

## Deferred Prosecution Agreements Are Coming To The UK

*Law360, New York (December 20, 2012, 10:27 AM ET)* -- On Oct. 23, 2012, the U.K. government published its response to the consultation on deferred prosecution agreements (DPAs). The consultation was published on May 17, 2012, and we considered it to raise a number of issues, as addressed in our previous e-bulletin, "U.K. Deferred Prosecution Agreements — are they the Bridge between Prosecution and Civil Recovery?"

In its response, the government states that it is committed to the introduction of DPAs as an additional resource available to prosecutors of economic crime, in particular fraud, bribery and money laundering. The Crime and Courts Bill 2012-13, which contains the relevant legislation, is currently passing through the House of Commons.

DPAs will be available to any party that is not an individual. This means that DPAs will apply to organizations, with no distinction between commercial and noncommercial organizations. Relevant offenses will include only economic crimes. DPAs will have retrospective application in that they will be available for conduct that took place before the commencement of the legislation providing for DPAs, where no proceedings have yet commenced against the organization.

A key incentive for organizations to enter into a DPA is the avoidance of prosecution and potential criminal conviction. Furthermore, the government remains of the view that a reduction of the financial penalty is required in order to incentivise organizations to cooperate in proceeding to a DPA. The available reduction will mirror that for a guilty plea at the first reasonable opportunity in proceedings, currently at one-third.

Interestingly, the government has proposed that in addition to the financial penalty, there should only be disgorgement of "profits," not all benefits obtained for the conduct. This is in contrast to the criminal confiscation regime and/or civil recovery regime under the Proceeds of Crime Act 2002 which applies to all benefits, albeit in practice in the corporate cases we have been involved in, the "benefit" has always been measured by reference to the profits. This concession will make DPAs more attractive to corporates. However, the fact that none of the funds go to the prosecution (unlike with confiscation/civil recovery orders) will act as a prosecutorial disincentive.

### The Proposed Model

#### 1. Process

The proposed model for DPAs, as set out in our previous E-Bulletin, includes a preliminary and final hearing before a judge to ensure that the DPA is properly scrutinized, transparent and in the interests of justice. Considering the response, the model stands as follows:

- **Approval:** Any decision by the prosecutor to enter into a DPA is to be personally approved by the director of public prosecutions or the director of the Serious Fraud Office (the “SFO”). This is to ensure that DPAs relating to offenses of bribery are aligned with the Bribery Act 2010, which requires the said approval before prosecution.
- **Initiation of Proceedings:** The prosecutor will begin proceedings in the Crown Court.
- **Initial Hearing:** The initial hearing will be held in private. The judge will indicate whether a DPA would be “in the interests of justice” and whether the proposed terms are “fair, reasonable and proportionate.” Reasons will be given by the judge in private.
- **Final Hearing:** The final hearing may be held in private. However, if the DPA is approved, the judge will make a declaration thereof and provide reasons in open court.
- **Charges:** Charges will be laid in the Crown Court without the need to go back to the Magistrate’s court.
- **Publication:** Upon approval of the DPA, the prosecutor will be obliged to publish the final DPA and the details of rulings made at the final hearing and any previous hearings, including reasons given. At the end of the DPA process, details of the organization’s compliance with the DPA will also be published by the prosecutor. Details of the facts and approach taken in the event of breach, variation or termination of the DPA will also be published.

The proposed model differs from U.S. DPAs by involving earlier and greater judicial oversight. The government also intends that the U.K. model will provide more transparency than that of the U.S.

## ***2. Contents of the DPA***

In order to allow sufficient flexibility to tailor the DPA to the particular wrongdoing, the government does not intend to set out an exhaustive list of terms and conditions to be included in the DPA. There will however be two mandatory elements.

The first mandatory element is a statement of facts agreed by the organization and attached to the agreement. The government agreed with our view as set out in our previous e-bulletin that an admission of guilt should not be required. The second mandatory element is an expiry date upon which the DPA will cease to have effect, thus giving clarity regarding the duration of the deferral period.

## ***3. Disclosure***

Under a DPA, a company may be required to cooperate with any investigation of their employees, including by making available nonprivileged information, as well as providing access to witnesses. Following our concern for it to be made clear that companies will not be expected to waive privilege under a DPA, we are glad to see that the response clarifies that entering in to a DPA does not remove other grounds on which to refuse disclosure, such as legal professional privilege. The government does not intend to make it a condition of the DPA that commercial organizations should waive privilege.

## ***4. Variation, Breach and Judicial Review***

If parties wish to vary the DPA, for example, in order to avoid breach, the variation will need to be approved by the court. If a breach is alleged to have occurred, the prosecutor may refer that alleged breach to the court for determination. Any factual determination of the breach would be binding on the parties.

Following the determination of a breach, the court has two options: it may invite the parties to agree proposals to remedy the organization's failure to comply (for example, by variation of the DPA), or it may terminate the DPA. If the DPA is terminated, the prosecution may then apply to the court to have the suspension of the underlying proceedings lifted.

The role of the court in relation to a DPA will not be open to judicial review. However, a prosecutor's decision such as that not to prosecute will remain open to challenge. This leaves an amount of risk and uncertainty in the use of DPAs.

## **Supporting Guidance**

### ***1. DPA Code of Practice for Prosecutors***

The government proposes that the director of public prosecutions and the director of the SFO issue a statutory DPA Code of Practice for Prosecutors (the "Code"). It expects the proposed contents of the Code to be consulted on separately.

The Code will set out the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case. It will also address the disclosure of information by a prosecutor to the organization in the course of negotiations for a DPA and after a DPA has been agreed. The Code may cover other areas such as the use of information obtained by a prosecutor in the course of the DPA negotiations, variation/termination of a DPA, and steps that may be taken by a prosecutor when the prosecutor suspects a breach of a DPA.

In the response, the government notes additional components to be addressed by the Code, as flagged by respondents to the consultation. Some of these components go to the issues we cited in our previous e-bulletin, such as further information on the level of protection for legal professional privilege, the status of admissions, and obligations relating to disclosure of evidence.

### ***2. Sentencing Guidelines***

In order to provide sufficient certainty to prosecutors and organizations entering into a DPA, the government remains of the view that a guideline to sentencing is required. The Sentencing Council has indicated its current intention to produce sentencing guidelines for offenses that are likely to be encompassed by DPAs when committed by an organization. This guidance will not be DPA-specific, but the government is comfortable that it will provide sufficient certainty to parties. In our view, it will be helpful since it is likely that a penalty under the DPA will be consistent with the penalty imposed in the event of a prosecution/conviction, subject to an appropriate discount, currently one-third as stated above.

## **Conclusion**

We welcome the introduction of DPAs as an efficient way for both prosecutors and organizations to rectify and remediate wrongdoing, and for wrongdoers to be penalized. It is possible that the prospective guidelines will assist in providing some additional clarity for organizations on issues such as protection of professional privilege and the basis for calculating the disgorgement figure. Despite

disgorgement being available under a DPA and in accordance with the attorney general's latest guidance to the SFO we believe that there will still be cases in which civil recovery is more appropriate than prosecution/deferred prosecution.

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