

Deferred prosecution agreements Q&A

Deferred Prosecution Agreements — what are they and how do they work?

What is a deferred prosecution agreement?

A deferred prosecution agreement ('a DPA') is an agreement between a prosecutor and an organisation whom the prosecutor is considering prosecuting. DPAs provide a mechanism for effectively settling the criminal liability of a corporate entity without prosecution, in return for the corporate agreeing to a number of terms and conditions. Under a DPA, the criminal proceedings against the corporate are suspended until the DPA expires. On expiry of the DPA, the criminal proceedings are discontinued.

These types of agreements have often been used by prosecutors in the United States.

Who can enter into DPAs?

Body corporates, partnerships and unincorporated associations may enter into DPAs. DPAs are not available to individuals suspected of an offence.

Which offences do DPAs apply to?

DPAs may be entered into in respect of a range of fraud and corruption related offences. These include theft, bribery and money laundering offences.

It can be anticipated that DPAs will become common in Bribery Act cases, where commercial organisations are faced with strict liability for the actions of third parties that are associated with them.

What requirements might a DPA include?

A DPA may include a broad range of terms. These may include the following:

- To pay the prosecutor a financial penalty
- To compensate victims of the alleged offence
- To pay the prosecutor's costs
- To implement a compliance programme

- To cooperate in any investigation related to the alleged offence

A DPA must contain a statement of facts relating to the alleged offence. These may include admissions by the commercial organisation, but there is no requirement for formal admissions of guilt.

A DPA will normally also contain a warranty as to the accuracy and completeness of the information provided to the prosecutor during negotiations.

How might a financial penalty under a DPA compare to a fine imposed by a court?

The financial penalty under a DPA must be broadly comparable to the fine that would be imposed following a guilty plea. This is a maximum of a one-third reduction. But there may also be an additional reduction where an organisation assists, for example, in the investigation or prosecution of offending by others. The Sentencing Council for England and Wales has published sentencing guidelines for financial crimes (specifically bribery, fraud and money laundering) for corporate offenders. These guidelines will inform the level of financial penalty payable under a DPA.

Will a commercial organisation have a right to commence negotiations with the prosecutor for a DPA?

No. The invitation to negotiate a DPA is a matter for the prosecutor's discretion. When considering whether a DPA is likely to be appropriate, the prosecutor will have regard to various codes of practice, including a Code of Practice governing DPAs.

We consider, however, that there may be scope for a commercial organisation to negotiate a DPA invitation through a process of 'self reporting'.

Does the court need to approve the DPA?

Yes. At a preliminary hearing, the court must declare that the DPA is likely to be in the interests of justice; and that the proposed terms of the DPA are fair, reasonable and proportionate. After the prosecutor and the organisation have agreed the terms of a DPA, a final hearing will take place. At that hearing, in order for the DPA to come into force, the court must be satisfied that the DPA is in the interests of justice, and the terms of the DPA are fair, reasonable and proportionate.

Is the existence of a DPA made public?

The negotiation process leading up to a DPA and the preliminary court hearing should be confidential. However, if the court decides to approve the DPA, it must give reasons for doing so in public. Furthermore, the DPA will be published, unless the prosecutor is prevented from doing so by an enactment or if there is a risk of prejudicing any other legal proceedings.

If the negotiation process fails, what will happen to information provided by the organisation to the prosecutor in the negotiation process?

The Code of Practice governing DPAs makes it clear that documents provided to the prosecutor during the course of any negotiations would be available to be used by the prosecutor in a subsequent prosecution of the organisation if the DPA negotiation failed.

What happens if the terms of a DPA are breached?

The prosecutor can apply to the court. If the court finds that an organisation has failed to comply with the terms of its DPA, it may either invite the prosecutor and the organisation to agree proposals to remedy the organisation's failure to comply with the DPA, or it may terminate the DPA.

Will the legislation that applies to DPAs be retrospective in effect?

Yes. DPAs can be used after 24 February 2014 in respect of conduct that took place at any time before that date.

Does this mean the end of civil settlements with the Serious Fraud Office?

No. Criminal conduct can still be dealt with by way of a civil recovery order, in appropriate cases.

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**Quotation from
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"They've got great cases, which are just beautifully prepared."

"They give their clients a fantastic service."

**Quotations from
Chambers UK 2016**

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