

CRIME AND COURTS ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Courts and Justice

Schedule 17: Deferred prosecution agreements

Part 1: General

539. *Paragraph 1* sets out the principal characteristics of a deferred prosecution agreement (“DPA”). A DPA is an agreement between a prosecutor and an organisation facing prosecution for an alleged economic or financial offence specified in Part 2 of the Schedule. *Paragraph 1(2)* sets out the two sides of this agreement. The organisation agrees to comply with a range of terms and conditions (*paragraph 1(2)(a)*) and the prosecutor agrees to institute but then defer criminal proceedings for the alleged offence in accordance with paragraph 2 on approval of the DPA (*paragraph 1(2)(b)*).
540. *Paragraph 2* details the court process once a DPA has been approved – essentially, the prosecution is commenced but is then deferred. Paragraph 2(1) provides that a prosecutor must commence proceedings by bringing charges against an organisation for the alleged offence in the Crown Court by way of a modified procedure for preferring a voluntary bill of indictment. This means that there is no need for any involvement of a magistrates’ court in the DPA process. Once the proceedings have been instituted in this way, they are automatically suspended (paragraph 2(2)). Paragraph 2(3) provides that the suspension of the proceedings can only be lifted upon application by the prosecutor which may not occur whilst the DPA is in force (that is, the suspension of the proceedings may only be lifted following the DPA’s termination as a consequence of a breach of the Agreement). The suspension of the proceedings is the means by which the prosecution is deferred. The threat of the prosecution proceeding in the event of breach hangs over the organisation to make compliance with the DPA more likely.
541. *Paragraph 2(4)* provides that no other person (this would include a private prosecutor), may bring charges against the organisation for the same alleged offence whilst the prosecution is deferred.
542. *Paragraph 3(1)* specifies the “designated prosecutors” who may enter into a DPA. The Schedule provides that these are the Director of Public Prosecutions (“DPP”) and the Director of the Serious Fraud Office (“DSFO”), and any other prosecutor the Secretary of State designates by order (made subject to the affirmative procedure) (paragraph 3(1) (c)).
543. *Paragraph 3(2)* provides that the decision to enter into a DPA must be exercised personally by a designated prosecutor (that is, either by the DPP or DSFO). However, *paragraph 3(3)* provides that, if the designated prosecutor is unavailable, another person who has been authorised in writing by that prosecutor to exercise the power to enter into a DPA may do so, but they must do so personally.

544. *Paragraph 4* sets out those organisations which may enter into a DPA with a prosecutor. It also provides that an individual may not enter into a DPA.
545. *Paragraph 4(2)* and *(3)* provide that when the organisation that is a party to the DPA is a partnership or an unincorporated association, the DPA must be entered into in the name of the partnership or association (and not in the names of the partners or members) and any money payable under the DPA must be paid out of the funds of the partnership or association.
546. *Paragraph 5* outlines the content of a DPA. *Paragraph 5(1)* provides that every DPA must contain a statement of facts relating to the alleged offence which may include admissions made by the organisation. There is no requirement for admissions to be made by an organisation but any that are made will be included in the statement. The statement will have been agreed by the parties before inclusion in the DPA. The inclusion of a statement of facts in every DPA is to ensure openness and transparency. If the organisation subsequently breaches the DPA, and criminal proceedings are brought, this statement of facts will be treated as an admission by the organisation (*see paragraph 13(2)*).
547. *Paragraph 5(2)* sets out the only other mandatory requirement for every DPA: each agreement must specify an expiry date upon which it will cease to have effect (unless, in a particular case, it has already been terminated following breach – see paragraph 9). This is to ensure that both parties have clarity about the duration of the deferral period. There is no prescribed maximum or minimum period as the terms of each DPA will depend on the particular circumstances of the case.
548. *Paragraph 5(3)* provides a non-exhaustive illustrative list of potential terms and conditions that may be included in a DPA. This list is not prescriptive. This is to ensure that each DPA can be tailored to the particular facts of an individual case. *Paragraph 5(3)* also provides that the DPA can set time limits for the organisation to comply with specific terms of the agreement within the deferral period. For example, the agreement could specify dates for the payment of compensation (*paragraph 5(3)(b)*) or of a financial penalty (*paragraph 5(3)(a)*). Any financial penalty will be collected by the prosecutor and paid into the Consolidated Fund (as set out at *paragraph 14*). Any disgorgement of profits under the Agreement (*paragraph 5(3)(d)*) will also be collected by the prosecutor and paid into the Consolidated Fund in the same way. Alongside or instead of monetary conditions, a DPA could also include terms such as the implementation of a compliance programme which could require, for example, revisions to an organisation's anti-corruption or anti-fraud policies and procedures and additional training provision for staff (*paragraph 5(3)(e)*); or cooperation with any related investigations, either of individuals or other organisations (*paragraph 5(3)(f)*). It may also include the appointment of an independent monitor to scrutinise the implementation of any compliance measures.
549. A DPA may also provide for the payment of reasonable prosecution costs (*paragraph 5(3)(g)*). The expectation is that the amount of the costs negotiated and agreed by the parties will be clearly set out on the face of the agreement, and they will be treated independently of any financial penalty, that is the prosecutor will not be able to defray any of its costs from a financial penalty paid by the organisation. This provision reflects the position regarding the payment of prosecutorial costs in ordinary criminal proceedings.
550. *Paragraph 5(4)* provides that the amount of the financial penalty agreed by the parties under a DPA must broadly reflect the likely fine that a court would have imposed on the organisation on conviction for the alleged offence following a guilty plea. When setting this amount, both parties will need to take into account all the relevant factors that would be considered by a sentencing court. These would include relevant Sentencing Guidelines covering specific offences and other matters such as the principle of a reduction of sentence following the entry of a guilty plea at the first reasonable opportunity. Consideration would also need to be given to the means of the organisation,

any compensation or charitable donations payable, the extent of any disgorgement of profits, and prosecutor's costs that would be payable.

551. [Paragraph 5\(5\)](#) states that the DPA itself may provide for the consequences of an organisation's failure to comply with the agreement. For example, the DPA may include a term specifying a punitive rate of interest for a late payment of a financial penalty. In the event that such a term were to be engaged, the prosecutor would have the option of either: (i) settling the failure to comply in accordance with the term provided in the agreement; or (ii) applying to the court under paragraph 9 (breach of a DPA).
552. [Paragraph 6](#) provides for a DPA Code of Practice for prosecutors setting out guidance on the DPA process. The Code must be issued jointly by the DPP and DSFO. Paragraph 6(1)(a) explains that this Code must give guidance on general principles to be applied by prosecutors in determining whether a DPA is likely to be appropriate in a given case. The Code must also include guidance on the disclosure of information by a prosecutor to the organisation both in the course of DPA negotiations and after a DPA has been agreed (paragraph 6(1)(b)). It is expected that guidance on disclosure in the DPA process included in the Code will reflect existing guidance on this subject (such as the Attorney General's Guidelines on Plea Discussions and the Attorney General's Guidelines on Disclosure) and general common law principles. Paragraph 6(2) sets out other relevant matters that may be included in the Code, including guidance on variation, breach and termination of a DPA. Prosecutors must take account of the Code when exercising their functions throughout the DPA process (paragraph 6(6)).
553. The DPP is obliged to set out this Code in his or her annual report to the Attorney General which is laid before Parliament (paragraph 6(3)). This is consistent with the process for publishing the Code for Crown Prosecutors under section 10 of the Prosecution of Offences Act 1985. Paragraph 6(4) requires that any alterations to the Code must be agreed between the DPP and DSFO and any other designated prosecutor. Following any amendments to the Code, paragraph 6(5) provides that any alterations to the Code or any new Code must be set out in the DPP's annual report to the Attorney General.
554. [Paragraph 7](#) outlines the court's role at the preliminary hearing. Following a prosecutor's indication that it is minded to enter into a DPA, and having negotiated outline terms with the organisation, paragraph 7(1) provides that the prosecutor must seek a declaration from the Crown Court that entering into a DPA with the organisation is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate.
555. [Paragraph 7\(2\)](#) provides that the court must give reasons for its decisions at a preliminary hearing. The court's declaration and reasons would remain confidential to the judge, prosecutor and the organisation under paragraph 7(4), but would be made publicly available under paragraph 8(7) in the event that a DPA were to be approved (subject to any restrictions necessary to protect ongoing or future prosecutions).
556. [Paragraph 7\(3\)](#) allows flexibility for there to be several preliminary hearings if for whatever reason the court has declined to declare that a DPA is likely to be in the interests of justice, and/or, its terms are fair reasonable and proportionate.
557. [Paragraph 7\(4\)](#) provides that the preliminary hearing must be held in private and any declarations also made in private. This is to avoid jeopardising any future prosecution of the organisation, and to limit any potential damage to the organisation's commercial interests at this stage. For example, if the detail of a preliminary hearing were made public, particularly where a judge considered that the alleged conduct was such that a DPA would not be likely to be in the interests of justice, it may be prejudicial to future criminal proceedings, whether against the organisation or another person.
558. [Paragraph 8](#) outlines the court's function at the final hearing. Once the court has approved the DPA in principle at a preliminary hearing and the terms have been agreed

by both parties, paragraph 8(1) provides that the prosecutor must apply to the Crown Court for a final declaration that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. Paragraph 8(3) provides that the DPA only takes effect when the court has made this final declaration. Paragraph 8(4) provides that the court must give reasons for its decision whether or not to make a declaration.

559. [Paragraph 8\(5\)](#) provides that the final hearing may be held in private: this is to allow the final proposed DPA to be set out before the judge and any final issues to be resolved in a free and frank environment. But if the court decides to approve the DPA and make a declaration, the court must do so in open court, giving reasons for its decision (paragraph 8(6)). Upon approval of the DPA, the prosecutor will be obliged to publish the final Agreement and all declarations made by the court at the preliminary and final hearings, including the reasons for these decisions (paragraph 8(7)). The prosecutor should publish these documents immediately, unless an enactment or an order of the court under paragraph 12 made to avoid prejudice to any ongoing or future proceedings prevents him from doing so.
560. [Paragraph 9](#) makes provision for any instances where an organisation fails to comply with any term of the DPA. Following any breach of the Agreement (including any instance of breach provided for in the DPA itself as outlined at paragraph 5(5)), the prosecutor may seek a factual determination from the court as to whether or not there has been a breach (paragraph 9(1)). Paragraph 9(2) provides that the court must then decide whether, on the balance of probabilities, the organisation has failed to comply with the terms of the Agreement. If the court determines that a breach has occurred, paragraph 9(3) provides that the court may either: (i) invite the parties to agree proposals to remedy the breach; or (ii) decide to terminate the Agreement. The court must give reasons for the decision it has made (paragraph 9(4)).
561. If the Agreement is terminated, then the prosecutor may seek to have the suspension of the criminal proceedings against the organisation lifted (see paragraph 2(3)).
562. [Paragraph 9\(5\)](#) provides that in cases where the court finds that the organisation has not failed to comply with terms of the DPA, the prosecutor must publish the court's decision and the reason for this decision (unless prevented by an enactment or order of the court made under paragraph 12 to avoid prejudice to any ongoing or future proceedings).
563. The prosecutor will be required to publish the court's decision and reasons to invite the parties to agree proposals to remedy the organisation's failure to comply with the Agreement (paragraph 9(6)). Similarly, paragraph 9(7) ensures that, upon termination of a DPA following breach, the prosecutor must publish both the fact of the termination and the court's reasons for its decision. Both these publication requirements are subject to any enactment or order of the court made under paragraph 12 to prevent prejudice to any ongoing or future proceedings.
564. There is also an obligation on the prosecutor, set out at paragraph 9(8), to publish a decision not to bring a suspected breach of a DPA before the court, in order to ensure that such decisions are made transparently. This would include any instance of breach for which the consequences were provided for in the Agreement (as set out at paragraph 5(5)). In these cases the prosecutor is obliged to publish reasons both for their belief that the organisation has failed to comply and for their decision not to bring the suspected breach before the court. These reasons might include the prosecutor's view that the matter was capable of being dealt with adequately through the mechanism provided in the DPA. This might be the case in particular where the organisation agrees that a breach has occurred, and is content to settle the matter with the prosecutor without involving the court.
565. [Paragraph 10](#) deals with variation of the DPA. Variation of the DPA may occur where the court has invited the parties under paragraph 9(3)(a) to remedy a breach of the DPA through varying its terms (paragraph 10(1)(a)). Paragraph 10(1)(b) provides that variation will otherwise be permissible only in exceptional cases. These are limited

to situations where variation is necessary to avoid a breach of the DPA, and the circumstances giving rise to the potential breach could not have been foreseen at the time that the DPA was agreed. Paragraph 10(2) provides that the court must approve any application to vary the Agreement. By virtue of paragraph 10(3), any variation will only take effect once the court gives its approval. The court will have discretion whether to approve the proposed variation and will apply the same tests as for the original terms of the DPA, that is, whether the variation is in the interests of justice and the terms as varied are fair, reasonable and proportionate. The court must give reasons for the decision made (paragraph 10(4)). Where it refuses to approve the variation the original Agreement will stand.

566. [Paragraph 10\(5\)](#) provides that the hearing for an application for variation may be held in private to allow the proposed variation and the reasons for it to be set out before the judge confidentially. This may be necessary, in particular, if the reasons giving rise to the proposed variation are commercially, or otherwise, sensitive. However, if the judge decides to approve the variation and make a declaration to that effect, the judge must do so in open court, and must give reasons for that decision. The prosecutor is required to publish the varied DPA and the court's declaration, unless prevented by any enactment or order of the court made under paragraph 12 to avoid prejudice to future or ongoing proceedings. Paragraph 10(7) provides that, if the court does not decide to approve the variation, the prosecutor must also publish this decision and the reasons for it (subject to the same restrictions).
567. If the organisation complies with the terms of the DPA throughout its duration, the DPA will expire on the expiry date set out in the Agreement in accordance with paragraph 5(2). [Paragraph 11](#) provides that the criminal proceedings against the organisation that were instituted under paragraph 2 are to be discontinued on expiry of the Agreement. Once the prosecutor has discontinued proceedings in this way, paragraph 11(2) provides a bar to any further criminal proceedings being brought against the organisation for the same offence (but this would not prevent proceedings being instituted against any other person for the same offence). This gives certainty to the organisation that, upon complying with the terms of the Agreement, it will not be vulnerable to future prosecution for the same alleged offending. However, this bar does not prevent the institution of fresh proceedings against the organisation for the same offence if the prosecutor finds that during negotiations for the DPA the organisation provided inaccurate, misleading or incomplete information to the prosecutor (paragraph 11(3)).
568. [Paragraph 11\(4\) to \(7\)](#) provide that if, in the particular circumstances of a case, there are ongoing breach proceedings and the Agreement's expiry date has been reached, the DPA will not be considered to have expired until the entire process for dealing with the breach has been completed, including full compliance with any remedy for the breach agreed by the parties.
569. Following full compliance with the Agreement, paragraph 11(8) provides that the prosecutor must publish the fact of the discontinuance of proceedings and details of how the organisation complied with the DPA (unless prevented from doing so by any enactment or order of the court made under paragraph 12 to prevent prejudice to any future or ongoing proceedings).
570. [Paragraph 12](#) provides that the court may order the postponement of the publication of information relating to the DPA process. This will cover the obligations on the prosecutor to publish the final Agreement and all court rulings upon approval of the Agreement; details of the facts and approach taken in the event of any breach or variation of the Agreement and details of how the terms and conditions of the DPA have been complied with by the organisation at the end of the DPA process. This is to ensure there is no prejudice to any ongoing or future proceedings by the publication of such material. The court may make such an order on its own motion or following an application.

571. *Paragraph 13* concerns the use of material arising out of the DPA process in criminal proceedings. Where a DPA has been entered into (subject to any necessary publication restrictions to avoid prejudice to future prosecutions) the final Agreement, including the statement of facts, will be a matter of public record. Once a DPA has been approved, paragraph 13(1) and (2) provide that the statement of facts, having been agreed by the organisation, can be treated as a formal admission in any future criminal proceedings against the organisation.
572. Where a DPA has not been approved (paragraph 13(3)), a prosecutor will not be able to rely either on the fact that it conducted DPA negotiations with the organisation, or on any draft DPA created during the negotiations in any future criminal proceedings, save in the circumstances set out at paragraph 13(4). These circumstances would be: (i) any criminal proceedings against the organisation for an offence consisting of the provision of inaccurate, misleading or incomplete information; or (ii) in proceedings for another offence, where the organisation makes a statement in evidence that is inconsistent with a statement it made in the course of the DPA process. Paragraph 13(6) sets out the range of material created in the course of unsuccessful DPA negotiations (a draft DPA, draft statement of facts and any statement indicating that the organisation entered into DPA negotiations) that cannot be used against the organisation except in these circumstances. However, prosecutors would not be prevented from relying on evidence obtained from investigations pursued as a result of anything said in any unsigned statement of facts or draft DPA. Further, any pre-existing material provided by the organisation during the DPA process would be admissible in proceedings for any offence (subject to existing rules on admissibility of evidence).
573. *Paragraph 14* provides that any money received by a prosecutor under a term of a DPA (that is, either a financial penalty or disgorged profits) must be paid into the Consolidated Fund.