

Deferred Prosecution Agreements: Key Differences Between the US and UK

Deferred prosecution agreements (DPAs) have gained traction in the US and UK in recent years. Both regulators and companies have an affinity for them; such agreements can often resolve legal matters quickly and reduce litigation costs. DPAs can help companies move past questionable actions and avoid the potentially painful and costly spotlight of ongoing litigation and damage to their brand and reputation.

But it is critical to understand DPAs and how they are used – there are significant differences between the US and UK systems that could affect companies and their individual directors and officers. Moreover, businesses would be well served to understand and review how their directors and officers (D&O) insurance may respond when DPAs are used.

WHAT ARE DPAS?

A deferred prosecution agreement (DPA) generally is an arrangement reached between a prosecutor and a company to resolve a matter that could otherwise be prosecuted. The agreement allows a prosecution to be suspended for a defined period, provided the organization meets certain specified conditions. A DPA is made with the approval or under the supervision of a judge.



DPAs can be used in potential cases of fraud, bribery, and other economic crime. DPAs have been used in the US for decades, and their use in the UK has been increasing since UK law made them available in 2014. Other countries, including France, Singapore, and Australia, have either introduced or are considering DPAs.

In the US, a DPA carries the risk that a company may be assigned an outside monitor to oversee compliance with the agreement. A DPA also carries the risk of potential suspension or debarment from government contracts by agencies impacted by the problematic conduct covered under the DPA. It is important to assess these risks before signing onto a DPA.

DIFFERENCES BETWEEN COUNTRIES

The differences between the US and UK DPA systems can be significant, and understanding those differences can help shape important decisions taken by companies (and individuals) at the early stages of a case and its subsequent investigation.

In the US and UK, DPAs apply to organizations; however, in the US they can also apply to individuals. Although an individual cannot be the subject of a DPA in the UK, the terms of a DPA involving a company can have an important impact on the criminal and civil liabilities of individuals.

The chart below includes other key differences between DPAs in the US and UK. These differences may be important to businesses that are potentially subject to scrutiny by authorities in both countries.

	US	UK
Judicial Involvement	DPAs are negotiated by prosecutors with little judicial involvement. Generally, the US judiciary approves the terms without significant amendment before they are made public.	Judicial approval is required to initiate negotiations, enter into a DPA, and modify its terms. The declaration of a DPA and the court's reasoning, in addition to an agreed-upon statement of facts, is made public.
Designated Prosecutors	Federal, state, and county prosecutors and others authorized to enforce federal and state regulations have the power to enter into a DPA. Individual prosecutors may have significant autonomy.	Only "designated prosecutors," including the Serious Fraud Office and Director of Public Prosecutions (in England and Wales), have the power to enter into a DPA.
Offenses	The scope of offenses where a DPA may apply is broad and authorities are given comparatively wide discretion. <small>(Notable exceptions are cases involving national security, foreign affairs, and violations of public trust by government officials.)</small>	DPAs are only available in relation to "scheduled offenses," which include certain violations under the Bribery Act, Proceeds of Crime Act, and Companies Act.
Non-Prosecution Agreements (NPAs) <small>(NPAs are similar to DPAs, except that the prosecutors agree not to prosecute, rather than deferring or reserving the right to do so in the future.)</small>	NPAs may be used in exceptional circumstances.	NPAs are not available.
Underlying Legal Framework	In addition to potential direct statutory liability for the organization, the concept of <i>respondeat superior</i> (an employer has responsibility for the acts of its employees and agents) makes corporate criminal liability a realistic prospect in situations where employees of a corporation are involved in criminal activities.	In the absence of a strict liability corporate defense, the so-called identification principle is used to determine whether the offender was a "directing mind and will" of the company and is a significant evidential hurdle to establishing corporate liability.*
Conduct of Internal Investigations	Authorities have a more developed methodology for organizations engaging outside counsel to perform investigations. These investigations and their results are routinely recognized by prosecutors and scrutinized by prosecutors for purposes of appropriately resolving cases.	Authorities — particularly the Serious Fraud Office — are less likely to rely on a private-sector investigation as a matter of course and may indicate that they do not wish initial interviews to be conducted by third parties such as the organization's lawyers.

*Against this background, the introduction of the strict liability offense contained within the UK's Bribery Act has at times caused wider enforcement of corporate criminal liability by prosecutors. The UK government is also considering broadening the scope of corporate criminal liability to apply to other "economic crimes."

Difficult decisions regarding how to structure the investigation and engage with prosecutors need to be made at the outset, when an investigation may be considered by authorities in multiple jurisdictions. These decisions can have a material impact on how individual directors and officers may become involved in the investigation.

Individuals caught up in an investigation — whether administered by their organization, a third party, or a regulator — should consider whether separate legal representation is needed, clarify whether their organization intends to indemnify them, and understand whether their D&O insurance provides affirmative coverage in this instance. The organization should consider these issues as well. Even though the interests of the individual and organization may diverge during the course of an investigation, the need for organizations and individuals to cooperate with authorities throughout an investigation is paramount.

Additional D&O coverage considerations would include the following areas, among others: availability and breadth of pre-investigation cover, internal investigation cover, and formal investigation cover; claims-reporting obligations vis-à-vis confidentiality mandated by the regulator; scope of the insured person definition; and personal conduct exclusionary language.



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