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UPDATE

Deferred Prosecution Agreements

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Deferred Prosecution Agreements (DPAs) were introduced in Jersey in March 2023 and are now available for corporate entities at risk of prosecution for regulatory breaches and/or financial crimes. By entering into a DPA, businesses can effectively strike a deal to avoid prosecution and the harm associated with a conviction. DPAs have been widely used in jurisdictions such as the UK and the US for some time. However, DPAs are not without their risks and businesses under investigation will need to consider carefully whether such an agreement is appropriate. The article below outlines the new DPA regime in Jersey and considers the potential advantages and risks for a business which finds itself in breach by reference to lessons learned from the UK experience.

What is a DPA?

A DPA is an agreement entered into between a corporate entity and the Attorney General's office (AG), under the supervision and approval of the Royal Court. Commonly used in the US and UK, DPAs offer corporate entities an alternative to criminal proceedings for wrongdoing in certain circumstances. DPAs were introduced in Jersey by the Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law 2023 (DPA Law) which came into force on 3 March 2023. The DPA Law is supplemented by Deferred Prosecution Agreements guidance published by the AG (AG's Guidance). The effect of a DPA is that a prosecution is suspended for a defined period provided the subject entity meets certain specified conditions.

In what circumstances can a DPA be used?

The offences covered are set out in Schedule 1 to the DPA Law which include typical 'white collar crimes' such as fraud, embezzlement and certain offences under the Companies (Jersey) Law 1991, the Financial Services (Jersey) Law 1991 and the Proceeds of Crime (Jersey) Law 1999. As such, it would be open to corporate bodies that discover regulatory breaches (such as, for example, shortcomings in relation to procedures to prevent and detect money laundering) to seek to enter into a DPA rather than face formal charges, prosecution and potential conviction at the conclusion of a criminal trial.

It should be noted however that the AG's Guidance describes a DPA as 'an exceptional criminal justice tool' which is 'not a routine measure'.

What is the process for entering into a DPA?

In order to initiate the process of entering into a DPA, the corporate entity must make a self-report to the AG which satisfies the requirements set out in the DPA Law. The contents of the self-report are private and confidential.

Once the entity has submitted its self-report, the AG must determine, by conducting a balancing exercise, (i) whether the evidence submitted is reasonably capable of demonstrating that a specified offence has been committed and (ii) whether it is in the interests of justice to enter into a DPA with the entity in relation to the specified offence. Factors which may militate against entering into a DPA include: cases where the entity is already subject to a criminal investigation in Jersey or elsewhere or where the Jersey Financial

Services Commission (JFSC) has made a referral to the AG or police; or the existence of previous criminal or regulatory enforcement actions against the entity and/or its officers or shareholders related to the conduct in the self-report.

If the AG determines that it is in the interests of justice to enter into a DPA with the entity, the AG and the entity will commence negotiations with a view to agreeing the terms of the DPA. The AG will then apply to the Royal Court for approval of the DPA.

The Court will consider the DPA application and will only sanction a DPA if it is satisfied that (i) it is in the interests of justice to do so and (ii) the terms are fair, reasonable and proportionate. If approved, the DPA's terms, together with the Court's reasons for approving the agreement, will be published.

What does a DPA look like?

There are a number of provisions which a DPA must include and these are set out in the DPA Law.

One of the most important features of a DPA is the 'statement of facts' relating to the specified offence which may include admissions made by the entity in relation to the specified offence. The statement of facts provides the foundation of the DPA.

Another key requirement of the DPA is that it must specify the independent monitor (IM) in relation to the DPA. An IM is a court appointed official who owes a duty to the Court. The IM's function is to monitor the entity's compliance with the terms of the DPA and report to the Court and the AG on the entity's compliance. The IM is also under a duty to report to the AG if it considers that, at any time during the DPA process, the entity or a connected person has provided inaccurate, misleading or incomplete information; committed an offence under the DPA Law; or committed a criminal offence. There will be an approved list of IMs which includes both individuals and businesses with appropriate qualifications in and experience of legal, accountancy, regulatory work and financial services.

The DPA must also set out the requirements imposed on the entity as a result of/in remediation of the wrongdoing. Such requirements may include:

- payment of a financial penalty
- to compensate victims
- to donate money to a charity
- disgorgement of profits made from the specified offence
- to implement a compliance programme or make changes to an existing compliance programme
- payment of the AG's costs in relation to the DPA proceedings
- remuneration of the IM.

The entity is required to comply with the terms of the DPA until its expiry and will be liable for prosecution for any breaches.

What are the advantages of entering into a DPA?

Perhaps the most obvious advantage for a corporate entity of entering into a DPA is that the entity avoids the negative publicity of a public prosecution and the inevitable reputational/financial damage of a corporate conviction. This is especially the case in a small jurisdiction such as Jersey where such effects would be amplified.

There are also other potential advantages which may make a DPA an attractive option for an entity which has discovered actionable wrongdoing within its business, for example:

- the entity is given an opportunity to remediate its breaches and make reparations which, optically, may inspire confidence that the entity is not seeking to avoid punishment (for example by defending a prosecution) but is holding itself accountable and committing to improving its practices and ensuring compliance going forwards;
- the entity is given a degree of bargaining power as the DPA is subject to negotiations between the AG and the entity. As such, the entity will have some input into the terms of the DPA including, for example, the quantum of any reparatory payments. This may make the extent of any financial damage to the entity more foreseeable and therefore more manageable. This is in contrast to a criminal trial where the outcome and quantum of any penalty is unknown;

- the increased visibility in relation to any adverse financial consequences outlined above may be particularly beneficial to smaller businesses as it may allow the entity to manage its affairs so that it can continue to trade as opposed to facing the financial uncertainty that would come with participating in a criminal trial and the associated risk of insolvency;
- finally, the costs of the DPA process are likely to be lower than the costs of defending a traditional prosecution.

What are the potential risks of entering into a DPA?

Notwithstanding the advantages outlined above, entering into a DPA is not without its risks. This may explain why it has been referred to as a 'high stakes bargain'.

The most notable material risk relates to the treatment of any evidence submitted by the entity pursuant to its self-reporting obligations in subsequent criminal proceedings. If a DPA is terminated, for example due to an entity's non-compliance with its terms, and the entity is subsequently prosecuted for the specified offences in the self-report, the evidence submitted by the entity is admissible against the entity and may be treated as formal admissions in subsequent criminal proceedings. In the same vein, if a DPA is not approved by either the AG or the Royal Court, any material submitted by the entity in the course of the self-report may be used against the entity in future criminal proceedings.

Other risks which an entity will need to consider before seeking to enter into a DPA are as follows:

- whilst entering into a DPA avoids the severe negative consequences of a criminal and/or regulatory prosecution, the entity should be mindful that the terms of an approved DPA will be published along with the Court's reasons. As such, the entity is still likely to suffer a degree of reputational damage by virtue of it entering into the DPA (albeit this will be more manageable);
- the AG's Guidance encourages entities to take their own legal advice prior to and in submitting a self-report. An entity will therefore need to consider that in addition to the requirement to pay the AG's costs of determining the self-report, the entity will have an additional costs liability in relation to its own legal fees. The AG's Guidance notes that a high quality of self-report should reduce the costs to borne by an entity in relation to the AG's costs. The production of a high quality self-report is however likely to occasion higher legal fees and internal costs for the business in terms of increased management time. An entity will therefore need to bear these costs factors in mind at the outset;
- the decision to self-report or not is finely balanced. In particular, many of the offences are ones with available defences and a matter of interpretation. The making of a self-report arguably waives those arguments;
- the AG's Guidance indicates that when the Royal Court is considering whether to approve the DPA, it may consider the extent of the entity's cooperation during the DPA process. An example given of a high level of cooperation is the waiver of any privilege which may attach to certain documents, for example documents produced during internal investigations. The decision to waive privilege is one which will require careful consideration and consultation with legal advisers. This is especially so given the risk outlined above that any evidence produced by an entity during the DPA process is potentially admissible against the entity in future prosecution;
- the DPA will only be available for the corporate entity, and individuals who might be implicated in any wrongdoing may face personal exposure, both from a criminal and regulatory perspective. This creates issues over duties owed by employers to its officers, and is an issue which has given rise to complicated considerations in other jurisdictions where DPAs are used (see below concerning the UK position);
- finally, there is of course a possibility that if an entity were to defend a prosecution, it would be successful and be cleared of the charges, thereby defending its reputation and clearing its name. Choosing to enter into a DPA removes the possibility of being acquitted of any wrongdoing as the process necessarily involves an entity making 'admissions' in relation to criminal/regulatory breaches. If an entity considers that it would have good prospects of successfully defending a prosecution, entering into a DPA may not be the most appropriate course.

On balance, the availability of DPAs is a welcome development in Jersey law and provides entities facing prosecution for criminal/regulatory wrongdoing with an alternative means of managing any potential damages they will face and the opportunity to protect their reputations from significant harm in the jurisdiction.

Lessons learned from the United Kingdom

Although there are undeniable differences between the new DPA framework in Jersey and the UK, the UK system is well established and cases emerging from the UK may prove extremely helpful in highlighting potential pitfalls and issues which entities in Jersey will wish to have in mind when navigating the DPA process.

Prosecuting individuals in DPA related proceedings

A major concern arising from the UK's experience relates to the prosecution of individuals blamed of wrongdoing in a DPA. The UK is witnessing an increasing trend whereby these individuals are prosecuted in lengthy and complex trials only to be acquitted at various points during the court process.

To date there has been only one successful prosecution of an individual in proceedings related to DPAs, which was in the case of *R v Bluu Solutions Limited and Tetris Projects Limited (2021)* . Under the DPAs, which were agreed in July 2021, Bluu Solutions Limited ('BSL') and Tetris Projects Limited ('TPL') accepted responsibility for bribery and failing to prevent bribery in connection with a number of office refurbishment contracts. The DPAs required the companies to pay a combined penalty of over £1.9 million and to pay back all profit obtained through the bribery, amounting to £604,407.

Following the agreement of the DPAs with the companies, an investigation into the individuals continued. This resulted in Roger Dewhirst, a former associate director of Sweett Group Plc, pleading guilty on 31 May 2021, to two counts of agreeing to receive bribes totalling approximately £290,998, contrary to Section 2(1) and (2) of the Bribery Act 2010. Three other individuals who denied wrongdoing, were acquitted following a trial by jury.

This apparent 'success' however, was short lived. Most recently, on 9 March 2023, the SFO abandoned its prosecution of three individuals linked to the DPA with G4S Care and Justice Services (UK) Ltd following an investigation which spanned almost 10 years. The case was abandoned after the SFO concluded that it was no longer in the public interest to proceed with the case.

This begs the obvious question of why are the prosecutions of individuals failing, and how can the prosecutors in Jersey learn from this?

Firstly, for many of the offences in which DPAs may operate, the route to criminal liability of the company is for a prosecutor to identify any individual(s) whose conduct and state of mind can be attributed to the company, so that he/she represents the company's 'directing mind and will'. To secure a DPA the company has to, in effect, sacrifice its directors or officers even if it subsequently transpires, on a closer analysis of the evidence, that the agreed case theory does not stand up to scrutiny. It is important to remember that DPAs remain an attractive outcome for both the prosecution and corporate defendants as an alternative to potential prosecution, so they are often aligned in their objective of securing a DPA, even at the expense of fairness for the individuals concerned.

Secondly, the concerned individuals have no role in negotiating the DPAs and have no right to challenge the blame attributed to them in the Statement of Facts. In approving the DPAs agreed between the SFO and BSL/TPL referred to above, Mrs Justice May DBE confirmed that '*the facts which have been agreed between the SFO and the corporate Respondents and set out in the Statement of Facts in this case…have not been agreed by any of the individuals to which I refer in this judgment, nor have they been asked for their comments*.'

Finally, in scrutinising the DPAs, the Court is merely making an independent assessment of the public interest in arriving at the DPA, and of the reasonableness, fairness and proportionality of the particular terms which the parties have agreed. The point was put squarely by Mrs Justice May DBE, who said that, '*in deciding whether or not to approve the DPA, the court exercises no fact-finding function, being dependent for its assessment upon the facts agreed between the parties and presented to it as part of the application. The court's role is one of oversight only…*'

It will be important for the AG and entities in Jersey to have in mind the position of individuals from the outset of DPA negotiations in the hope that unlike the UK experience, proceedings can be fair for all parties whose lives may be affected by the agreement.

Naming individuals in the Statement of Facts

In the Statement of Facts published alongside the DPA with Tesco Stores Ltd, blame was attributed to three named individuals, notwithstanding that those individuals were subsequently acquitted after the Judge acceded to a submission of no case to answer which was upheld by the Court of Appeal. This led to an uncomfortable situation in which individuals were named as having committed wrongdoing that they were subsequently cleared of.

The practice in the UK is generally moving towards anonymising the names of individuals within the Statement of Facts to avoid this tension. Some argue that this is insufficient as the facts are often sufficiently detailed such that the individuals can still be identified, however not publishing their names makes this concern less egregious.

The law in Jersey contains discretionary protections for the privacy of the entity involved however, the associated Statement of Facts will be a fully public record. An issue for consideration at the outset will therefore be whether any individuals concerned should be named, or whether to follow the approach of anonymising individuals at least until such time that they are convicted of the underlying criminal activities.

The Mourant team is highly experienced in managing regulatory investigations and action arising, and DPAs are certainly an area that will require careful consideration.

Thanks to Kathryn Hughes a Barrister at QEB Hollis Whiteman Chambers for her help in producing this briefing.

If you have any queries in relation to the above, please do not hesitate to contact our corporate regulatory law experts:

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