the organisation complies with a set of agreed terms and conditions. These conditions will typically include the payment of substantial fines and the implementation of remediation and/or monitoring programmes.

In the first instance, only the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) will be able to agree DPAs with co-operating corporate organisations. Best estimates suggest that prosecutors and corporate organisations may conclude the first DPAs in early 2014 and that, eventually, up to ten DPAs per year may be agreed between prosecutors and corporate organisations.

DPAs are not a new concept for multinational corporate organisations, particularly those with US operations. US prosecutors have long been able to use similar mechanisms to conclude investigations into historic misconduct by co-operating corporate organisations.

Their introduction in the UK gives prosecutors additional options when deciding how to deal with corporate crime. However, some important practical questions as to how actively, frequently and effectively DPAs are likely to be used in practice remain.

Judges hold the balance of power

When the first DPAs are concluded in the UK, the process under which they are approved will differ significantly from their US counterparts. The Serious Fraud Office (SFO) has received scathing judicial criticism in cases to date where it has sought judges' imprimaturs in respect of settlements which have already been negotiated between the parties (and, in some cases, overseas enforcement authorities), as is usually the practice for DPAs entered into in the US.

The Act responds to these concerns by prescribing a detailed timetable under which, though a series of private and public hearings, judges will take a much earlier and more active part in shaping the terms of DPAs than their US counterparts (see diagram below for full details of this process).

The indications from recent UK cases involving prosecutions of corporate organisations and senior

executives for bribery and corruption are that judges, anxious to avoid any public perception of corporate crime being treated any less seriously than other offences, will subject proposed settlements to significant scrutiny. Specifically, they will concern themselves with whether the charges forming the basis of the DPA adequately reflect the alleged wrong, whether the proposed sanction is adequate and, where an overseas prosecutor is involved in a parallel settlement, the balance in the proposed agreements.

The Sentencing Council of England and Wales is to publish guidelines to assist judges in exercising their role in the DPA regime consistently and proportionately. However, the proposed structure and contents of these guidelines and the timescales for their release are, as yet, uncertain.

One particular issue which is unlikely to be addressed in such guidance but which may be important to the numbers of DPAs entered into will be the influence of individuals associated with a corporate organisation over whether a DPA is agreed with that organisation. Corporate criminal liability can only be established through the actions of individuals. The introduction of DPAs potentially brings the instincts of corporate organisations seeking early closure to a criminal investigation by admitting prejudicial facts, and those of individuals involved to vigorously defend themselves against allegations of wrongdoing into conflict with one another. One question likely to arise in early cases will be whether the courts will sanction DPAs based on factual admissions made by a corporate organisation in circumstances where individuals, who may themselves be subject to prosecution, are denying those facts. Conversely, corporate organisations may think twice about entering into DPA (on potentially onerous terms) given the difficulty for the prosecution – section 7 Bribery Act aside – of meeting the high threshold for establishing corporate criminal liability.

Changing enforcement landscape

The involvement of judges is the most significant, but by no means the only, unknown quantity in the proposed DPA process. In order for judges to become involved in this process, prosecutors must first decide that cases are suitable for DPAs.

Whilst proposals for the introduction of DPAs have been debated and designed, the SFO has made some important changes to its policy on self-reporting. These may have a bearing on the number of cases in which it is prepared to entertain the idea of entering into DPAs with co-operating corporates.

The SFO has reduced the level of comfort that it previously prepared to offer to self-reporting corporates; namely, that self-reporting would likely lead to a decision not to prosecute (see Clifford Chance briefing – October 2012). It now states that self-reporting will be one of a number of factors considered when it comes to applying the criteria set out in the Code for Crown Prosecutors (the Code).

The Act requires the SFO and the CPS to issue joint guidance that will set out general principles as to the appropriateness of DPAs in given cases (the joint guidance).

The Ministry of Justice, at the consultation stage, gave some indications of the relatively limited clarification likely to be provided by the joint guidance. As respondents suggested at that stage, the joint guidance provides prosecutors with an opportunity to provide as much clarity and predictability as possible in relation to DPAs.

The extent to which they (in particular the SFO) do so in the joint guidance will affect how confident corporates contemplating self-reporting can feel that prosecutors will agree that the public interest will be best served by entering into a DPA. However, it will not be comprehensive or prescriptive. Some important questions will remain, both in relation to when prosecutors are likely to entertain the idea of entering into a DPA, and in relation to how negotiations will be conducted. The table below summarises the areas on which the SFO and the CPS are expected to provide some clarification in the joint guidance, and those where practice will have to be the guide.

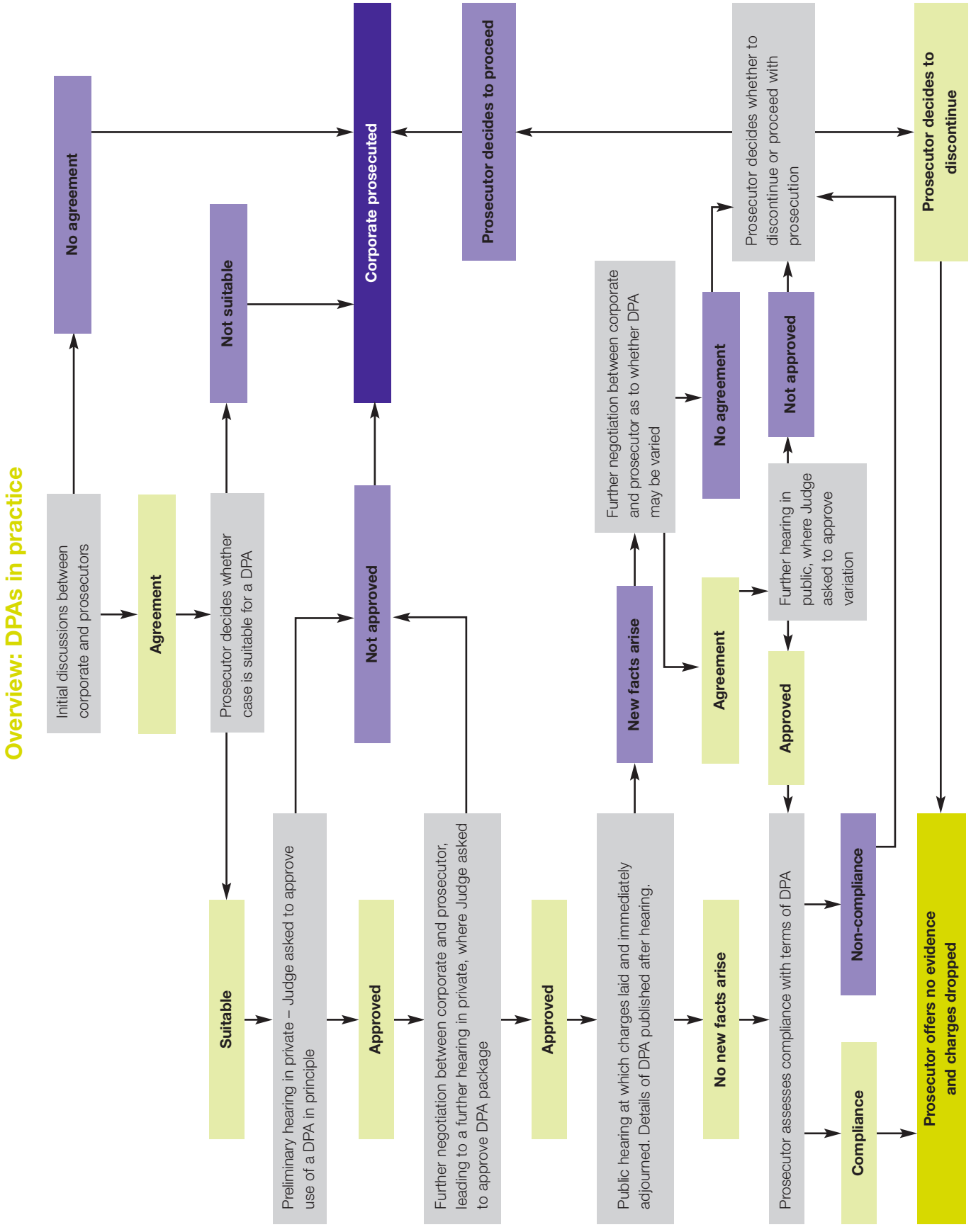
The FCA and DPAs

Presently, only the directors of the SFO and the Crown Prosecution Service (CPS) are named in the Act as “designated prosecutors” who may enter into DPAs. However, the Home Secretary has the power to add other prosecutors to this list.

Amongst the frontrunners is the newly created Financial Conduct Authority (FCA). It is, and its predecessor the Financial Services Authority was, an assertive and pragmatic criminal prosecutor, although to date of individuals rather than corporate organisations.

The Act allows DPAs to be made in respect of specific financial services offences in addition to more general fraud and corruption offences. Those responsible for enforcement at the FCA have not made any public comment on whether, in due course, they would wish for DPAs to be added to its prosecutorial toolkit.

	Clarification to be provided in guidance	Remaining questions
Will prosecutors enter into DPAs?	■ The joint guidance is expected to include a set of criteria by reference to which the SFO and the CPS will decide when it is "in the public interest" to enter into a DPA with a co-operating corporate. These criteria are expected to include: – The nature and seriousness of the offence; – The level of premeditation and whether any attempt was made to hide the wrongdoing; – How widespread within the commercial organisation the wrongdoing was and the seniority and number of the perpetrators; – The likely impact of prosecution on the commercial organisation and its financial health; – Any action being taken in relation to wrongdoing in other jurisdictions; – Any losses to innocent third parties; – What action has been taken by the commercial organisation and the level of commitment to resolving the issues, recovery and restitution of benefits, and improving compliance.	■ When will the SFO and CPS be prepared to commence negotiations about whether a DPA is appropriate?
How will negotiations be conducted?	■ How much information will prosecutors disclose to corporate during and after negotiations about whether to enter into DPAs? ■ In which circumstances will prosecutors consider varying or terminating DPAs after they have been made? ■ Which steps will prosecutors take if they suspect that an organisation has breached a DPA?	■ How will prosecutors approach internal investigations conducted by self-reporting corporate? ■ How much information will have to be placed before a Court considering whether to approve a draft DPA? ■ What will happen to documents produced and information disclosed to prosecutors during unsuccessful negotiations? Will prosecutors be able to use them against a corporate in any subsequent prosecution? ■ Will prosecutors pass documents produced or information disclosed during negotiations (whether or not successful) to other regulators (whether in the UK or overseas)? ■ Will prosecutors use documents produced or information disclosed by a corporate when prosecuting other corporate or individuals?


Overview: DPAs in practice
Initial discussions between corporate and prosecutors
Agreement
Prosecutor decides whether case is suitable for a DPA
No agreement
Not suitable
Suitable
Corporate prosecuted
Prosecutor decides to proceed
Prosecutor decides to discontinue
Preliminary hearing in private – Judge asked to approve use of a DPA in principle
Approved
Not approved
Further negotiation between corporate and prosecutor, leading to a further hearing in private, where Judge asked to approve DPA package
Approved
Not approved
Public hearing at which charges laid and immediately adjourned. Details of DPA published after hearing.
New facts arise
No new facts arise
Further negotiation between corporate and prosecutor as to whether DPA may be varied
No agreement
Agreement
Further hearing in public, where Judge asked to approve variation
Not approved
Approved
Prosecutor decides whether to discontinue or proceed with prosecution
Prosecutor assesses compliance with terms of DPA
Non-compliance
Compliance
Prosecutor offers no evidence and charges dropped

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