Deferred Prosecution Agreements: a high stakes bargain

Insights - 18/11/2022

Ogier partner James Angus recently advised, in consultation with the Government of Jersey, on the form and ambit of the draft Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law, lodged for States' debate and enactment at the end of October 2022.

The draft Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law (**DPA Law**) marks a significant development in Jersey's international status as a leading financial hub promoting transparent and robust financial enforcement. It brings Jersey up to speed with jurisdictions such as the UK and US, which have mature DPA regimes.

The guidance note accompanying the draft DPA Law makes the public policy initiative clear:

> "The adoption of the Draft Law would enable the creation of an effective additional criminal justice measure. It would help to address a fundamental issue with sanctioning legal entities whilst completing another important building block in the Island's preparation for the upcoming MONEYVAL assessment which will be critical for Jersey's international reputation and, ultimately, its prosperity."

But beyond this rationale, what is the DPA Law, how is it relevant to businesses operating in Jersey and what should organisations bear in mind before entering a Deferred Prosecution Agreement?

What is a Deferred Prosecution Agreement?

A Deferred Prosecution Agreement (**DPA**) is an agreement that is entered into between an organisation and the Attorney General's office (**AG**), under the supervision and approval of the Royal Court. Under a DPA, the AG agrees to suspend prosecution for an offence, usually an economic or corporate crime, for a defined period of time and subject to specific conditions.

The DPA regime applies exclusively to corporate bodies, though it will usually relate to criminal

acts of specific individuals in their capacity as representatives or officers of the organisation.

The types of offending for which a DPA will be available are set to encompass most (if not all) of the criminal offending likely to be encountered in the corporate setting, including:

- common law fraud, larceny, conversion, etc
- offences under the Companies (Jersey) Law 1991 (for example, knowingly wrongful solvency statements)
- offences under Financial Services (Jersey) Law 1998 (for example, insider dealing, market manipulation, etc)
- Proceeds of Crime (Jersey) Law 1999 offences (for example, failure to prevent money laundering)
- intermeddling
- bribery and corruption
- incitement to and procurement of criminal offences

Provided that the organisation complies with the terms of the DPA, it would cease to be of effect after its expiry date, and the AG must then discontinue proceedings in relation to the offence. In short, if the specified conditions are satisfied for the term of the DPA, the organisation will avoid public prosecution for the relevant offending. However, if the organisation is deemed by the Royal Court, on application by the AG, to be in breach of the DPA, the non-compliance would need to be remedied or the DPA might be terminated. This means a "regular" criminal prosecution could proceed.

The organisation's compliance with the terms of the DPA would be monitored by a so-called Independent Monitor, nominated by the AG and approved by the Court in the DPA. By reference to the DPA regime in the UK and US, the Independent Monitor will usually be a legal or regulatory consulting firm. The Independent Monitor's fees, including those associated with preparing reports on compliance for the AG, will be payable by the organisation as a condition of the DPA.

How would it work in practice?

The DPA regime is based on self-reporting.

Where an organisation discovers that criminal offences may have been committed by or within its business, the organisation itself would approach the AG. By way of full and frank disclosure, the organisation would provide evidence reasonably capable of demonstrating that an offence has been committed and invite the AG to enter into DPA negotiations.

The AG is under no obligation to enter negotiations simply because an organisation has self-reported. The AG will not take the report at face value and will (1) scrutinise the evidential basis underpinning the self-reporting and (2) consider whether it is in the interests of justice for a DPA to be entered into. The AG will have wide discretion and consider factors such as:

- the degree of harm caused, to whom and when (if very historic, why the delay)
- any history of similar conduct
- the extent of the nexus with Jersey
- the impact of the offending on Jersey's position as an international finance centre

Assuming the AG considers that the self-report is evidentially sound and that it would be in the public interest for a DPA to be put in place, the AG will apply to the Royal Court for approval of the DPA.

The Court will scrutinise the DPA application, including the terms of the proposed DPA and the identity and role of the Independent Monitor, via an initial (private) and subsequent (private or public) hearing. If approved, the DPA's terms will be published along with the Court's reasons for approving it. There will, therefore, always be a significant element of publicity even if traditional prosecution is avoided.

The Court will ultimately approve a DPA if it considers that it is (1) in the interests of justice and (2) fair, reasonable and proportionate to do so.

The specific terms of a DPA will depend very much on the circumstances of the case, including the nature of the offence, the harm caused and the effect on Jersey. The following are reparatory measures commonly found in UK and US DPAs and will also feature in the new Jersey regime:

- financial penalties – these have stretched to nine-figure sums in the UK and US
- cooperation in the prosecution of natural persons (such as for example the Standard Bank Bribery DPA in 2015)
- compensation to victims
- donations to charity
- disgorgement of profits
- wholesale and monitored corporate/compliance reform
- payment of prosecution costs
- remuneration of independent monitor

Considerations for organisations – should they enter into a DPA?

The decision whether to enter into a DPA will be momentous – the consequences of making the wrong decision could be business-ending. While there are clear benefits for an organisation in entering into a DPA, namely avoiding a "regular" criminal prosecution, there are material risks.

For example:

- if a DPA is approved but falls away, such as due to the organisation's non-compliance with its terms, then the evidence submitted by the organisation in its self-reporting may be treated as formal admissions in subsequent criminal proceedings
- if a DPA fails, either because the negotiations with the AG fail to pass evidential and public interest test thresholds or the Royal Court does not approve the DPA, the same material may still be used in specified future criminal proceedings

Given that the terms of an approved DPA will be published along with the Court's reasons, the subject organisation is likely to face reputational damage by virtue of it entering into the DPA (necessarily requiring, as it does, (1) criminal conduct; and (2) essentially an admission of criminal liability). Of course, far worse damage would follow any criminal and/or regulatory prosecution in the absence of a DPA.

Despite the attendant risks, there are clear advantages to entering into a DPA:

1. due to the reformative and reparatory focus of DPAs, public perception is generally kinder to subject organisations than if they had been found guilty of offences following a traditional prosecution. That is particularly the case in a smaller jurisdiction like Jersey, where the reputational (and, thereby, financial) damage occasioned by a prosecution is likely to be amplified
2. the financial damage occasioned by the penalties can also be made more manageable, as the subject organisation has a place at the negotiating table when it comes to the quantum of reparatory measures. This is to be contrasted with a criminal trial, where a defendant entity has far more limited options, and little to no negotiating power
3. a DPA is likely to be particularly beneficial to larger financial institutions that face isolated criminal conduct and wish to make reparations for it, but quarantine its impact on the business at large
4. in relation to smaller businesses, a DPA might be the difference between business continuity or business termination
5. the costs of a DPA procedure are likely to be significantly lower than the cost of defending a traditional prosecution

What are the next steps?

The DPA Law is due to be debated in the States in mid-December, with a view to it receiving approval by the end of 2022/early 2023. It is likely that the AG will publish guidance on the DPA regime around the same time.

Given that this is a new and developing area of law in Jersey, bringing it in line with the financial crime prosecution regime in the UK/US, there will be a degree of flux before the process is fully established and understood. There will no doubt be test cases progressing through the Royal Court for DPA approval during the course of 2023. We will be keeping a close eye on how both the AG and the Royal Court treat and develop the regime.

How can Ogier help?

If an organisation is considering making a self-report to the AG under the new DPA regime, they should seek early, comprehensive legal advice in light of the attendant advantages and risks.

Ogier's partner led white collar crime and regulatory team is on hand and particularly well-placed to offer detailed guidance, and liaison with the Law Officers' Department where necessary.

Please contact James Angus and Tom Hall for further information or advice.

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