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Crime and Courts Act 2013: Deferred Prosecution Agreements Code of Practice

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The authors explore the key sections of the draft Code of Practice on Deferred Prosecution Agreements issued recently in the United Kingdom by the Director of the Serious Fraud Office and the Director of Public Prosecutions.

Several months ago, the Director of the Serious Fraud Office (the "SFO") and the Director of Public Prosecutions issued their draft DPA Code on Deferred Prosecution Agreements ("DPAs"), namely the Deferred Prosecution Agreement Code of Practice (the "Code"), pursuant to paragraph 6 (1) of Schedule 17 of the Crime and Courts Act 2013 (the "Act").

The stated purpose of the Code is to provide guidance to prosecutors negotiating DPAs with organizations they are considering prosecuting. The Code also aims to provide guidance to organizations on the factors that will be taken into account by prosecutors when they are considering whether or not to prosecute or offer a DPA.

The Directors of the SFO and the Crown Prosecution Service (the "CPS") have highlighted eight areas within the Code on which they sought views. The deadline for comment was September 20, 2013. Further developments are anticipated. This article sets out parts of the Code that are of

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interest and those parts that may cause considerable debate prior to the close of the consultation process.

The Code will be particularly important for those considering the advantages and disadvantages of self-reporting. It gives guidance on how far a "self-reporter" may have to go to be eligible for a DPA.

WHETHER A DPA IS A POSSIBLE DISPOSAL OF ALLEGED CRIMINAL CONDUCT

The Directors have stated that in order to determine whether it would be appropriate to enter into a DPA, the prosecutor must apply the evidential and public interest tests.

The Evidential Test

The evidential test requires the prosecutor to satisfy either the evidential stage of the full Code Test for Crown Prosecutors, i.e. that "there is a realistic prospect of conviction" or that "there is a reasonable suspicion that the commercial organization has committed the offense and that a continued investigation would provide further evidence, within a reasonable period of time, such that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the full Code Test."

This second evidential test, based on the belief that a continued investigation would produce sufficient evidence to launch a prosecution, allows the prosecutors to cut short lengthy investigations. Although, it should be noted that it is often very difficult for prosecutors to predict the likely outcome of an investigation and even more difficult to predict the likelihood of a conviction in court.

The potential risk of this approach is that the SFO and CPS may be tempted to offer a DPA when the case has not been fully investigated. Equally, the defendant organization may be tempted to accept the offer when the reality may be that there would not have been enough evidence to prosecute the case in court. Some of the uncertainty in this approach will be reduced by the disclosure requirements. However, the speed and efficiency of this process may well suit both parties.

The Public Interest Test

Once the prosecutor is satisfied that the evidential test is passed s/he must assess the public interest in prosecuting the organization. The Code sets out factors which will lead a prosecutor towards or away from a decision to prosecute. Interestingly, the Code imports a presumption in favor of prosecution: "A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in [favor] of prosecution."[1]

Perhaps referring to decisions made in previous high profile bribery cases, the Code states that the prosecutor, when investigating and prosecuting the bribery of foreign public officials, should not be influenced by considerations of "national economic interests, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

FACTORS THAT THE PROSECUTOR MAY TAKE INTO ACCOUNT WHEN DECIDING WHETHER TO ENTER INTO A DPA

In Favor of a Prosecution

The Code lists of some of the factors which will lead a prosecutor to prosecute rather than offer a DPA. One factor worthy of note is whether the potential offense was committed at a time when the company had an ineffective corporate compliance program in place. This suggests that any corporate being investigated for not having "adequate procedures" in place[2] is unlikely to be offered a DPA. For those who are concerned about their compliance programs, this may provide a disincentive for companies to self-report in the hope a DPA may be granted.

One of the other factors that will favor a prosecution is the failure of the organization to report wrongdoing "within *reasonable* time of the offending coming to light" and a "failure to report *properly* and *fully* the true extent of the wrongdoing." (Emphasis added.) A company considering a self-report will need to be conscious, not just of the clock on the timing of any self-report, but also the level of detail the SFO may require.[3]

Against Prosecution

The Code lists some of the factors that will mitigate against prosecution.

The first of these is a "proactive approach by the corporate management team when the offending is brought to their notice, involving self reporting and remedial actions." The Code further states that in "applying this factor the prosecutor needs to establish whether the company has provided sufficient information to assess whether the company has been proactively compliant. This will include making witnesses available and disclosing details of any internal investigation." This could mean that the SFO and CPS will require the organization to waive privilege over the interview notes, investigation plans and other material related to the investigation. Failure to do so may lead to prosecution. We consider such a step is a step too far. It is not required in the United States nor in the United Kingdom in order to obtain immunity with respect to competition matters. This is an area of the Code which should be clarified before it is finalized.

The prosecutor will also consider how early the corporate self reports and how engaged it is with the prosecutor. The prosecutor will be assessing any internal investigations and looking out for any delay in obtaining first accounts "affording witnesses the opportunity to fabricate evidence." However, the reality is that in most internal investigations, a considerable amount of work needs to be completed before first accounts can be taken from witnesses. Similarly, SFO investigations are normally well developed before investigators begin taking first accounts from suspects or witnesses. The risk with this proposal in the Code is that a justified delay by the organization in conducting interviews in an internal investigation may lead the prosecutor to come to an erroneous conclusion about the reasons for the delay. This may lead to uncertainty and confusion and add to concerns that a DPA may not be granted. We consider that the Code should be clarified here to recognize the need for a proper internal review before a conclusion has to be made about a self-report.

PROCESS FOR INVITATION TO ENTER IN DPA NEGOTIATIONS

The Code requires the prosecutor to ensure that the prosecution and the organization have obtained enough information from each other so they can play an informed part in the negotiations. This will be governed by the dis-

closure requirements imposed by the Code. The Code also states that records must be kept of negotiations, including details of every offer and concession. This raises a number of concerns as it seems that this material could be used by the prosecutor should DPA negotiations fail (this is discussed below). It is also perhaps worth highlighting that the prosecutor will be unable to undertake not to disclose information received to foreign jurisdictions requesting material under a request for Mutual Legal Assistance. This is likely to be a further legitimate concern where parties are trying to co-ordinate the settlement of a global case where multiple prosecutors are involved.

SUBSEQUENT USE OF INFORMATION OBTAINED BY A PROSECUTOR DURING THE DPA NEGOTIATION PERIOD

The Code refers to the legislation governing the use of information provided during this process.[4] The Code then highlights the fact that the use of material provided during negotiations when a DPA has not been approved is governed by Paragraph 13 (6) of Schedule 17 of the Act. The "limited use" provisions of this section refer only to the categories of material specified in Paragraph 13(6). The result of this is that there is no limitation on the use that can be made of other material provided during the negotiation process. This includes any report on an internal or independent investigation carried out by or for the organization prior to the DPA negotiation period commencing and any interview notes or witness statements obtained from an employee of the organization prior to the DPA negotiation period commencing.

Any attempt to delay an internal investigation until the commencement of DPA negotiations and thereby take advantage of the "limited use" provisions is likely to be seen as a factor in favor of a prosecution and not allowing a DPA, as it may seem that, at least initially, the organization will be unable to report properly and fully the extent of the wrongdoing.

UNUSED MATERIAL AND DISCLOSURE

The Code points out that DPA negotiations will not trigger the statutory disclosure regime. However, the Code does require the prosecutor to ensure that the organization is not misled as to the strength of the prosecu-

tion case. The Code adds that the prosecutor must always be aware of the potential need to disclose material in the interests of justice and fairness, and that a statement of the prosecutors duty of disclosure described above will be included in the terms and conditions letter provided to the commercial organization at the outset of negotiations.

The Code's duty of disclosure is an ongoing one and the prosecutor must disclose any material that comes to light after the DPA has been agreed which would ordinarily satisfy the test for disclosure.

STATEMENTS OF FACTS

The statement of facts included in the application to the court for approval of the DPA must be agreed between the parties. It is interesting that although there is no requirement for the organization to admit guilt in respect of the offenses charged in the bill of indictment, "it will be necessary for the corporate to admit the contents and meaning of key documents referred to in the statement of facts." This may well be tantamount to admitting guilt without admitting the actual offense.

TERMS TO BE INCLUDED IN A DPA

The Code sets out examples of terms that may be included within DPAs. The prosecutor and the organization are free to agree terms of a DPA which are fair, reasonable and proportionate. However, there are further terms which, according to the Code, must be included. These include a warranty by the organization that the information provided to the prosecutor during the DPA process is not misleading or incomplete. The organization should also provide the prosecutor with any material that it becomes aware of during the term of the DPA that would have been relevant to the offenses particularized in the draft indictment. This would be an onerous requirement and, possibly, where the omissions are material, could expose the organization to the risk of prosecution because the warranty referred to above is not accurate. In a footnote to the Code, it is made clear that the prosecutor cannot agree to a term that would prevent the organization from being prosecuted for conduct not included in the bill of indictment even where the conduct has been

disclosed during the course of DPA proceedings. This is at odds with the system in the United States where the practice is that the Department of Justice frequently agrees not to use any information disclosed to it by the organization during DPA negotiations, even if that information does not form part of the DPA agreement. This proposal does not sit comfortably with other provisions in the Code that require the organization to provide proper disclosure to the prosecutor. It may also be unattractive to organizations that wish to have all matters dealt in one agreement rather than risk further enforcement action further down the line, but do not have sufficient visibility of compliance issues in their organization to justify inclusion in the DPA agreement.

The Code also makes it clear that when a financial penalty is to be imposed it must be approximate to the penalty the organization would have received had it pleaded guilty. This point was the subject of considerable debate in the House of Lords during the reading of the Crime & Courts Bill. Opponents of this section argued that offering an organization the same discount for a DPA as they would have received for a guilty plea removes a significant incentive for an organization to agree to a DPA.

In addition to the maximum discount the organization would have received for a guilty plea there may be an additional reduction where an organization assists in the investigation or prosecution of others. There is no guarantee of a reduction for providing such assistance but any additional discount will depend on the circumstances and reflect the level of assistance given.

THE USE OF A MONITOR

The Code states that an important consideration for entering into a DPA is whether the corporate already has a genuinely proactive and effective corporate compliance program, and as such the use of monitors should be approached with care. However, where the terms of the DPA do require a monitor to be appointed, it will be the responsibility of the organization to pay all costs in relation to the selection, appointment, remuneration and monitoring. Further, where monitorship is proposed, then prior to the DPA receiving approval, the monitor must be selected, provisionally appointed and the terms of the monitorship agreed by the parties to the DPA with a detailed work plan for the first year in place.

PRELIMINARY HEARING

The Code states that this is the hearing at which the issue of concurrent jurisdiction, namely where two or more different courts within the same territory will simultaneously have jurisdiction over the same subject matter, should be raised with the court. There is no further comment as to how the court or parties should deal with issues such as a live investigation by another jurisdiction on the facts forming the basis of the DPA before it.

The final part of the draft Code provides an overview of issues relating to the final hearing, breach, termination, variation and discontinuance of DPAs.

CONCLUSION

The Code makes it clear that offering a DPA is a decision to be made by the prosecutor. The Code provides some guidance as to when and how that decision will be made but it is clear that prosecutors will have considerable scope in exercising this discretion. It remains to be seen how attractive the SFO and CPS wish to make DPAs to organizations. In its present form the Code, read in conjunction with the Act, provides only a few legal benefits to the corporate considering agreeing to a DPA rather than fighting, the principal ones being no debarment (where there is a risk of a Section 1 or Section 6 corporate Bribery Act offense having been committed); and any equivalent of confiscation may be agreed at the (gross) profits not the revenue of, for example, any contract tainted by corruption. Of course, there may be reputational issues which mean any trial should be avoided.

NOTES

[1] Paragraph 9.
[2] Bribery Act 2010, Section 7.
[3] For further information please refer to the SFO Self Reporting Guidelines.
[4] Paragraph 13 of Schedule 17 of the Act.