Deferred Prosecution Agreements (DPAs): September 2013 response to the draft Code of Practice

Note that since the date of this Consultation, the final Code has been published and is available here on the SFO website

This response is provided by the criminal department of Kingsley Napley LLP. Our criminal and regulatory practice is one of the largest and most experienced in the UK.

We have acted for companies self-reporting to the SFO; individuals conducting plea agreements under the Attorney General's guidelines and in many SFO and CPS prosecutions for corruption and fraud offences.

We continue to be involved in many of the most challenging and complex cases, whether relating to general crime, serious fraud, financial services investigations, offences under the Bribery Act, money laundering, internal and corporate investigations and health and safety investigations. We are frequently involved in international activity which includes extradition, mutual legal assistance requests and international investigations into offences such as corruption, cartels, fraud and money laundering.

Question 1: Do you agree with the test for entering into a DPA set out in paragraph 2?

We understand that the DPA Code is based on the procedural steps set out in the 'Attorney General's guidelines on plea discussions in cases of serious or complex fraud'. D8 of that document confirms that *'Before agreeing to proposed pleas, the prosecutor should satisfy himself that the Full Code Test as set out in the Code will be made out in respect of each charge….'*

The evidential stage for determining whether a DPA will be appropriate should be the evidential test set out in the Code for Crown Prosecutors. Section 2.i.b of the proposed DPA Code should be removed. It cannot be correct that a decision on whether a DPA is appropriate (the breach of which could lead to a full scale prosecution) is satisfied by a 'reasonable suspicion...and reasonable grounds...' test which is proposed to apply not only at the Schedule 17 paragraph 7 stage (approval of proposal to enter an agreement) but also at the paragraph 8 stage (approval of terms of an agreement). It is akin to the test for the lawfulness of a police officer's arrest and is likely to result in DPAs being agreed in circumstances where there has not been an investigation conducted by the prosecution to test whether a prosecution could, in the normal course of events, be justified.

It is important to remember that if a DPA is to be negotiated, an indictment needs to be preferred. It cannot be the case that an indictment is put forward in circumstances where limb one (i.e. the evidential test) in the full Code for Crown Prosecutors is not satisfied.

Companies will be under pressure to enter into agreements even where there is little evidence of criminality to avoid the costs of a thorough and properly evidenced investigation and to minimise reputation damage that could prove fatal to the business. In our view it is not appropriate that the second limb of the test under section 2 i b must also be considered and discounted before the prosecutor can consider whether a Civil Recovery Order is appropriate (paragraph 4 DPA Code).

We are concerned that without proper safeguards, the introduction of DPAs will create a results-lead mentality where prosecutor's negotiation skills are more relevant than their legal ones. Although that may be an acceptable price for the company to pay in order to put a line under the issue, it increases the likelihood that individuals will be targeted on the basis

of admissions of criminal activity by the company, when there is in fact no such criminality. It will be the individual who will bear the burden of proving that the accusations are not made out and will inevitably lead to acquittals for individuals in circumstances where there has been a DPA for the company – something that can only undermine the process.

We are also concerned that, despite being based on the 'Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud', the DPA Code does not make any provision for the Judge to be provided with:

'The minutes of any meetings between the parties and any correspondence generated in the plea discussions' [as set out at E4 of the AG's guidelines]

in order to assist him in making his decision as to whether the DPA is in the interests of justice and the terms of the DPA are fair, reasonable and proportionate.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA, as set out at paragraphs 11-13?

As set out above, only the full Code test on the evidential stage is sufficient. Only once that is satisfied, should the public interest factors be engaged.

The consultation does not ask for comments in respect of sections 3 and 4 of the DPA Code, which relate to the process for invitation to enter into DPA negotiations and the letter of invitation itself. We are concerned that all is required under the letter is:

18.

i. Confirmation of the prosecutor's decision to offer P the opportunity to enter into DPA negotiations;

ii. A request for confirmation of whether P wishes to enter into negotiations in accordance with the Act and this DPA Code; and

iii. A timeframe within which P must notify the prosecutor whether it accepts the invitation to enter into DPA negotiations.

In our view, it should be incumbent on the prosecutor to set out why it believes that the evidential test under the Code for Crown Prosecutors has been met. The prosecutor should also set out which public interest factors it has taken into account in concluding that a DPA would be an appropriate disposal.

The prosecutor will clearly have gone through this decision making process in considering both the evidential and public interest tests and it is important for P to understand the background to the important decision it will be required to make. This is particularly so in circumstances where under 18 iii. P is required to respond within a particular time frame.

In respect of paragraph 12 of the DPA code, we are concerned at the emphasis:

12.i - ….It must be remembered that when P self-reports it will have been incriminated by the actions of individuals. It will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted. 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 where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution.'

This section assumes that the only issue of interest to the prosecutor is whether or not material is being withheld from it by P which might be used in support of a prosecution of individuals. It should also be emphasised in the Code that it is important that any internal investigation conducted by P:

- respects the legal rights of individuals under suspicion;

- does not lead to any contamination of evidence;
- leads to the retention of all notes of interviews and draft witness statements of those individuals who may become witnesses in any subsequent prosecution of individuals within the company.

We are also concerned at the emphasis contained at paragraph 12ii:

12 ii – …..In particular, the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or ***the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded.*** *Errors in the conduct of internal investigations which lead to such adverse consequences will militate against the use of DPAs.*

The manner in which this is drafted does not put any onus on the company to respect the interests of individuals being investigated by P. In relying on the contents of internal investigations as a basis for either a DPA or a prosecution, the prosecutors are in effect delegating their investigatory duties. When an individual is being investigated by a body such as the SFO, they know for what purposes any interview is being conducted. This knowledge and subsequent protections are not afforded to individuals during internal investigations. In these circumstances, it would be wrong for such an emphasis to be contained within the Code. To suggest that delay provides an opportunity for fabrication is worrying. Indeed, delay due to an individual being legally advised and provided with proper pre-interview disclosure provides more accurate, informed first accounts and therefore more reliable internal investigations. As a minimum an employee who is suspected of wrong doing should be given an opportunity to seek independent legal advice prior to such an interview.

In addition, we do believe that a duty of ongoing and continued cooperation with the prosecutor in respect of any subsequent prosecutions of individuals should form part of the DPA (see our response to question 4 below).

EU Procurement point

We note that footnote 1 at paragraph 11 a ii states:

1 Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is excluded from participation in public contracts within the EU. (Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect;

This statement recognizes that under current EU procurement rules, a company would be blacklisted if convicted in the UK. (see The Bribery Act 2010 (Consequential Amendments) Order 2011 which amends the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006).

On 30 March 2011 in a written statement to Parliament, the Lord Chancellor and Secretary of State for Justice stated that:

'The Government has also decided that a conviction of a commercial organization under section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK's implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this.'

We therefore do not consider it appropriate for this to be a relevant public interest consideration and believe that this reference should be removed from the DPA Code.

Question 3: Do you agree with the approach to disclosure at paragraphs 30-35?

The requirement set out at section 6(1) (b) of Schedule 17 to the Act is for the Code for prosecutors to give guidance on:

(b) *the disclosure of information by a prosecutor to P in the course of negotiations for a DPA and after a DPA has been agreed…*

It also sets out that '*(6) a prosecutor must take account of the Code in exercising functions under this Schedule.'*

The DPA Code sets out how the prosecutor should deal with unused material and disclosure, in light of the fact that the statutory disclosure regime is not engaged at the negotiation stage and that the CPIA will only apply during the brief moment that the bill of indictment is approved upon entering into the DPA, after which it is immediately suspended and, again, the statutory regime does not apply unless suspension is lifted with the termination of the DPA and a prosecution of the company.

We find it extremely disappointing that the Code has taken this approach. We cannot accept that the CPIA should be immediately suspended after the bill of indictment is approved, or that it does not apply at the initial stages of the negotiations. It is difficult to understand in circumstances where there is a spirit of open cooperation in seeking to negotiate a DPA, the prosecutor should not be required to disclose information to P which undermines the prosecutor's case or assists P's. This is particularly important where P and the prosecutor are being required to negotiate and produce for the Court the agreed facts and basis for the DPA.

The DPA code does not provide sufficient clarity either on the disclosure obligations of the prosecutor or provide a sanctions regime where the prosecutor has not fulfilled their obligations.

Unfortunately non-disclosure has always been an area of potential abuse by prosecuting authorities and the DPA regime should ensure that there is clarity in what should be disclosed and the penalties for failures in the disclosure regime. The DPA Code should from the outset embrace the spirit of the CPIA's obligations, and voluntarily adopt their terms at this pre-CPIA stage in an investigation.

We refer to the Criminal Procedure Rule Committee's consultation paper on proposed new rules to govern DPAs and in particular rule 12.2 (3). In the narrative to the rules, it is clear that the Criminal Procedure Rule Committee have identified this as an area which requires oversight by the court and that the statutory sanction for the provision of inaccurate, misleading or incomplete information should be reinforced by a declaration by each party which would lay the foundation for the imposition of sanctions should there be a breach.

It appears to us that as this is such an important part of the process that is in the hands of the prosecuting authorities and is prone to abuse this obligation should be clear and transparent in the DPA Code.

We are also very concerned about the vagaries of the language in the current draft. In particular:

Para 31

- *"In principle, P should have sufficient information to play an informed part in negotiations".* This language is too vague. It should be clear in the Code that this includes all information that would assist the Company in knowing whether it could avoid even the need to enter into DPA negotiations and the related expense and reputational damage consequences. "In principle" at the beginning of this sentence adds nothing and could maybe interpreted that there are some circumstances where this level of disclosure is not required and therefore should be deleted.

- *"During the negotiations the prosecutor should ensure that the suspect is not misled as to the strength of the prosecution case"* – we refer back to our comments in relation to the evidential test at Q1. Should the weakened "reasonable suspicion" test be retained, it is essential that the prosecution make it clear which limb of the test they believe their case lies – if the prosecutor's case does not move out of this second limb throughout the negotiations, it is clearly an important factor for the company to consider whether there is sufficient risk of a prosecution to merit them entering into a DPA at all.

- There is reference to a *"Terms and Conditions"* document which will set out the prosecutor's duty of disclosure – this is likely to be a very important document and as set out above its contents should require disclosure to be dealt with in a manner in line with the prosecutors CPIA's obligations.

Para 32

- If requests are 'reasonable and specific', they should be granted rather than just given "Consideration".

Although this paragraph is not referred to in the consultation document, we believe that paragraph 19.ii is very important in highlighting the need for the undertaking to include a recognition that "the law in relation to the disclosure of unused material may require the prosecutor to provide information received during the course of DPA negotiations to a defendant in criminal proceedings". We believe specific reference should be made to the AG guidelines. In addition the Code and the undertaking should refer to the risk of onward disclosure of their 'confidential' material to prosecutors abroad if MLA is properly requested and/or through other disclosure gateways.

Question 4: Would it assist if examples of potential terms additional to those addressed at paragraphs 40-42 are included in the Code?

We welcome the reference to ongoing disclosure obligations under 42 (vi). This should be extended to cover any additional indictments preferred against individuals as a result of the investigation, rather than just covering the indictment to which the DPA relates.

If it is likely that the factual basis for the DPA will lead to a prosecution of individuals for the underlying offence, then a continued duty of cooperation with the prosecutor by P in respect of its disclosure obligations should also be inserted into the DPA. Rather than it being just a requirement for P to notify the prosecutor of material it becomes aware of relating to the draft indictment to which the DPA relates this duty of ongoing cooperation should also include:

- an obligation to respond to requests by the prosecutor for disclosure; and

- a duty relating to disclosure of material which undermines or assist the case of the accused.

It may, for example, become necessary for all draft witness statements or initial interviews taken by P to be disclosed to the defendant. It may also become necessary for the prosecutor to have access to the underlying electronic search material or documents. In limited circumstances, the advice given to key witnesses in any prosecution might also become disclosable and entail a limited waiver of LPP by P. Unless P is subject to an ongoing duty of cooperation with respect to third party disclosure, it could lead to the collapse of any subsequent prosecution of individuals on abuse grounds.

Question 5: Do you agree with the approach to the use of a monitor at paragraphs 43-51?

This forms a sizeable part of the DPA Code and in our view it gives the impression that the appointment of a monitor could be an appropriate term in any DPA, regardless of the nature of the alleged offence and the circumstances of the company. This is not the case and the appointment of a monitor is in fact a potentially very onerous sanction and should be used sparingly and only where appropriate to the offence, for example where the charges against the company specifically relate to the company's failure to comply with this obligation.

Although there is an "adequate procedures" defence to criminal liability under section 7 of the Bribery Act 2010, there is in fact no positive obligation as such on companies to operate anti-bribery procedures. To avoid any misinterpretation the Code should make this distinction.

Question 6: Do you agree that the examples of the policies and procedures at paragraph 52 that the monitor may be tasked to identify are in place is sufficiently comprehensive?

It should be made clear that the monitor's remit should be limited to the elements of an internal compliance programme prescribed by the terms of the DPA.

Question 7: Is the approach to determining an appropriate level of a financial penalty term in paragraphs 53 to 57 clear?

Paragraph 53 of the Code refers to the duties of the prosecutor to draw to the judge's attention relevant information, including statutory provisions and the relevant Sentencing Council Guidelines and guideline cases. The Sentencing Council (SC) has issued its own consultation on sentencing guidelines on Fraud, Bribery and Money Laundering Offences, which include guidelines for corporate offences. There is currently no guideline for sentencing organisations convicted of financial crimes and the SC notes that the only punishment available to the courts for a corporate defendant is a fine. There is no established sentencing practice. With this background in mind, the SC Guidelines seek to achieve a balance between providing a level of certainty with the need for flexibility. In many ways they are similar to the approach taken by the FCA, in particular "DEPP 6.5A The five steps for penalties imposed on firms"

Paragraph 55 of the DPA Code repeats the statutory requirement that any financial penalty is to be "broadly comparable to a fine that the court would have imposed upon P…following a guilty plea."

Paragraph 56 of the Code states that a financial penalty must provide for a discount equivalent to that which would be afforded by an early guilty plea…"*But there may also be an additional reduction where an organisation assists, for example, in the investigation or prosecution of offending by others. This reflects the regime under section 73 of the Serious Organised Crime and Police Act ….The discount to reflect the assistance provided to the authorities is not prescribed by the legislation".*

No other examples are given of where an additional reduction may apply.

s73 SOCPA relates to agreements for plea and reduction in sentence by co-operating defendants. This is in contrast to Paragraph 38 of the DPA Code which states that there is no requirement for formal admissions of guilt in respect of the offences charged. The Code should clarify whether admissions of guilt are a requirement before any additional reduction would be considered.

The CPS guidance to agreements under section 73 also confirms that reductions in sentence are not mandatory, but that in determining sentence the court may take into account the extent and nature of the assistance given or offered – the choice of sentence being a matter for the court alone. The DPA is obviously a different scenario where it is envisaged that the "*amount of any financial penalty agreed between the prosecutor and [the Company] must be broadly comparable to the fine that a court would have imposed on [the Company] on conviction for the alleged offence following a guilty plea".*

The SC Guidelines state that the courts should take into account both section 73 and 74 of SOCPA). S74 allows a specified prosecutor to refer a sentence back to the sentencing court for review if certain conditions are met and the defendant is still serving the sentence. In order to provide consistency, guidance should be provided for the circumstances where s74 may become relevant.

Paragraph 56 of the DPA Code state that "the parties should be guided by sentencing practice and pre-existing case law on this matter" and refers specifically in a footnote to R v Blackburn [2007] EWCA Crim 2290 and R v Dougall [2010] EWCA Crim 1048. However, it is not clear what, if any "guidance" is provided by this, particularly as any DPA will turn on the particular facts.

Paragraph 39 of R v Blackburn [2007] EWCA Crim 2290, sets out principles for application of s73 agreements:

> *"….. Accordingly, the discount for the assistance provided by the defendant should be assessed first, against all other relevant considerations, and the notional sentence so achieved should be further discounted for the guilty plea. In the particular context of the SOCPA arrangements, the circumstances in which the guilty plea indication was given, and*

whether it was made at the first available opportunity, may require close attention. Finally we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. In this Court, on appeal, focus will be the sentence, which should reflect all the relevant circumstances, rather than its mathematical computation."

R v Dougall [2010] EWCA Crim 1048 relates to the s73 agreement with the SFO under which he agreed to plead guilty and to assist the SFO and the US Department of Justice in their investigations and subsequent prosecutions for corruption offences. In return for his assistance the US authorities entered into a non-prosecution agreement while in the UK Mr Dougall received a reduced sentence when the Court of Appeal overturned the decision of the first instance judge by imposing a suspended prison sentence.

The Code does not clarify what factors over and above the assistance that is required in any event to be eligible for a Deferred Prosecution Agreement will mean that a reduction of sentence is appropriate.

The SC Guidelines have sought to achieve a balance between providing a level of certainty with the need for flexibility. The DPA Code at paragraph 56 state that, "The extent of the discretion available when considering a financial penalty is broad."

The problem with this flexibility or discretion is that it is very difficult for the DPA Code to provide any real guidance to what the likely financial penalty would be for a guilty plea, in particular where there are no relevant precedents to draw from.

Although the SGC draft guideline provides a step by step process, several of these in themselves provide a very broad discretion to the sentencing judge, for example Step 3 determines the starting point of the financial penalty by applying a multiplier derived from the culpability level to the harm figure. The possible range is 20 to 400%. Step 4 then enables an "Adjustment of fine" which provides a list of non-exhaustive factors for the court to consider in making any adjustment to the fine (reduction or increase) to ensure it is proportionate. It is then at step 5 that the court will consider any factors which would indicate a reduction, such as assistance to the prosecution, with specific reference to S73 and 74 of SOCPA and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given. Step 6 then requires the court to take into account any potential reduction for a guilty plea in line with s144 of the Criminal Justice Act 2003 and the *SGC Guilty Plea* guideline.

The current Code provides no guidance at all to how the prosecutor of parties should apply the SC guidelines to DPAs, beyond affirming that the judge's attention should be drawn to it. This may be as far as the Code can and should go in this area.

As stated above, paragraph 56 of the Code also refers to additional discounts where the organisation provides assistance in relation to the investigation or prosecution of others. It appears likely that these 'others' will include individuals who worked for the organisation which is entering into the DPA either directly or as an agent. The potential discount provides the organisation with an incentive to identify and place blame on an individual or individuals and thereby reducing the corporate culpability and increasing the likelihood of receiving an additional discount. Where a company suspects an employee of wrongdoing and interviews them as part of an internal investigation, there is a tension between the employee's contractual obligation to co-operate with any reasonable request of the employer (which could include co-operating with an interview as part of an internal investigation) and their rights as a suspect. In essence, the employer is not required to provide the same level of protections as would be afforded if the investigating authority conducted an interview. The employee faces the threat of dismissal for misconduct for non-cooperation. The DPA sentencing regime should not encourage employers or the prosecutor to exploit this situation. A failure to treat an individual employee fairly during an internal investigation has the potential to undermine public confidence in the DPA process and to erode the right to a fair trial according by Article 6 of the European Convention of Human Rights.

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice? Please refer to the relevant section of the draft Code when responding.

We have set out above a number of concerns about the current draft of the DPA. These include:

1. A full Code test must, in our view, be satisfied before a prosecutor invites P to enter into DPA negotiations;

2. An invitation to enter into DPA negotiations should set out the basis for the invitation, including details of why the prosecutor is satisfied that the full Code test is met and that it is in the public interest for there to be a DPA. Given that under D1 of the AG's guidelines on plea discussions, a defendant is entitled to a statement of the case setting out the proposed charges, this does not seem to be an onerous requirement.

3. The relevant Judge must be provided with all minutes of the negotiations. Further, in the AG's guidelines on plea discussions, there are provisions for a joint written submission to be provided to the court listing an agreed set of aggravating and mitigating factors arising from the agreed facts [D9].

4. Clear prosecution disclosure duties must be set out in the DPA Code akin to the duties under the CPIA;

5. There must be an ongoing third party disclosure obligation on P to assist with any subsequent prosecution of individuals;

In addition to those concerns, we also note that there are provisions within the AG's guidelines on plea discussions (referred to above) at D13 for a plea agreement to include a resolution of all matters in one plea agreement where another prosecuting authority or regulatory body (whether in England and Wales or abroad) has an interest in the matter. We invite such a clause to be included in the DPA Code, to encourage cooperation between prosecutors and avoid P having in some instances to seek DPAs in multiple jurisdictions or with more than one regulator where the underlying conduct being investigated is the same.

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