Deferred Prosecution Agreements

A Practical Guide

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Introduction

The introduction of Deferred Prosecution Agreements ("DPA") in the UK has been hotly anticipated. On 24 February 2014 the underlying legislative scheme (Schedule 17 of the Crime and Courts Act 2013) will finally come into force. This publication aims to provide a practical, working guide to the process through which DPAs will be offered, arranged and, if breached, terminated. In doing so it identifies the relevant provisions and guidance, linking the reader to the source material. The final section explores current DPA trends in the United States.

Whether the provisions will usher in a new era of corporate accountability remains to be seen. Time will tell whether the operative framework, in its current form, is workable and whether or not companies (and their advisers) will consider the pursuit of a DPA to be an attractive alternative to the threat of litigation. For the Serious Fraud Office ("SFO") at least, the option of DPAs will no doubt reinvigorate its appetite for taking action against corporate misconduct.

Whilst the under-resourced SFO may see clear benefits, for companies the position is likely to be more opaque and finely balanced. DPAs offer several potential benefits to companies: a degree of certainty, especially in regards to penalty; the opportunity to prepare for and manage the reputational damage; the opportunity to review and restructure their internal systems and controls; and the avoidance of protracted litigation, carrying a risk of criminal conviction.

However, the relative lack of recent success by UK authorities when pursuing companies will act as a counterpoint to the perceived benefits of a DPA, especially given the inherent difficulty of establishing corporate criminal liability. Moreover, the DPA scheme poses risks to those facing prosecution:

- Having self-reported, companies will have no guarantee of reaching a DPA, especially given the requirement for judicial approval;
- Companies could still face prosecution in other jurisdictions;
- Individual employees linked to the misconduct may be the subject of a prosecution, causing the reputational damage that the company had previously sought to avoid; and
- The increased scrutiny placed on a company subject to a DPA may reveal other problematic conduct.

In assessing the merits of a DPA, companies should hesitate to draw upon the US experience, the process in the UK being materially different. Most notably, the UK statutory framework entails more rigorous judicial oversight. Courts can only approve the DPA having considered the interests of justice, and are then responsible for deciding whether the company subsequently breaches the agreement. In contrast, the US courts' approval of DPAs has historically been perfunctory and it is the Department of Justice's responsibility to determine breach. Although there are indications that the approach of the US courts may be changing, it remains the case that there is no clear authority or established protocol for judicial involvement (click here for related commentary).

The diagram on the following page shows the key stages of the DPA process. By clicking on each step, the reader will be taken to the corresponding notes. Links to the relevant materials are set out below.

This publication has been prepared by the WilmerHale Investigations and Criminal Litigation Team, which specialises in the full spectrum of white collar crime and financial services enforcement work.

Links to relevant materials:

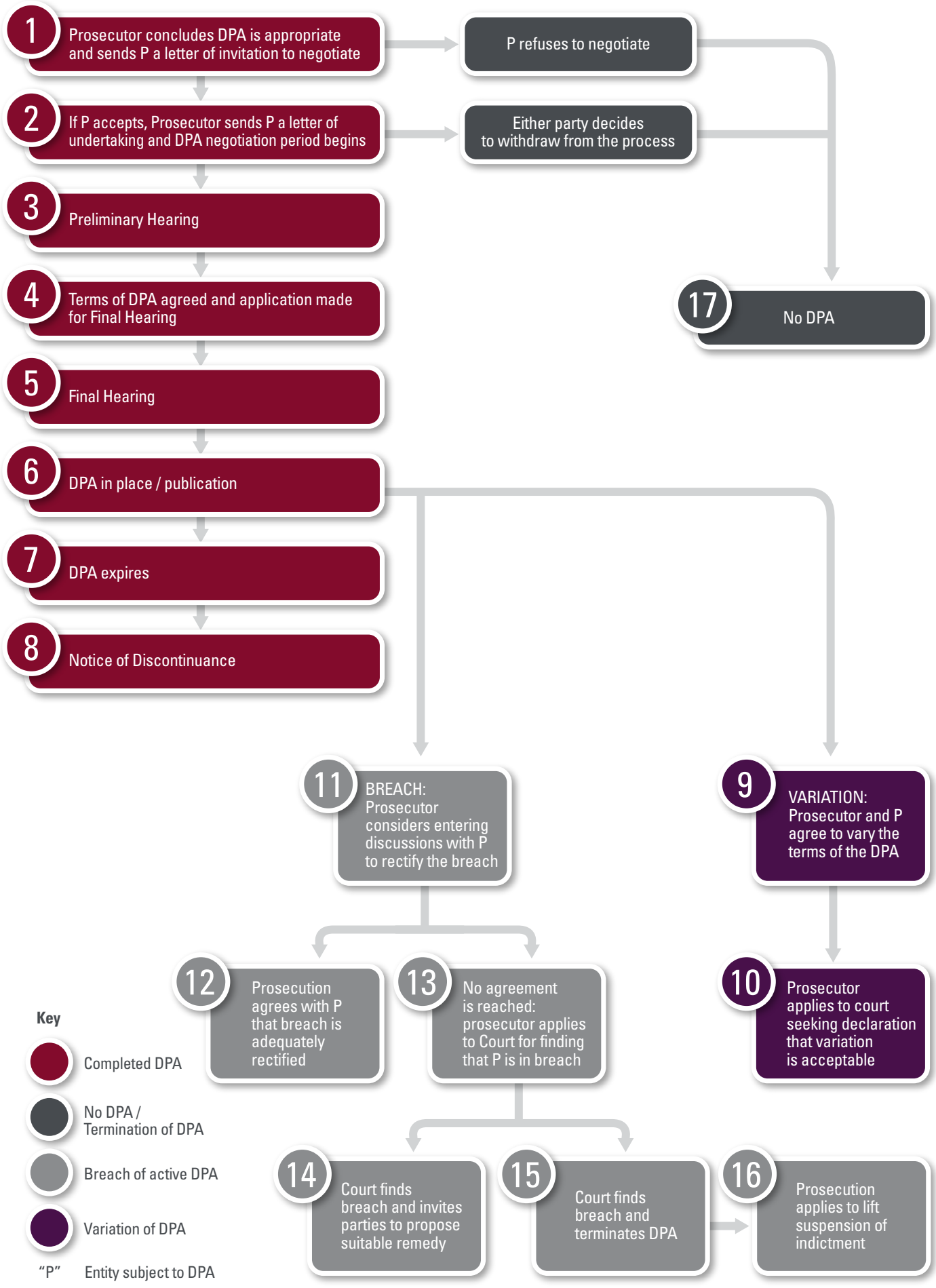
Schedule 17 of the Crime and Courts Act 2013

Deferred Prosecution Agreements Code of Practice

Rule 12 of the Criminal Procedure Rules (specifically pertaining to DPAs)

UK DPA Process
Route Map

Click on each numbered step of the DPA process to be taken to the corresponding notes



UK DPA Process
Accompanying Notes

To be read in conjunction with the Route Map

1 PROSECUTOR CONSIDERS WHETHER DPA IS AN APPROPRIATE MEANS OF DISPOSAL

PROSECUTOR

Only the Director of Public Prosecutions or the Director of the Serious Fraud Office may enter into a DPA with P (p.3(1) Schedule 17, Crime and Courts Act 2013).

WHO CAN ENTER INTO A DPA WITH THE PROSECUTOR?

DPAs can be entered into with a company, partnership or unincorporated association ("P") whom the prosecutor is considering prosecuting for a specified offence. A DPA cannot be entered into with an individual.

APPLICABLE OFFENCES

The list of offences in relation to which a DPA may be entered into is included at Part 2 of Schedule 17, Crime and Courts Act 2013. The list includes the common law offences of conspiracy to defraud and cheating the public revenue as well as offences under, amongst others, the following statutes: Fraud Act 2006, Bribery Act 2010, Companies Act 2010, Financial Services and Markets Act 2000 and Proceeds of Crime Act 2002.

IS A DPA APPROPRIATE? THE TWO STAGE TEST

The DPA Code states that before a prosecutor can enter into a DPA, the following two stage test must be satisfied.

Stage 1 – Evidential Stage:
In order to pass the evidential stage, either:

- The evidential stage of the full code test in The Code for Crown Prosecutors must be satisfied. This requires the prosecutor to satisfy itself that there is sufficient evidence to provide a realistic prospect of conviction.

OR, if this test is not met,

- There is at least a reasonable suspicion that the commercial organisation has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the full code test.

The DPA Code does not make clear the lengths to which the prosecutor is required to go in order to satisfy the full code test before it is entitled to rely on the alternative, lower threshold. It simply suggests that the prosecutor must consider the full code test first.

It should be noted that, somewhat curiously, the DPA Code espouses a slightly different test for determining when a prosecutor can 'initiate negotiations'. The prosecutor must be satisfied that: either the evidential stage of the full code test is met or 'there is a reasonable suspicion based on some admissible evidence that P has committed an offence'; and that the full extent of the alleged offending has been identified.

Stage 2 – Public Interest Stage:
In order to pass the public interest stage, the public interest must be properly served by the prosecutor entering into a DPA with P instead of prosecuting.

The DPA Code states that, where the evidential limb of the two stage test is met, a prosecution will usually be initiated unless the public interest factors against it clearly outweigh those in favour.

Prosecutors will have regard to the public interest factors in The Code for Crown Prosecutors, and in the Bribery Act Guidance where applicable, as well as to the following additional (non-exhaustive) factors found in the DPA Code.

Additional Public Interest Factors in Favour of Prosecution	Additional Public Interest Factors Against Prosecution
A history of similar conduct including prior criminal, civil and regulatory enforcement.	A lack of history of similar conduct including prior criminal, civil and regulatory enforcement.
P failed to report wrongdoing within a reasonable time of the conduct coming to light.	A genuinely proactive approach has been adopted by P's management team when offending is brought to their notice, involving self-reporting and remedial actions, including compensation of victims. This includes making witnesses available to the prosecutor and disclosing the details of any internal investigation.
P failed to report the full extent of the wrongdoing or reported it inaccurately or in a misleading way.	
P had an ineffective corporate compliance programme.	P had a genuinely proactive and effective corporate compliance programme at the time of both the offending and the reporting.
The conduct alleged is part of established business practices.	The offending represents isolated actions by individuals.
P had been previously subject to warning, sanction or criminal charge and has failed to take remedial action.	The offending is not recent in nature, and P in its current form is effectively a different body to that which committed the offences.
Significant harm caused, directly or indirectly, to the victims, or a substantial adverse impact on the integrity or confidence of markets or the government.	A conviction is likely to have unduly disproportionate consequences for P under the law of another jurisdiction including European Law.
	A conviction is likely to have collateral effects on the public / P's employees / shareholders.

When considering the additional factors against prosecution, the prosecutor will consider the totality of the information provided by P in its self-report. P must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and future prosecution of individuals.

The prosecutor will also consider how early P self-reports and the extent to which P involves the prosecutor in the early stages of an investigation. The prosecutor will assess the extent to which P's failure to self-report in a timely fashion may have prejudiced the investigation. In particular it will consider whether the manner in which any internal investigation was conducted could either have led to material being destroyed or have provided an opportunity for suspects to fabricate their accounts given the delay in the investigation.

In order to initiate DPA discussions, the prosecutor will send a letter that:

- Confirms the prosecutor's decision to offer P the opportunity to enter into DPA negotiations;
- Requests confirmation as to whether P wishes to enter into negotiations; and
- Gives a timeframe within which P must notify the prosecutor whether it wishes to enter into negotiations.

The DPA Code makes clear that an invitation to enter discussions is not a guarantee that a DPA will be offered at their conclusion.

2 PROSECUTOR SENDS P A LETTER OF UNDERTAKING

Once P has agreed to enter into DPA negotiations, the prosecutor sends a further letter setting out the way in which discussions will be conducted. The letter makes undertakings in respect of:

- The confidentiality of the fact that DPA negotiations are taking place; and
- The confidentiality of the information provided by the prosecutor and P in the course of the DPA negotiations.

The letter will make clear the use which may be made by the prosecutor of such information and inform P that the information may be disclosed as unused material in any future prosecution or as permitted by law.

The letter must also include a statement of the prosecutor's responsibility for disclosure of material pursuant to the DPA Code and set out the practical means by which discussions will be conducted including appropriate time limits.

The prosecutor will require P to provide undertakings that:

- Information provided by the prosecutor in the course of DPA negotiations will be treated as confidential and will not be disclosed to any other party, other than for the purposes of the DPA negotiations or as required by law; and
- P will retain all documentation or other material relevant to the conduct under consideration by the prosecutor.

The DPA Code makes clear that the prosecutor must not continue with substantive DPA negotiations until the undertakings have been obtained in a signed agreement. When sharing information with the prosecutor, P should keep in mind that, even after the DPA has expired and the criminal proceedings discontinued, fresh criminal proceedings may be instituted against P for the same alleged offence if the prosecutor finds that, during the course of negotiations for the DPA:

- P provided inaccurate, misleading or incomplete information to the prosecutor; and
- P knew or ought to have known that the information was inaccurate, misleading or incomplete (p.11(2) & (3) Schedule 17, Crime and Courts Act 2013).

NEGOTIATIONS

Either party can withdraw from the negotiations at any stage and does not have to give its reasons for doing so. However, it will normally be appropriate for the prosecutor to give 'the gist of the reasons' (DPA Code).

The negotiations must be transparent. A complete and accurate record of the negotiations must be prepared and retained, recording every key action and event in the discussion process. Minutes of meetings between the parties should be prepared, agreed by the parties and signed.

DISCLOSURE

The DPA Code sets out the position in relation to disclosure as follows:

- Whilst the statutory disclosure regime under the Criminal Procedure and Investigations Act 1996 ("CPIA") does not apply[1], the prosecution is still under an ongoing obligation to act fairly in the disclosure of material, pursuant to the interests of justice;
- P should have sufficient information to play an informed part in the DPA negotiations, and the prosecutor should ensure that P is not misled as to the strength of the prosecution case;
- Consideration should be given by the prosecutor to reasonable and specific requests by P for disclosure. Where the need for such disclosure is not apparent to the prosecutor, any disclosure may depend on what P chooses to reveal when seeking to justify the request; and
- The duty of disclosure is a continuing one and the prosecutor must disclose to P any qualifying material that comes to light after the DPA has been agreed.

1 Technically the CPIA applies after the indictment is preferred at the Final Hearing, but immediately ceases to apply following the subsequent suspension of the indictment.

3 PRELIMINARY HEARING

Once negotiations are underway, but before the terms of the DPA have been agreed, the prosecutor must apply to the Crown Court for a declaration that:

- Entering into a DPA with P is likely to be in the interests of justice; and
- The proposed terms of the DPA are fair, reasonable and proportionate (p.7(1) Schedule 17, Crime and Courts Act 2013).

The Preliminary Hearing must be held in private (p.7(4) Schedule 17, Crime and Courts Act 2013).

Both the prosecutor and P must be present at this hearing (r.12.2(3)(a) Criminal Procedure Rules). The prosecutor and P must provide the Court with a written declaration that they have not supplied inaccurate, misleading or incomplete information (r.12.2(3)(b) Criminal Procedure Rules).

The prosecutor must include the following in its application for the Preliminary Hearing (r.12.3(3) Criminal Procedure Rules):

- The identity of the parties to the proposed agreement;
- A proposed indictment setting out the offences;
- A Statement of Facts proposed for inclusion in the agreement, which must give full particulars of each alleged offence, including details of any alleged financial gain or loss;
- Any information about P that would be relevant to sentence if convicted;
- The proposed expiry date of the agreement;[2]
- A description of the proposed terms of the agreement;
- An explanation of how the terms comply with (1) the DPA Code and (2) any sentencing guidelines or guideline cases which apply;
- P's written consent to the proposal; and
- An explanation of why entering into an agreement is likely to be in the interests of justice, and why the proposed terms of the agreement are fair, reasonable and proportionate.

If the proposed Statement of Facts includes assertions that P does not admit, the application must specify the facts that are not admitted and explain why that is immaterial for the purposes of the proposal to enter an agreement (r.12.3(4) Criminal Procedure Rules).

If the Court approves a proposal to enter an agreement, the general rule will be that any further applications that are necessary should be made to the same judge (r.12.2(5)(a) Criminal Procedure Rules). It should be noted that a finding by the Court that the DPA is in principle appropriate does not bind the Judge to approve the agreement at the Final Hearing.

The Court may proceed to the Final Hearing immediately after the Preliminary Hearing if it has approved the proposal to enter into an agreement (r.12.2(7)(a) Criminal Procedure Rules). In these circumstances, the Court may allow an application for a Final Hearing to be made orally (r.12.11(1) Criminal Procedure Rules).

If the Court declines to make a declaration at the Preliminary Hearing, the prosecutor may make a further application (p.7(3) Schedule 17, Crime and Courts Act 2013). However, it should be noted that if a DPA is eventually sanctioned, the prosecutor will be required to publish the reasons why the Court originally declined to make the declaration (p.8(7)(c) Schedule 17, Crime and Courts Act 2013).

There is no right of appeal in relation to the outcome of a Preliminary Hearing.

4 TERMS OF DPA AGREED AND APPLICATION MADE FOR FINAL HEARING

The terms of any DPA must be fair, reasonable and proportionate. The proposed duration of the DPA must be sufficient to allow for its terms to be honoured (including, for example, compliance and monitoring).

The following is a non-exhaustive list of requirements that a DPA may impose on P, and which may be subject to time limits[3]:

- To pay to the prosecutor a financial penalty (the amount of any penalty to be broadly comparable to the fine that a Court would have imposed on P on conviction for the alleged offence following an early guilty plea);

2 Schedule 17 to the Crime and Courts Act 2013 and the DPA Code are silent as to the appropriate duration of a DPA. However, the Government's consultation paper on DPAs suggested that their duration was likely to be one to three years.

3 Some of these are contained within P.5(3) Schedule 17, Crime and Courts Act 2013.

- To compensate victims of the alleged offence;
- To donate money to charity or another third party;
- To disgorge any profits made by P from the alleged offence;
- To implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
- To cooperate in any investigation related to the alleged offence;
- To pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA;
- To comply with arrangements relating to the management and conduct of P's business;
- To allow P's compliance to be monitored, the cost of which is borne by P[4].

The DPA Code also states that a DPA may include terms prohibiting certain activities and / or imposing financial reporting obligations.

The prosecutor must make an application for the Final Hearing as soon as practicable after the parties have settled the terms (r.12.4(2)(a) Criminal Procedure Rules). The application must:

- Attach the agreement;
- Indicate in what respect the terms of the agreement differ from those proposed in the application for the Preliminary Hearing;
- Contain P's written consent to the agreement;
- Explain why the agreement is in the interests of justice and the terms are fair, reasonable and proportionate;
- Attach a draft indictment; and
- Include any application for The Final Hearing to be in private (r.12.4(3) Criminal Procedure Rules).

5 FINAL HEARING

Once P and the prosecutor have agreed the terms of the DPA, the prosecutor must apply to the Crown Court for a declaration that:

- The DPA is in the interests of justice; and
- The terms of the DPA are fair, reasonable and proportionate (p.8(1) Schedule 17, Crime and Courts Act 2013).

The prosecutor may not make an application for a Final Hearing unless the court has previously made a declaration at a Preliminary Hearing.

The Final Hearing may be held in private, but if the Court decides to approve the DPA it must do so and give its reasons in open court (p.8(4) & (5) Schedule 17, Crime and Courts Act 2013).

Both the prosecutor and P must be present at this hearing (r.12.2(3)(a) Criminal Procedure Rules). The prosecutor and P must provide the Court with a written declaration that the party making it has supplied no inaccurate, misleading or incomplete information of which that party is aware. The prosecutor must also declare that it has complied with its obligation to disclose material to P (r.12.2(3)(b) Criminal Procedure Rules).

6 DPA IN PLACE / PUBLICATION

A DPA only comes into force when it is approved by the Crown Court making a declaration at a Final Hearing (p.8(3) Schedule 17, Crime and Courts Act 2013).

At that stage, criminal proceedings will be instituted with the preferment of an indictment but automatically suspended (p.2(1) & (2) Schedule 17, Crime and Courts Act 2013). The suspension may only be lifted on an application to the Crown Court by the prosecutor, and no such application may be made while the DPA is in force (p.2(3) Schedule 17, Crime and Courts Act 2013).

Once a DPA is in force, the Statement of Facts contained within it will be treated as an admission by P under s.10 of the Criminal Justice Act 1967.

P.8(7) Schedule 17, Crime and Courts Act 2013 requires that, upon approval of the DPA the prosecutor must publish:

- The DPA;
- The declaration made by the Court at the Preliminary Hearing and the reasons for the Court's decision;

4 The DPA Code sets out further guidance on monitoring at para. 7.11 – 7.22

- If the Court initially declined to make a declaration at the Preliminary Hearing, the Court's reason for that decision; and
- The declaration made by the Court at the Final Hearing and the reasons for the Court's decision.

The Court may order that the publication of this information be postponed for such period as the Court considers necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

If a party wishes to obtain an order that publication be postponed, it must apply in writing as soon as practicable and in any event before publication occurs (r.12.9(2) Criminal Procedure Rules). The application must:

- Specify the proposed terms of the order and its duration; and
- Explain why an order in the proposed terms is necessary (r.12.9(2) Criminal Procedure Rules).

7 DPA EXPIRES

A DPA will expire on the specified date unless:

- There is an outstanding application by the prosecutor for a finding that the DPA has been breached;
- The Court has invited the parties to agree proposals after a breach has been found, but the parties have not yet reached an agreement; or
- The parties have agreed proposals to remedy P's breach, but P has not yet complied with the agreement (p.11(4) Schedule 17, Crime and Courts Act 2013).

Where there is an outstanding application by the prosecutor for breach, and the Court subsequently decides that no breach has occurred, the DPA is to be treated as expiring when that application is decided (p.11(5)(a) Schedule 17, Crime and Courts Act 2013).

Where the Court has invited the parties to agree proposals to remedy a breach, the DPA is to be treated as expiring when the parties have reached such an agreement and P has complied with it (p.11(5)(c) Schedule 17, Crime and Courts Act 2013).

8 NOTICE OF DISCONTINUANCE

If the DPA remains in force until its expiry date, the proceedings against P must be discontinued by the prosecutor giving notice to the Court that the prosecutor does not want proceedings to continue (p.11(1) Schedule 17, Crime and Courts Act 2013).

Fresh criminal proceedings may not be instituted against P for the alleged offence, unless the prosecutor finds that during the course of negotiations for the DPA:

- P provided inaccurate, misleading or incomplete information to the prosecutor; and
- P knew or ought to have known that the information was inaccurate, misleading or incomplete (p.11(2) & (3) Schedule 17, Crime and Courts Act 2013).

When proceedings are discontinued, the prosecutor must publish:

- The fact that the proceedings have been discontinued; and
- Details of P's compliance with the DPA (p.11(8) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

It should be noted that a DPA entered into in the UK is no bar to a subsequent criminal prosecution of the company in the US.

9 VARIATION IN CIRCUMSTANCES THAT COULD NOT HAVE BEEN FORESEEN BY THE PARTIES AT THE TIME THE DPA WAS AGREED

The prosecutor and P may agree to a variation of the DPA if necessary to avoid a failure by P to comply with its terms in circumstances that were not, and could not have been, foreseen by the prosecutor or P at the time that the DPA was entered (p.10(1) Schedule 17, Crime and Courts Act 2013).

10 PROSECUTOR MUST APPLY TO THE COURT TO SEEK A DECLARATION THAT THE VARIATION IS ACCEPTABLE

The prosecutor must apply to the Court for a declaration that the variation is acceptable, as soon as practicable after it has been agreed (r.12.6(2) Criminal Procedure Rules). The application must:

Specify each variation proposed;

- Contain or attach P's written consent to the variation;
- Explain why the variation is in the interests of justice and why the terms of the varied agreement are fair, reasonable and proportionate; and
- Include any application for the hearing to be in private (r.12.6(3) Criminal Procedure Rules).

Both the prosecutor and P must be present at this hearing (r.12.2(3)(a) Criminal Procedure Rules). The prosecutor and P must provide the Court with a written declaration that the party making it has supplied no inaccurate, misleading or incomplete information of which that party is aware, or of which the individual through whom the party makes the declaration is aware, after making reasonable enquiries (r.12.2(3)(b) Criminal Procedure Rules).

The Court must consider whether:

- The variation is in the interests of justice; and
- The terms of the DPA as varied are fair, reasonable and proportionate (p.10(2) Schedule 17, Crime and Courts Act 2013).

The Court must give reasons for its decisions (p.10(4) Schedule 17, Crime and Courts Act 2013).

The hearing may be held in private, but if the Court agrees to make a variation it must do so and give its reasons in open court (p.10(6) Schedule 17, Crime and Courts Act 2013). The prosecutor is required to publish the varied DPA and the Court's reasons for its declaration (p.10(8) Schedule 17, Crime and Courts Act 2013).

Where the Court decides not to approve the variation, the prosecutor must publish the Court's decision and the reasons for it (p.10(7) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

11 BREACH OF THE DPA

The DPA Code makes clear that if, prior to the expiry of the DPA, the prosecutor believes that P is in breach of it, where possible the prosecutor should ask P to rectify the alleged breach immediately.

12 BREACH IS ADEQUATELY RECTIFIED THROUGH DISCUSSIONS

If the breach can be adequately rectified through agreement between the parties the prosecutor can avoid involving the Court. However, the prosecutor must subsequently publish (a) the reasons for believing that P has failed to comply; and (b) the reasons for not making an application to the Court (p.9(8) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

13 PROSECUTOR APPLIES TO COURT SEEKING A FINDING THAT P IS IN BREACH

If the parties fail to reach an agreement or the prosecutor considers the breach to be so material that it cannot adequately be rectified, it may make an application to the Court seeking a finding that P is in breach. (r.12.5(2)(a) Criminal Procedure Rules). The application must:

- Specify each respect in which the prosecutor believes that P has failed to comply with the terms of the agreement, and explain the reasons for the prosecutor's belief; and
- Attach a copy of any document containing evidence on which the prosecutor relies (r.12.5(3) Criminal Procedure Rules).

If P wishes to make representations at the hearing it must serve the representations on the Court and the prosecutor not more than 28 days after service of the application. This hearing may proceed in P's absence if no representations are made within that period (r.12.2(4) Criminal Procedure Rules).

The Court will decide if, on the balance of probabilities, P has failed to comply with the terms of the DPA (p.9(2) Schedule 17, Crime and Courts Act 2013). The Court must give reasons for its decision (p.9(4) Schedule 17, Crime and Courts Act 2013).

If the Court finds that P has failed to comply with the terms of the DPA, it may:

- Invite the prosecutor and P to agree proposals to remedy P's failure to comply; or
- Terminate the DPA (p.9(3) Schedule 17, Crime and Courts Act 2013).

There is no right of appeal in relation to the outcome of a breach hearing.

Where the court decides that P has not failed to comply, the prosecutor is required to publish the Court's decision and the Court's reasons for that decision (p.9(5) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

14 WHERE BREACH IS FOUND THE PARTIES WILL BE INVITED TO PROPOSE A SUITABLE REMEDY

If the Court invites the prosecutor and P to agree proposals to remedy P's failure to comply, it is required to give reasons for that decision (p.9(4) Schedule 17, Crime and Courts Act 2013). The prosecutor is required to publish the Court's decision and the reasons given by the Court (p.9(6) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

15 COURT TERMINATES THE DPA

Following a finding that P has breached the DPA, the court may terminate the agreement. It is required to give reasons for this decision (p.9(3) & (4) Schedule 17, Crime and Courts Act 2013).

The prosecutor is required to publish (1) the fact that the DPA has been terminated by the Court following P's failure to comply with the terms; and (2) the Court's reasons for its decision to terminate the DPA (p.9(7) Schedule 17, Crime and Courts Act 2013).

The Court may order the postponement of the publication of this information for such period as is necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings (p.12 Schedule 17, Crime and Courts Act 2013).

16 APPLICATION TO LIFT SUSPENSION OF THE INDICTMENT

Once the Court has terminated the DPA, the prosecutor may apply to lift the suspension of the indictment (r.12.7 Criminal Procedure Rules). This application can be made orally if it immediately follows the Court's ruling on termination (r.12.11(1) Criminal Procedure Rules).

If P wishes to make representations in response to the application, it must serve those representations on the Court and prosecutor no more than 28 days after the service of the prosecutor's application (p12.7(3) Criminal Procedure Rules).

This hearing may proceed in P's absence if no representations are made within that period (r.12.2(4) Criminal Procedure Rules).

Where the Court has terminated the DPA for breach prior to its expiry, criminal proceedings may follow provided the full code test in The Code for Crown Prosecutors is met. In any subsequent criminal proceedings for the alleged offence, the Statement of Facts contained within it will be treated as an admission by P under s.10 of the Criminal Justice Act 1967. Anything disclosed publicly through the DPA process may also be admissible in civil proceedings.

17 NO DPA IS ENTERED INTO

If no DPA is entered into, criminal proceedings may follow where the full code test in The Code for Crown Prosecutors is met.

If it is not considered appropriate to continue the criminal investigation, the DPA Code states that the prosecutor should consider whether a Civil Recovery Order is appropriate.

USE OF MATERIAL PROVIDED BY P, IN CRIMINAL PROCEEDINGS AGAINST P

In any subsequent criminal proceedings:

- Material that shows that P entered into negotiations for a DPA, including any draft of the DPA, any draft of the Statement of Facts intended to be included in the DPA or any statement that P entered into negotiations; and
- Material that was created solely for the purpose of preparing the DPA or Statement of Facts,

may only be used in evidence against P:

- In a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information; or
- In a prosecution for some other offence where, in giving evidence, P makes a statement inconsistent with the material (but only if P adduces evidence or asks a question relating to the material) (p.13(3) & (4) Schedule 17, Crime and Courts Act 2013).

USE OF MATERIAL PROVIDED BY P, IN CRIMINAL PROCEEDINGS AGAINST INDIVIDUALS

The Government's consultation paper on DPAs envisaged that, in criminal proceedings against an individual, information provided by P could be admissible against that person, although admissions made by P could not.[5] This raises the possibility that interviews conducted with individuals in the early stages of P's internal investigation – when those individuals may not even have contemplated the possibility of criminal proceedings – could subsequently be used against them at trial. Indeed, the DPA Code states that there is no limitation on the use to which other information obtained by a prosecutor during the DPA negotiation period (i.e. material not falling into the categories above) may subsequently be put during criminal proceedings brought against P, or against anyone else, so far as the rules of criminal evidence permit. This may include, for example:

- Pre-existing, contemporaneous documentation provided by P to the prosecutor;
- Any report of an internal or independent investigation carried out by P prior to the DPA negotiation period commencing;
- Any interview note or witness statement obtained from an employee of P prior to the DPA negotiation period commencing;
- Any document obtained by the prosecutor at any time from any source other than P; and
- Any information obtained by the prosecutor as a result of enquiries made pursuant to information provided by P at any time.

5 "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements", May 2012.

Current DPA Trends in the United States

In contrast with their new UK counterparts, US deferred prosecution agreements ("DPAs") are a well-established feature of the legal landscape in the United States. Their precise role may be in a state of flux, however, as they have recently been subject to an unprecedented degree of judicial scrutiny. Even so, these agreements continue to have a steady presence, both as a way to resolve corporate criminal charges and as a means to take advantage of factual admissions when pursuing collateral litigation arising out of conduct addressed in a DPA.

BACKGROUND

DPAs were first used by US prosecutors in the 1990s and have since become a "mainstay of white collar criminal law enforcement." [1] In 2013, the US Department of Justice ("DOJ") entered into sixteen publicly disclosed DPAs (as compared with twenty-two in 2012, fourteen in 2011, and twenty-three in 2010).[2] Since 2003, there have been 145 DPAs in total.[3]

Companies in the United States have benefited from DPAs because they minimise the collateral consequences of criminal charges—including reputational harm, loss of revenue and market share, and revocation of essential business licences—which can collectively amount to a corporate "death penalty" (as demonstrated by the demise of Arthur Andersen LLP following its indictment and conviction in the Enron accounting scandal). DOJ has found DPAs an attractive option for the same reasons, as indictment can have the unintended collateral consequence of harming innocent employees, shareholders, and those in the general public who rely upon the company's services or products. DOJ has also embraced DPAs because they incentivise companies to engage in good behaviour (such as cooperating with authorities, making factual admissions, and implementing more robust compliance programs), while still allowing the imposition of hefty fines that promote accountability and deterrence.

INCREASING JUDICIAL SCRUTINY

As the use of DPAs has become more commonplace, US judges have shown increasing interest in taking a more active role in reviewing them. Historically, there has been very little oversight of DPAs—unlike the new UK system, there is no clear authority or established protocol for a court to approve or reject a DPA.[4] Judges have frequently approved DPAs summarily, often on the same day they are filed, without inquiring into whether factual evidence exists to prove the alleged crime or whether the charges are otherwise legally sound. However, two federal district court decisions in 2013 may signal a break from that trend.

The first involved a DPA between a US not-for-profit healthcare company and DOJ to resolve charges of false statements made to a federal healthcare benefits programme. Rather than rubber-stamping the DPA, the judge expressed serious hesitation in resolving the case by deferred prosecution. He initially refused to enter the DPA, postponing his final decision until after a substantive hearing at which he challenged the factual and legal basis, as well as the policy rationale, for not indicting the company. Ultimately, the judge was persuaded by the significant harm that could result to the public if the company were formally convicted, which would prevent it from continuing to be a provider under Medicare and Medicaid. That, in turn, would likely force it to shut down, with "severe consequences" for the company's "blameless" employees and the patients who relied on its services. Even though the judge approved the DPA, he remained intimately involved in the case by requiring the parties to submit periodic status reports and by scheduling a hearing to be held a year later "to determine whether the deferral of prosecution is properly being managed."

The second case in which a judge has scrutinised a DPA to an unusual degree involved the agreement between DOJ and a multinational bank with a US subsidiary to resolve money laundering and related charges. The judge in that case refused to

1 Lanny A. Breuer, then Assistant Attorney General for DOJ's Criminal Division, Speech at the New York Bar Association (Sept. 13, 2012); see also David M. Uhlmann, Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability, 72 MD. L. REV. 1295, 1303 (2013) ("Over the last decade, the use of [DPAs] and non-prosecution agreements has surged within [DOJ], particularly its Criminal Division and several United States Attorney's Offices.").

2 See Brandon L. Garrett & John Ashley, Federal Organizational Prosecution Agreements, Va. Sch. of Law (compiling a list of DPAs), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/home?order=field_date&sort=asc.

3 Id.

4 US Gov. Accountability Office, Report to Congressional Requesters: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, But Should Evaluate Effectiveness, No. 10-110, 25-26 (2009).

agree with the parties that his authority to review the DPA was limited. Rather, he found that the court's "inherent supervisory power [that] serves to ensure that [it] does not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety" enabled him to conduct a substantive review of the agreement. In approving the DPA, he found it noteworthy that it imposed "significant, and in some respect extraordinary measures … [along the lines] of what might have been accomplished by a criminal conviction." He approved the DPA subject to the condition that the parties would file quarterly status reports, and he expressly reserved the right to require hearings as he deemed necessary.

USE IN COLLATERAL LITIGATION

DPAs are not judgments of guilt and therefore do not amount to conclusive findings of fact for the purposes of US civil litigation. However, factual admissions made in DPAs (often in the "Statement of Facts") are admissible in civil proceedings and have been used with some success by plaintiffs.[5] Plaintiffs have used defendants' admissions to defend against motions to dismiss and motions for summary judgment. For example, after Beazer Homes, U.S.A. Inc. (a company in the business of home building and mortgaging) entered into a DPA in which it admitted to having fraudulently inflated the price of homes it sold and thereby the loan amounts to be repaid, a plaintiff brought proceedings against it and related entities alleging, in part, to have been given such a fraudulently high loan.[6] The plaintiff successfully defended a motion to dismiss that claim, having convinced the court that the company's admissions in the DPA were "a significant factor in assessing the plausibility of [her] claim."[7]

However, while plaintiffs (and courts) have certainly relied on DPAs to resolve such motions in civil litigation, defendants have also been successful in persuading judges to be circumspect in their reliance. For example, in a shareholder derivative suit against a US defence company, a federal district court read the relevant DPA narrowly in granting the defendant board of directors' motion to dismiss. There, the court noted that the company had admitted in its DPA to defrauding a city in connection with a contract for a municipal project, but that all of the admissions addressed corporate and managerial conduct rather than any malfeasance on the part of the board. Similarly, defendants in a tax fraud case were successful in their motion for summary judgment when the court determined that their admissions in a DPA (that they had participated in fraudulent tax shelters by issuing sham loans) did not constitute specific admissions with respect to the loan at issue in the proceedings.[8]

DPAs are an entrenched part of the US legal system, playing an important role both in the disposal of criminal cases and in related civil litigation. Whilst recent developments may indicate a move towards greater judicial oversight, the position nevertheless remains very different from the UK where close judicial involvement is an integral and mandatory part of the DPA process. Click here for an overview of the UK DPA process.

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5 See Fed. R. Evid. 801(d)(2).

6 *Davis v. Beazer Homes, U.S.A. Inc.*, No. 1:08CV247, 2009 WL 3855935, at *7 (M.D.N.C. Nov. 17, 2009).

7 Id. (internal quotation marks omitted).

8 *Malone v. Nuber*, No. C07-204RSL, 2010 WL 3430418, at *9 (W.D. Wash. Aug. 30, 2010); see also *Rezner v. Bayerische Hypo–Und Vereinsbank AG*, 630 F.3d 866, 873-74 (9th Cir. 2010) (reversing a grant of summary judgment in favor of the plaintiff and concluding that the defendant's admission in a DPA to having engaged in a scheme to defraud the United States of tax revenue could not constitute proof that that defendant had proximately caused harm specifically to the plaintiff).

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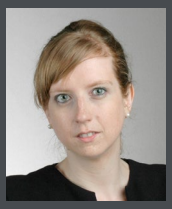

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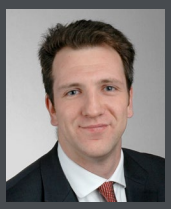

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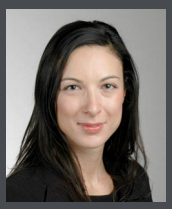

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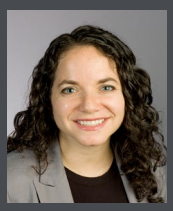

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