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Briefing note

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Light at the end of the tunnel: UK prosecutors publish guidance on deferred prosecution agreements

On 14 February, in readiness for the addition of deferred prosecution agreements ("DPAs") to their prosecutorial toolkits from 24 February, the Serious Fraud Office ("SFO") and Crown Prosecution Service ("CPS") published the finalised version of their joint code of practice ("the Joint Code"). The Joint Code gives guidance on when they will entertain the idea of settling criminal investigations concerning corporate organisations by way of a DPA, how negotiations will work in practice and the types of terms which they may include. It is estimated that, once they become available, DPAs will be used (principally by the SFO) up to ten times per year.

The Directors of the SFO and CPS ("the Prosecutors") have made clear that prosecution remains their *"preferred option"* and that the use of DPAs as an alternative will only be deemed appropriate in a minority of cases where relatively stringent evidential and public interest tests (set out in the Joint Code and other guidance) are satisfied.

In our briefings to date tracking the progress of the legislation introducing DPAs and the Joint Code, we have considered some of the questions of most concern to corporate organisations. In this briefing, we re-examine these and some additional questions and consider the extent to which the Joint Guidance has clarified matters for corporate organisations.

What are DPAs and how will they work?

DPAs are discretionary tools enabling corporate organisations to settle allegations of primarily economic criminal activity without being prosecuted. Similar (although not identical) arrangements have long been used by US prosecutors.

Under the arrangements, if a Court approves, the Prosecutors can agree that a prosecution for bribery, corruption, fraud, money laundering and some other offences may be suspended in return for accepting the imposition of measures including the payment of financial penalties, implementation of remedial measures and/or appointment of monitors. If the corporate organisation concerned breaches the terms of a DPA, or if new information comes to light (and again, only if a Court approves), the prosecution may be re-started.

For further details of when they may be used and the mechanics of the process by which they will be negotiated, approved, varied and terminated, see our briefings published in May and June 2013.

(When) will prosecutors use DPAs?

Before prosecutors will even commence negotiations with a view to concluding a DPA, they must test the facts of the particular case against a series of questions set out in a combination of:

- the Joint Code;
- the Code for Crown Prosecutors ("the CP Code") (the code to which all UK prosecutors must have regard in all cases when deciding whether to prosecute);

- the Joint Prosecution Guidance on Corporate Prosecution Guidance ("the Corporate Prosecution Guidance"); and
- the Bribery Act 2010: Joint Prosecution Guidance ("the Bribery Act Guidance").

The questions prosecutors must ask themselves when considering whether it may be appropriate to enter into negotiations are set out below:

Evidential Stage

1. **Is there *"sufficient evidence to provide a realistic prospect of conviction"?***

In simple terms, this requires prosecutors to consider whether there is a greater than 50 per cent chance that an objective, impartial and reasonable bench of magistrates, jury or judge would convict the corporate organisation of the offence.

2. **If the answer to the above is no, is there *"at least a reasonable suspicion based upon some admissible evidence"* that the corporate organisation concerned has committed the offence?**

This test has been slightly updated in the finalised version of the Joint Code to include the requirement for the prosecutors' suspicion to be "*based upon some admissible evidence*". Guidance published alongside the Joint Code clarifies that *"admissible evidence"* may include source documents such as emails underlying an internal investigation report.

3. **Are there *"reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time"* leading to enough evidence to provide a reasonable prospect of conviction?**

The Joint Code allows prosecutors a wide discretion to decide what amounts to "*a reasonable period of time",* simply stating that it will depend on *"all the facts and circumstances of the case, including its size, type and complexity*".

Public Interest Stage

4. **Would *"the public interest be properly served by the prosecutor not prosecuting but instead entering into a DPA"*?**

Prosecutors determine this by reference to a lengthy and detailed list of factors and interpretative guidance set out in the Joint Code (which draw on sections of the CP Code, the Corporate Prosecution Guidance, the Bribery Act Guidance and other guidance in relation to some specific offences).

How will prosecutors decide whether "the public interest would be properly served" by a DPA?

Prosecutors' decisions at the public interest stage of the above process are dictated by their judgements made on;

- the date and seriousness of the conduct;
- how central the conduct was to the organisation's business activities;
- the level of harm caused by the conduct;
- the compliance arrangements maintained by the organisation (both currently and at the time of the conduct);
- the organisation's past record;
- whether the consequences of a conviction would be disproportionate for the organisation or would have collateral effects on innocent third parties; and
- whether the organisation has reported the conduct and co-operated with the Prosecutors.

In an addition to the draft version of the Joint Code, prosecutors have indicated that they *"may choose to bring in an external resource to assist in the assessment of* [the organisation's] *compliance culture and programme".* Although not explicit on the point, the Joint Code appears to envisage that this would take place by consent, as neither of the Prosecutors has an express statutory power to appoint "skilled persons" in the same way as, for example, the FCA may under section 166 of the Financial Services and Markets Act 2000. It appears to envisage the provision of advice rather than the delegation of functions or powers. However, the addition of this statement at this stage (which is included in a footnote to the Joint Code and not referred to in the otherwise detailed accompanying consultation response) is interesting in the light of the challenge currently being pursued to the decision of the previous Director of the SFO to delegate responsibilities to the agency's former Chief Operating Officer.

The Joint Code confirms that, when assessing an organisation's past record, the Prosecutors will have regard to previous civil, regulatory and criminal enforcement proceedings previously pursued against that organisation (whether by them or any other authority) in respect of similar conduct. The Prosecutors had been urged at the consultation stage not to take such a wide view. Their decision to do so means that historic and unconnected action taken by, for example, the Financial Conduct Authority ("FCA") may be taken into account, thus elevating

the importance of effective compliance systems across all areas of organisations' operations.

Will a self-report lead to a DPA?

Revisions to the SFO's guidance in October 2012 saw it retreat from previous assurances that self-reporting enhanced the prospects of a negotiated solution (see our briefing in October 2012). The Joint Code does not give any such firm assurances as the SFO gave prior to October 2012 and it is clear that, by itself, the fact that an organisation has self-reported will not bring about a DPA. However, the importance of proactively bringing matters to prosecutors' attention has been restored by the Joint Code, which suggests that prosecutors may attach *"considerable weight"* to self-reports and describes their expectations as to the timing and content of reports.

In an important change from the draft version, the Joint Code now refers to *"*notification*"* rather than *"reporting"* of concerns to prosecutors as the factor to be considered by prosecutors when deciding whether a DPA will be appropriate. This acknowledges the concerns registered on behalf of corporate organisations in relation to the tension between reporting early and spending sufficient time investigating matters to be able to report fully. The Joint Code states that prosecutors expect to be notified of past misconduct "*within a reasonable time of the offending coming to light*". It goes on to make clear that, in practice, this will involve an initial notification, followed by discussion with and involvement of the prosecutor in any internal investigation to be carried out by the organisation. The Prosecutors have indicated that examples of this involvement may include input into work plans, timetabling, or providing 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. This does not claim to be an exhaustive list of potential involvement but it hints at the more high level nature of the involvement anticipated.

How will DPAs be agreed?

The Joint Code reiterates that DPAs are voluntary agreements, and that the onus is on the organisation concerned to make its own decision as to whether to enter into DPA negotiations or to enter into a proposed DPA. Answering suggestions that corporate organisations may seek to use DPAs to draw a line under investigations notwithstanding their rejection of allegations, the Prosecutors state in terms that where organisations conclude that they have not been involved in criminal misconduct, they should *"refuse to enter into DPA negotiations or a DPA"*.

However, in reality, the position is more nuanced. Whether to enter into negotiations or, if they are productive, a DPA, are commercial decisions for organisations based upon analysis of the benefits of early resolution as against the risks inherent in the process.

Organisations' ability to make an informed decision on whether the risks are outweighed by the benefits has been improved by some concessions made in the finalised version of the Joint Code in response to concerns raised at the consultation stage. However, the balance of power in DPA negotiations is still firmly in the Prosecutors' favour. Considerable uncertainty remains as to exactly how much information will have to flow between prosecutors and co-operating organisations prior to and during these negotiations.

What must prosecutors disclose to organisations prior to and during DPA negotiations?

Prosecutors' disclosure obligations have been strengthened in the finalised version of the Joint Code. For example, in response to a suggestion made by Clifford Chance at the consultation stage, there is now a positive obligation in the Joint Code to "*ensure that the suspect is not misled as to the strength of the prosecution case"*.

However, the Joint Code does not descend into detail as to the type or amount of disclosure to be provided to organisations prior to or during negotiations. It is open to organisations and their advisers to make requests for disclosure in relation to specific documents or issues, but prosecutors have significant discretion as to whether to accede to such requests.

Although it remains to be seen how the Prosecutors will approach this issue in practice, the Joint Code suggests that they recognise that negotiations are unlikely to be constructive or successful unless meaningful disclosure is provided in a timely way.

What must organisations disclose to prosecutors prior to and during DPA negotiations?

The Joint Code makes clear that prosecutors will not consider organisations to have *"genuinely"* or *"proactively"* co-operated, and thus are unlikely to enter into negotiations,

unless they have identified relevant witnesses, disclosed their accounts and documents shown to them and provided internal investigation reports and source documents.

The Prosecutors have not specifically addressed whether they expect the disclosure of privileged material as a precondition to or during DPA negotiations. The Joint Code simply notes that neither it nor the legislation introducing DPAs alters the law on legal professional privilege, meaning that they cannot impose an obligation on a corporate organisation to waive privilege.

However, their implicit position appears to be that it will be much more difficult to agree a DPA where the organisation concerned withholds material, whether on grounds of privilege or for any other reason. This is analogous to the approach taken by the FCA in its Enforcement Guide in relation to the treatment of material underpinning internal investigations.

What will be included in DPAs?

The contents of DPAs will be determined not only by negotiations between prosecutors and corporate organisations, but also by the input of the Court at preliminary hearings. As such, the Joint Code is not prescriptive as to the terms which may be included.

However, it is more pragmatic about the contents of DPAs than was previously proposed. For example, it recognises that it will not be necessary in every case for a monitor to be appointed or for monitors to have access to all areas of organisations' business. It also now includes stronger obligations on prosecutors to consider the consequences for the organisation concerned when deciding whether to propose the appointment of a monitor as a term of a DPA.

The level of financial penalties is an area of remaining uncertainty. Under separate guidance released by the Sentencing Council, judges may (and likely will, although they are not obliged to) follow a penalty calculation methodology based on multipliers for higher degrees of harm and culpability analogous to that used by the FCA. The Joint Code provides for prosecutors to recognise the fact that a DPA brings numerous costs other than fines, although it remains to be seen how accommodating they and judges are prepared to be in practice.

What will happen if a DPA is not agreed?

Where prosecutors conclude that a DPA is not appropriate or DPA negotiations fail, the way is clear for the organisation concerned to be prosecuted. Indeed, the Joint Code is clear that the fact that negotiations are commenced *"is not a guarantee that a DPA will be offered at the conclusion of the discussions*".

In these circumstances, material showing that the subject of the DPA entered into negotiations and material "*created solely for the purpose of preparing*" a DPA and statement of facts may not be used against the organisation concerned. However, these restrictions are narrower than they may appear. The Joint Code expressly states that any other material not falling into these categories is available for use in subsequent prosecutions (whether of the organisation concerned or anyone else).

The Joint Code does not give examples of such material, which could include information or documents not provided to prosecutors during negotiations but which they obtain on their own initiative based on such negotiations. It is possible to foresee disputes over the purpose(s) for which material relied upon in prosecutions was created and challenges to attempts by prosecutors to admit it in evidence against organisations where proceedings follow failed DPAs (although, based on analogous situations under the established criminal law, courts are likely to be relatively unsympathetic to such challenges).

It does not necessarily follow that the corporate organisation concerned will automatically be prosecuted, or that the prospects of a negotiated solution are extinguished if DPA negotiations fail. If the case does not pass all the tests for immediate prosecution set out in the Code, but should, in the prosecutor's view, still be marked by some formal action, it may elect to pursue civil recovery proceedings under the Proceeds of Crime Act 2002 ("POCA"). In a number of cases, the SFO has reached settlements with organisations without the need for contested proceedings where it has used these powers (although it should be noted that proceedings in these cases were commenced before the current Director, whose rhetoric on prosecution has been much tougher than his predecessor, took over in April 2012). The Joint Code acknowledges the possibility for civil recovery proceedings to be used again as an alternative to a DPA or prosecution.

What will happen after a DPA has been concluded?

The conclusion of a DPA will not mark the end of organisations' contact with prosecutors. In addition to verifying compliance with the terms of the DPA, prosecutors are likely to wish to pursue investigations and take action against individuals connected with the wrongdoing. In

some circumstances, they may also be able to take further action against the organisation with which they have agreed a DPA.

The Joint Code and accompanying guidance, recognising that corporate criminality can only occur through the actions of individuals, make clear that "*ordinarily the prosecutor will [investigate and] prosecute individuals in addition to taking enforcement action against the organisation, rather than as an alternative*". In this respect, the Prosecutors clearly regard DPA negotiations as a useful addition to their investigative toolkit and envisage the commencement of multiple derivative investigations. As noted below, the Prosecutors envisage that assistance and evidence given by co-operating organisations will provide an easier, and therefore cheaper, route to investigating and prosecuting individuals – which the SFO no doubt hopes will obviate what are otherwise often lengthy and costly investigations into complex and historic alleged misconduct.

The Joint Code and accompanying guidance make clear that it will be a condition of DPAs being offered that corporate organisations will provide assistance in linked prosecutions of individuals. The Prosecutors have removed some of the more onerous elements of the draft Joint Code, such as the suggestion that organisations should use coercive powers to require employees to attend interviews and should provide information "*about the company in its entirety*" where wrongdoing only relates to a discrete part of an organisation. The Joint Code makes clear that assistance may include providing evidence to be used against individuals in separate proceedings subsequently pursued against them.

Will a DPA preclude any other action?

One of the objectives of DPAs is to incentivise corporate organisations to come forward with details of historic wrongdoing by providing a mechanism for misconduct to be dealt with by way of one negotiated settlement.

It is expected that, in most cases, this will occur. However, although organisations which have entered into DPAs may not be prosecuted for the conduct to which they relate, neither the legislation introducing DPAs, the Joint Code nor any other provisions include any bars to other types of enforcement action being taken.

For example, as noted above, the Joint Code allows for the possibility of negotiated settlements through the use of civil recovery powers as an alternative to a DPA or prosecution. However, both it and guidance published by the Attorney General on the circumstances in which prosecutors should pursue civil recovery proceedings are silent as to whether prosecutors may use these powers under POCA in addition, rather than as an alternative, to a DPA.

This preserves the Prosecutors' theoretical ability to use the DPA regime in combination with their powers under POCA. The SFO has previously adopted this approach to recoup monies from shareholders of a company prosecuted for bribery offences (see our briefing in January 2012). However, in reality, the range of terms which may be incorporated into a DPA, together with courts' likely emphasis on compensation when considering proposed financial penalty terms, mean that this approach is only likely to be replicated in exceptional cases.

Organisations contemplating entering into DPAs whose activities bring them within the enforcement remit of other regulators, particularly the FCA, will also wish to be conscious of the gateways enabling information to be shared between authorities and of the potential for follow-on enforcement action to be taken. For instance, the FCA, which is currently paying particular attention to firms' financial crime compliance systems and controls may take action under, for example, Principles 2 (management and control) and/or 3 (skill care and diligence) of the Principles for Businesses) in respect of matters covered by a DPA.

What happens next?

It is expected that the SFO may embark upon tentative negotiations in some cases relatively quickly after the formal introduction of DPAs on 24 February. The finalised Joint Code offers organisations involved in such negotiations or contemplating whether a DPA may be a suitable resolution more certainty and greater comfort that prosecutors will approach matters pragmatically in a number of areas than the relatively uncompromising draft version consulted on last year.

However, practice will be the real guide, particularly to the principal remaining unknown quantity; the approach of judges, who have a right of veto over proposed DPAs. Given the novelty of the concept of DPAs in English law, the relative infrequency with which prosecutors will consider DPAs and the wish of the Courts to subject proposed settlements to close scrutiny, it will take some time for the answers to remaining questions to become clear.

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