

UK Government Set to Introduce Deferred Prosecution Agreements for Economic Crimes

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Matthew Cowie
London
+44.20.7519.7139
matthew.cowie@skadden.com

Gary DiBianco
London
+44.20.7519.7258
gary.dibianco@skadden.com

* * *

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

40 Bank Street, Canary Wharf
London, E14 5DS, England
Telephone: +44.20.7519.7000

Four Times Square, New York, NY 10036
Telephone: +1.212.735.3000

WWW.SKADDEN.COM

On October 23, 2012, the U.K. Ministry of Justice (MOJ) published the results of its **public consultation and the U.K. government's response** (the government) to the consultation on a proposal to introduce deferred prosecution agreements (DPAs) as a new enforcement tool to deal with economic crime committed by commercial organizations in England and Wales. The government will introduce amendments to the Crime and Courts bill, which is currently in Parliament, consistent with the government's response. If the bill is enacted, DPAs will be in force in England and Wales for conduct preceding and postdating its enactment.

DPAs are viewed by the government as a necessary new tool for prosecutors such as the Serious Fraud Office (SFO) and the courts to bring serious and complex economic cases quickly, cost effectively and fairly to a conclusion. The government envisages that DPAs will be used primarily for corporations that cooperate with government investigations, and the government intends that DPAs will be made available for corporations in overseas corruption cases as well as other economic crimes.

The government's response to the public consultation sets forth a model for DPAs that has some similarities to U.S. law and practice but involves earlier and greater judicial oversight than U.S. DPAs.

DPA Code of Practice for Prosecutors. The government's response sets out that there should be written guidance to prosecutors on when and how DPAs would be used. The prosecutor will be bound by a DPA Code of Practice to be written by the director of public prosecutions (DPP) and the SFO. The purpose of this proposed guidance is to provide consistency of approach by prosecutors, and transparency and confidence for corporates negotiating with the SFO or another U.K. prosecutor. The DPA Code would supplement existing protocols, which consist of the **Code for Crown Prosecutors**, the attorney general's **Guidance on Corporate Prosecutions** and the attorney general's **Guidance on Plea Discussions**. The government rejected the proposal to merge DPA guidance into the Code for Crown Prosecutors, preferring a stand-alone statutory DPA Code of Practice which will contain:

- Criteria for eligibility of a particular case for a DPA;
- Principles relevant to a decision to proceed with a DPA;
- Procedural guidance for the conduct of all stages of the DPA discussion process;
- Provisions to protect legal professional privilege; and
- Guidance on how to deal with termination of discussions or of an agreement and the initiation of prosecution.

The government also received suggestions in the consultation process for further components and has directed the DPP and the SFO to further consult with stakeholders prior to the publication of the DPA Code of Practice.

Commencement of Proceedings Before a Judge. U.K. criminal proceedings always have been commenced in the lower court (Magistrates Court) and then transferred to the Crown Court (trial court), and defendants do not have direct access to a Crown Court judge prior to the initiation of charges. To allow early judicial involvement in DPA proceedings without the filing of charges, the U.K. DPA model envisages the first appearance in the Crown Court before the “sentencing” judge, with no involvement of the lower Court. This hearing will be in private and be without prejudice to the defendant corporation’s right to withdraw or refuse to accept factual or legal positions conceded for the purposes of deferred prosecution discussions which do not come to successful conclusion. The purpose of the initial hearing will be for the judge to determine whether a DPA is a potentially appropriate resolution to the matter, based on assessment of whether a DPA would be first, “in the interests of justice” and second, “fair, reasonable and proportionate.”

DPA Sentencing Principles. Existing U.K. law lacks comprehensive and clear guidance regarding corporate criminal financial penalties. Under the U.K. Bribery Act, for example, there is no limitation on corporate criminal fines and no guidance on the calculation of appropriate financial penalties. The government has proposed offense-specific guidelines to be produced by the Sentencing Council. The government reported that the Sentencing Council currently intends to cover offenses likely to be encompassed by a DPA if committed by an organization with an appropriate sentencing guideline.

DPA Proceedings and DPA Documents. The government has made a number of suggestions concerning the format and content of DPA proceedings, and respondents largely agreed with the proposed content of papers required for a DPA hearing, which would include:

- Outline of the facts;
- Draft indictment;
- Agreed or contemplated conditions to be attached to the DPA;
- Areas for further negotiation between the parties; and
- Any international aspects (for multijurisdictional settlements).

A crucial area for consultation with the court is the area of financial penalties as this may, more than any other element, influence the court as to the question of whether the DPA meets the interests-of-justice tests. The government expects that although each DPA will be tailored to particular circumstances of each case, the DPA itself will generally include:

- Agreed statement of facts;
- Specified term;
- Detailed workings of the financial penalty;
 - Penalty pursuant to sentencing guidelines;
 - Penalty reduction of one third for co-operation and agreement to a DPA;
 - Disgorgement of profits/benefit;
 - Reparation to victims;
 - Costs; and
 - Time to pay;
- Obligations to assist in ongoing investigations of implicated individuals;

- Individual remediation;
- Corporate remediation;
- Corporate commitment to enhance compliance policies and procedures; and
- Monitorship (where appropriate).

Consistent with recent **OECD criticism of lack of transparency in certain SFO enforcement proceedings** the government have indicated that the final agreement and any proceedings brought by the regulator for breach of the DPA should be published and in open Court.

Conclusion

Two structural obstacles to corporate self-reporting of corruption or serious economic crimes in the U.K. have been the absence of clear sentencing principles and a transparent framework for proportionate penalties. The government is seeking to address both issues in this proposal.

The chief difference between the U.S. DPA and the U.K. proposal is early access to a judge, prior to charge or any admissions being made. Given the centrality of the judicial function proposed in the U.K. model, the success or failure of the proposal will largely rest on how the judiciary take to a largely unfamiliar role, and whether corporations are willing to pursue a settlement process under judicial oversight.