



Attorney General's Guidance

Deferred Prosecution Agreements

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Introduction

- 1) A Deferred Prosecution Agreement (“**DPA**”) is an agreement reached between the Attorney General and a corporate entity which could be prosecuted, under the supervision of the Royal Court. It is a discretionary tool which enables a corporate to make full and carefully structured reparation for its criminal conduct and avoid the damaging consequences of a conviction. In a small jurisdiction, the harm caused to the reputation of a corporate as a result of a conviction is likely to be significant. In addition, a corporate that enters into a DPA with the Attorney General may avoid a complex, lengthy and costly trial.
- 2) The Attorney General’s Guidance on Deferred Prosecution Agreements (the “**DPA Guidance**”) is issued pursuant to Article 14 of the Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law 2023 (the “**Law**”). Article 14 of the Law mandates general guidance on the elements of the DPA proceedings be issued by the Attorney General, which may include specific guidance on the matters set out in paragraphs (a) to (l) of Article 14 of the Law. This DPA Guidance will follow the structure of paragraphs (a) to (l). The Appendix contains a flow chart which contains a simplified overview of the intended process.
- 3) A DPA is an agreement between a company and other types of corporate body (“**Entity**”), and the Attorney General. DPA proceedings are conducted under the supervision of the Bailiff and Royal Court. This is an important element of the DPA process. The Royal Court must be satisfied that the DPA is in the interests of justice and that the terms are fair, reasonable and proportionate. Ultimately, they must be satisfied that the final DPA is also fair, reasonable and proportionate. The effect of the DPA is that a prosecution is suspended for a defined period provided the corporate meets certain specified conditions.
- 4) A DPA is an exceptional criminal justice tool and is not a routine measure. It is not possible to issue guidance in relation to every element of a DPA, including purely procedural matters which participants and their legal representatives can be expected to resolve themselves. Nor is it possible to answer in guidance all queries arising from DPA proceedings. All cases are fact specific and all DPAs must start with a self-report that is compliant with the Law. DPAs and DPA proceedings in Jersey are different from DPAs in other jurisdictions. Consideration of the suitability of a DPA will be informed by the application of this guidance and the assessment of the Attorney General as required in Article 5 (1) and (2) of the Law. Entities are encouraged to take their own legal advice

before and in submitting a self-report. The Law Officers' Department cannot provide advice to an Entity.

- 5) DPAs in Jersey only apply to an Entity as defined in Article 1 (1) of the Law and to a limited category of statutory and customary law offences set out in Schedule 1. Only the Attorney General can agree to a DPA. The relationship between the Entity and the Attorney General with respect to the formation, variation and termination of DPA is not governed by the law of contract (Article 2 (3)).

A. The process of submitting a self-report

- 6) In order to enter into a DPA the Entity *must* make a self-report which satisfies the requirements of Article 4 (1) (a) and (b) of the Law. The contents of the self-report are private and confidential. Once the Entity has done so the Attorney General is obliged to carry out a determination as required in Article 5 (1). However, no determination will commence unless the Entity complies with the cost requirement in Article 5 (3) which must also be part of the self-report (see below).
- 7) An Entity that wishes to submit a self-report should note the terms of Article 19 in the Law. The effect of this Article is that the DPA process applies to a specified offence notwithstanding that the commission of the specified offence might have occurred before the commencement of the Law.
- 8) If an Entity wishes to make a self-report, they must submit it via secure email to ECCUadmin@gov.je. All correspondence will be treated confidentially, and any evidence or material received in support of a self-report will be exchanged via a secure Egress (or similar) workspace. The self-report should be addressed to the Attorney General with a covering letter setting out in broad terms the evidence supplied. The preferred method of submitting the self-report is electronically, however this will be determined on case-by-case basis.
- 9) The self-report should meet these requirements:
 - a) A short case summary explaining in broad terms the offences the Entity has committed, how they came to light, whether any natural persons other than the Entity are suspected to be involved and the sources of the evidence that form part of the self-report;

- b) Details of when the suspected offences first came to the attention of the Entity and what steps, if any, have been taken since, such as internal investigations. These must be disclosed including whether any conduct by the Entity has been referred to the Enforcement division of the JFSC;
- c) Details of the relevant suspected offence(s) in Schedule 1 to the Law should be set out in chronological order;
- d) The evidence which is said to support the suspected offence(s) should be ordered and organised thematically by reference to each offence and any supporting documentation must be paginated and ordered sequentially; and
- e) All material submitted as part of the self-report should, in the first instance, be submitted electronically, paginated and accompanied by an index;
- vi) The self-report should contain confirmation that it is true, accurate and complete to the best of the Entity's knowledge and belief;
- vii) An undertaking concerning costs signed on behalf of the Entity in accordance with Article 5 (3) of the Law must be provided; and
- viii) It should request that the Attorney General determines whether to enter into a DPA with the Entity in accordance with Article 4 (1) (b) of the Law.

B. Principles regarding evidence submitted demonstrating the commission of an offence

- 10) Whether the evidence submitted as part of a self-report is reasonably capable of demonstrating that a specified offence has been committed will require a careful analysis of the elements of the particular offences in Jersey law. Instances may arise where the Attorney General considers that the self-report discloses offences of a different type or seriousness than those revealed by the Entity. In those circumstances, the Attorney General's determination of the offences will be final. However, the Entity may be invited to supply further evidence or make further written representations about the offences it says should form part of the DPA proceedings.
- 11) The Entity may also wish to consider disclosing full records of internal investigations. Detailed information provided in a coherent, timely and logical fashion will assist the Attorney General in making a determination within a reasonable time. For example, an

Entity that has preserved all available evidence, provides it promptly in a coherent format and has identified relevant witnesses disclosing their accounts and any documents shown to them, may receive an expedited determination. A high quality of self-report should also reduce the costs requirement to be borne by an Entity.

- 12) A self-report submitted in accordance with the minimum requirements should not be taken as a guarantee that DPA proceedings will commence nor represent a binding obligation on the Attorney General to enter into a DPA. It is a matter for the Attorney General whether the requirements of a self-report have been met. The decision to agree to DPA remains a matter for the Attorney General as informed by assessment of the interests of justice according to the requirements in Article 5 (4).
- 13) As explained above, Article 19 (1) of the Law permits specified offences which have occurred before commencement of the Law to be taken into account. This is a broad discretionary provision that would allow the Entity, if it wished, to submit a self-report concerning a specified offence that occurred before the Law came into force. Pre-commencement conduct which amounts to a specified offence will also be relevant for making any determination, decision, application or, for taking any step in DPA proceedings (as defined in the Law).

C. Principles applied for costs determinations

- 14) The amount of costs in considering a self-report will be determined by reference to the Factor A hourly rates published by the Royal Court on the Jersey Legal Information Board.
- 15) The costs will depend on the amount of material to be considered in the self-report and its complexity. Where the self-report is presented in accordance with the guidance set out above, costs are estimated to be approximately £7,500 - £10,000. However, this is an estimate and may need to be revised in the light of experience. The cost determination for the consideration of a self-report does not include any subsequent costs if the decision is that DPA proceedings should be commenced. Such subsequent costs will also be at Factor A rates.

D. Principles regarding the interest of justice test

- 16) The Attorney General's determination under Article 5 (1) and (2) is a balancing exercise. It requires an assessment of the factors which would justify a prosecution and those that militate against it. The Attorney General will consider the totality of the information provided by the Entity and the extent to which it is providing information voluntarily. If the Entity is only making a self-report because of the threat of disclosure by a third party or where it knows a complaint to States of Jersey Police is imminent or has already been made, the Attorney General may draw inferences as appear proper from those circumstances. In all cases however, which matters are considered relevant and what weight is given to them are matters for the Attorney General and will be decided on a case-by-case basis.
- 17) The Attorney General will not usually explain to an Entity why entering into a DPA would not be in the interests of justice under Article 5 (2) if this is the conclusion reached by the Attorney General. However, the presence of any of the following factors may indicate that a DPA would not be appropriate:
- a) where there has been a high degree of harm caused directly or indirectly to the victims of the offending whether in Jersey or elsewhere;
 - b) cases which involve alleged criminal conduct that takes place wholly outside Jersey;
 - c) cases where the Entity is already subject to a criminal investigation in Jersey or elsewhere or where the JFSC has made a referral to the Attorney General or Police pursuant to its policy dated 26 July 2019; or
 - d) previous criminal or regulatory enforcement actions (wherever the enforcement actions occurs) against the Entity and/or its directors/partners and/or shareholders related to the conduct in the self-report.

E. The process of negotiating and agreeing a DPA

- 18) If the Attorney General has made the determination under Article 5(5) that it is in the interests of justice to enter into a DPA with the entity, the Attorney General and the entity will commence negotiations with a view to agreeing the terms of the DPA. The Attorney

General will do so by way of a letter of invitation outlining the basis on which any negotiations will proceed (the “**commencement letter**”).

- 19) The commencement letter will set out a timeframe within which the Entity must notify the Attorney General whether it accepts the invitation to commence DPA proceedings. That letter will also establish the date upon which DPA proceedings have begun for the purposes of Article 6 (2) of the Law. DPA proceedings will end upon either the withdrawal of the Attorney General, the Entity or both from the process, or the grant/ refusal by the Royal Court of a DPA at a final hearing under Article 7 of the Law. Neither the Attorney General nor the Entity is obliged to give reasons for withdrawal from DPA proceedings. The Entity should understand that a DPA is a discretionary tool that is an alternative to prosecution. The Entity must also keep in mind that a DPA is a voluntary agreement, governed by the provisions of the Law.
- 20) The Attorney General will, at this stage, subject to the successful completion of these initial steps, agree not to seek leave of the Court, under Article 81A (1) of the Criminal Procedure Law 2018, to progress proceedings in relation to the specified offence at any time while the DPA is in force.
- 21) If the Entity agrees to the commencement of DPA proceedings the Attorney General or Crown Advocate on his behalf will send the Entity a letter setting out the way in which the discussions will be conducted (the “**negotiations letter**”). This letter will confirm the confidentiality of the DPA negotiations, and the confidentiality of information provided by the Attorney General and the Entity in the course of the DPA proceedings.
- 22) The negotiations letter will explain the use which may be made by the Attorney General of information provided by the Entity pursuant to Article 15 of the Law during the negotiation process.
- 23) The negotiations letter will explain that all documentation or other material relevant to the matters the Attorney General is considering prosecuting will be retained until the Entity is released from the obligation to do so by the Attorney General.
- 24) Issues relating to confidentiality as well as the use and retention of information must be agreed to the satisfaction of the Attorney General before the substantive DPA negotiations commence.
- 25) It is not necessary for the first application to the Court that the final terms of the DPA will have been agreed by the Attorney General and the Entity, but agreement is desirable. Agreement is also necessary for the purposes of a final hearing in accordance with Article 7 of the Law. Where obtaining agreement of the Entity to the terms of the DPA the

Attorney General may refer the matter back to the Court or consider use of the material in the self-report in a prosecution in accordance with Article 15 of the Law.

- 26) The Entity will note that the Royal Court has wide powers under Article 13 (1) (a) and (b) to prohibit publication of information. It is anticipated that the Attorney General and the Entity will consider in advance of any hearing what information provided as part of the DPA proceedings might be subject to a prohibition on publication.
- 27) The Law contains discretionary protections for the privacy of an Entity involved in DPA proceedings (see Articles 6 (8), 8 (6), 10 (5), 11 (5)).
- 28) Private hearings are necessary to avoid a substantial risk of prejudice to the administration of justice in any legal proceedings and the Royal Court will not identify the parties to a private application.
- 29) If the Attorney General and or the Entity make an application that a declaration under Article 7(2) is made in private, the parties must consider whether the hearing can be heard in public as a starting point and if not, whether as much as possible of the hearing can be heard in public.
- 30) Where the application to approve the DPA is in private under Article 7 (6) it would normally be appropriate for reasons of open justice for the Royal Court to postpone the making of a declaration approving a DPA in open court so that a listing might be publicised in the normal manner, and therefore exercise its discretion under Article 13 (1).
- 31) All communications with the Royal Court in respect of a DPA must be treated as confidential. DPAs are not publicly accessible documents unless and until they are published by the Attorney General on the Law Officers' Department website in accordance with an Order of the Royal Court.

F. DPA content, requirements, penalties, and costs

- 32) The DPA must contain the terms as set out in Article 3 of the Law. One of the most important features of a DPA is the statement of facts in Article 3 (1) (b). This will provide the foundation of the DPA. It explains in detail the conduct which underpins the allegations, and which forms the basis of the counts on the indictment that has been suspended with a view to the Entity agreeing to enter into a DPA.

- 33) The Entity is encouraged to make clear (if it has not already done so) what admissions it makes to the alleged conduct which formed the basis of the self-report. It should be noted that the Attorney General is not required to prove the conduct before an Entity admits all or part of the allegations that are particularised on the indictment. It is the Entity that makes a self-report, and it will know or have the best recollection of what it (or its officers) have done.
- 34) The statement of facts will ultimately represent a full public record of the wrongdoing in which the Entity has engaged. The public are entitled to a full statement of the facts in order to understand why the Entity is not being prosecuted. The following standards apply to a statement in Article 3 (1) (b):
- a) The particulars relating to each alleged offence must be clearly set out;
 - b) The statement must give details of any financial gain or loss, with reference to key documents;
 - c) Mitigation or explanations for misconduct should not be included, save where remediation steps have been taken since the self-report or where it is necessary to explain a complex programme of remediation;
 - d) The Entity should take care to avoid assertions relating to matters wholly outside the knowledge of the Attorney General or irrelevant matters of fact that would not make a material difference to any financial penalty imposed on the Entity by the DPA. The DPA is not a basis of plea;
 - e) Where the *mens rea* for particular offences requires alternative states of mind (intention or recklessness, knowledge or suspicion), the Entity must make it clear which applies to the misconduct alleged in the indictment and the Attorney General must agree which applies before any statement of facts is agreed;
 - f) There is no requirement for formal admissions of guilt in respect of the offences alleged in the indictment. However, it will be necessary for the Entity to admit the contents and meaning of key documents referred to in the statement of facts. Where admissions are made, these should be clearly stated and explained. If possible, they should mirror the misconduct alleged in the indictment;
 - g) The statement of facts will explain that in the event the DPA proceedings are terminated, and the Entity is subsequently prosecuted for the alleged offences in the self-report or, where the Entity, for example, misled the Attorney General

during DPA proceedings the statement of facts is admissible against the Entity in those subsequent criminal proceedings.

- 35) The Attorney General will ensure that the terms sought in a DPA are reasonable and proportionate to the wrongdoing alleged in the statement of facts. This should not form the basis of protracted negotiations. If an Entity disagrees with scope of a particular term or the terms themselves, it must set out a principled basis why they should not apply in its case.
- 36) The terms of a DPA will usually comprise a set of requirements and general terms which will usually include a financial penalty. Measures may also be included as a means of redress for victims, such as payment of compensation. Requirements for a programme of remediation where the Entity's conduct occurred as a result of defective policies and procedures may be included. Save in exceptional cases, a requirement will be included to recover from an Entity the reasonable costs of the Attorney General in relation to the DPA proceedings.
- 37) The final and agreed requirements will be set out as part of the Attorney General's application under Article 7 (2) (a). The requirements must set out clearly the measures with which the Entity must comply.
- 38) The DPA must specify the end date. The length of a DPA will need to be sufficient to enable compliance with financial penalties paid in instalments, monitoring and co-operation with the investigations into individuals, including any criminal trials.
- 39) The Attorney General will not agree to a term or requirement that would prevent an Entity from being prosecuted for conduct not included in the indictment even where the conduct has been disclosed during the course of DPA negotiations but not pleaded in the case summary or indictment.
- 40) The following will normally be requirements of the DPA:
 - a) A financial penalty;
 - b) that the DPA relates only to the offences particularised in the counts of the draft indictment;
 - c) an undertaking provided by the Entity that the information provided to the Attorney General throughout the DPA negotiations and upon which the DPA is based does not knowingly contain inaccurate, misleading or incomplete information relevant to the conduct the Entity has disclosed in its self-report or at any stage to the Attorney General;

- d) a requirement on the Entity to notify the Attorney General and to provide where requested any documentation or other material that it becomes aware of whilst the DPA is in force which an Entity knows or suspects would have been relevant to the offences in the draft indictment;
- e) the payment of the reasonable costs of the Attorney General; and
- f) Co-operation with any investigation into the alleged offence(s).

41) Under Article 3 (3) of the Law other terms that may be agreed might include:

- a) prohibiting an Entity from engaging in certain activities;
- b) remediation requirements; and
- c) financial reporting obligations.

42) Where a financial penalty is to be imposed there should be a transparent approach to the setting of a financial penalty. Previous sentencing decisions of the Royal Court and Court of Appeal will be of limited assistance, save where the conduct is directly analogous.

43) Any financial penalty must be broadly comparable to a fine that the Royal Court could have imposed upon an Entity if had pleaded guilty to all of the offences in the indictment. The assessment of the penalty should include a detailed and evidence-based consideration of an Entity's means. The financial penalty will be fair and proportionate but sufficiently substantial to have a real economic impact on the Entity. The financial penalty must reflect the seriousness of the specified offence contained within the self-report. Where compensation is appropriate, this will usually take priority over a penalty.

44) As entering a DPA is voluntary the fact that the scheme requires a self-report by an Entity will not, without more, be factored into the assessment of the financial penalty leading to a downward adjustment of the amount. Entities should not expect an automatic additional discount to the financial penalty simply because they have made a self-report. The financial penalty must provide for a discount equivalent to that which the Entity would be entitled by an early guilty plea. This will involve an assessment of all the circumstances which include the conduct of the Entity and its legal advisers during the DPA negotiations.

45) The new nature of the DPA regime in Jersey and the limited number of convictions of corporate offenders for offences in Schedule 1 of the Law is likely to mean that financial penalties will be fixed with reference to other sources, for example the JFSC guidance

on civil penalties (or the UK FCA's civil penalty guidance). Examples of DPAs from other jurisdictions may serve as illustrations where the conduct alleged is similar to the offences in the indictment. Before negotiations commence, the Attorney General and the Entity should attempt to identify an approximate starting point so that the Royal Court is aware at the outset of the justifications for the financial penalty and other requirements that may be suggested as part of the DPA itself.

- 46) The Attorney General and the Entity should not attempt to apply directly the sentences specified in definitive English sentencing guidelines issues by the UK Sentencing Guidelines Council. However, it is permissible for the Attorney General to have regard to those guidelines in order to compare any applicable sentencing decisions in Jersey and to assess whether sentences passed in Jersey for the same misconduct are out of step with penalties currently imposed in coordinate jurisdictions.
- 47) Timely and accurate information about an Entity's means must be provided to the Attorney General. At a minimum, this will be the Entity's annual accounts. Although the process of fixing an agreed financial penalty described in paragraph 62 is to a degree collaborative, where accounts or other financial information are not supplied, the Attorney General will likely conclude the Entity should pay any financial penalty the Attorney General considers is fair and proportionate.
- 48) In order that a proper assessment of the financial penalty can take place the Entity's accounts should be supported by an affidavit of means.
- 49) Once the circumstances in Article 6 (1) (a) and (b) apply, the Attorney General must initiate DPA proceedings against the Entity in accordance with Article 14(1A) of the Criminal Procedure Law 2018. At this stage, the Attorney General will follow the procedure to directly indict the Entity, prepare an indictment in the prescribed form, sign and lodge it with the Judicial Greffier and serve a copy of it upon the Entity.
- 50) Although the obligation in Article 6 (2) is in mandatory terms there is no time limit by which the Attorney General is required to initiate proceedings and make the initial application to the Royal Court. By this stage, it is anticipated that the Attorney General and the Entity will have progressed negotiations to an advanced level short of agreeing the final terms of the DPA.
- 51) At this stage there is no requirement for negotiations to have concluded nor for the terms of the DPA to have been agreed in final form. It is anticipated that the Attorney General will have served an indictment together with an initial case summary explaining the allegations and an outline of the terms of the DPA in contemplation. The Attorney

General is not required to agree the contents of the initial case summary with the Entity at this stage. It is a broad outline subject to later correction or amendment.

- 52) If possible and appropriate in a particular case, the outline of the terms of the DPA should include an approximation of the financial penalty envisaged by Article 3 (3) (a). Again, it is not necessary to agree the amount of the financial penalty with the Entity at this stage. The Attorney General must, however, identify the independent monitor (the “**IM**”) in accordance with Article 6 (5).
- 53) The Attorney General will also provide written justification (“the **Attorney General’s certification**”), setting out why entering a DPA with the Entity is likely to be in the interests of justice why the proposed terms of the DPA are fair, reasonable and proportionate. It is expected that the Entity will similarly (either in writing or through submissions to the Court) confirm that the proposed terms of the DPA are fair, reasonable, and proportionate.
- 54) The Attorney General will then list the matter before the Royal Court to apply for a declaration under Article 6 (4) of the Law. Under Article 6 (6) the Royal Court must give reasons for making or refusing to make a declaration.
- 55) The Royal Court is required to approve the DPA in its final form applying the statutory test in Article 7 (2) (a). The factors it considers when making a declaration under paragraph (2) (a), will be a matter for its own judgment based on all the evidence placed before it. However, the Attorney General is likely to bring to the Court’s attention the Entity’s conduct and the extent of its cooperation during the DPA process. Although a matter entirely for the Entity about which it may wish to take legal advice, high levels of cooperation such as the extent to which the Entity was willing to waive any privilege attaching to documents produced for example, during internal investigations will be an important matter the Court may wish to consider when deciding whether to make a declaration.
- 56) The Royal Court has general powers to postpone for such period as the Court considers necessary, publication of information under Article 13 of the Law pertaining to the matters in Article 7 (8) if it appears to the Court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings or for any other substantial reason.
- 57) At this stage, the Attorney General has formed the view that DPA proceedings should commence in light of the requirements in Article 6 (4) (a) and (b). The penalties imposed by a DPA will be significant. Confidential without prejudice negotiations will be necessary.

In those circumstances, Article 6 (8) states that a hearing at which an application under paragraph (4) is determined must be held in private, any declaration under paragraph (4) must be made in private, and any reasons under paragraph (6) must be given in private.

G. Use of information by the Attorney General

- 58) The Entity will benefit significantly by entering into a DPA and avoid prosecution for and conviction of an offence(s). The process requires trust and transparency on behalf of the Entity. If an Entity attempts to induce the Attorney General to enter into a DPA on an inaccurate or misleading basis, this undermines the foundation of the DPA process. Intentionally omitting to include relevant information or evidence in the self-report would also be considered to be misleading.
- 59) If the Attorney General finds during the course of the negotiations for the DPA the entity provided inaccurate, misleading, or incomplete information to the Attorney General and knew or ought to have known that the information was inaccurate, misleading, or incomplete, the Attorney General may instigate fresh proceedings against the Entity for the same alleged offence notwithstanding any DPA that may have been approved or expired: Article 12 (2) and (3) of the Law.
- 60) Further to Article 15 (1) and (2) of the Law, where a DPA is approved by the Royal Court the statement of facts contained in the DPA may be used in subsequent criminal proceedings against the Entity as an admission in accordance with Part 2 (formal admissions) of the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998. Article 15 (1) and (2) applies where the DPA has been approved but has expired or, upon an application by the Attorney General that the Entity has breached one of the terms contained within it under Article 10 (1).
- 61) Where a DPA has not been concluded the material described in Article 15 (5) may only be used in the limited circumstances described in Article 15 (4) (a) and (b).
- 62) Where the Court does not approve the DPA under Article 7 (2) (a), certain information may be used in criminal proceedings in the circumstances described in Article 15 (4). The nature of that information is specified in Article 15 (5). However, in circumstances where a prosecution for the specified offence is progressed in accordance with Article 81A (1), the ordinary rules of criminal evidence and procedure would apply to the admissibility and use of information provided during the DPA process: Article 15 (6).

- 63) There are, however, restrictions on the use of certain information by virtue of Article 9 (6) and (7). It is important to protect a person's right against self-incrimination. Paragraphs (6) and (7) of Article 9 therefore refer to a prohibition on the use of a "*statement*" against the connected person, made by them to an IM in response to a requirement under Article 9 (4).
- 64) If the DPA negotiations fail and a prosecution of an Entity and/or its officers or personnel is commenced it should expect that, material of the type listed below will be used by the Attorney General in those subsequent proceedings (this is not exhaustive):
- a) pre-existing contemporary documentation such as contracts, accountancy records including payments of any kind;
 - b) any records evidencing the transfer of money, asset holdings, emails or other communications provided to the Attorney General;
 - c) any internal or independent investigation report carried out by the Entity and disclosed to the Attorney General before the issuance of the commencement letter; or
 - d) any interview, note or witness statement obtained from a current or former employee of the Entity and disclosed to the Attorney General before the issuance of the commencement letter.
- 65) The normal disclosure regime in criminal proceedings as set out in Article 82 of the Criminal Procedure Law 2018 does not apply to DPA proceedings. Although the Entity is indicted in circumstances as set out in Article 14 (1A) (a) and (b), no plea is entered by the Entity and the proceedings are, by order of the Royal Court suspended under Article 14 (1B) (a) and (b)
- 66) The DPA proceedings and negotiations must be fair. The Attorney General and any Crown Advocate appointed on his behalf must always be aware of the need to disclose material in the interests of justice and fairness in the particular circumstances of any case. The Attorney General recognises that disclosure ought to be made of any information in his possession that might undermine the factual basis of the allegations disclosed in the self-report. Equally, disclosure ought to be made of any material which may mean a particular term sought by the Attorney General in a DPA is no longer justified or appropriate. This does not mean that the Attorney General is required to prove the evidential basis for the inclusion of a term in a DPA, merely that the Attorney General must ensure that the terms of a DPA are fair, reasonable and proportionate.

67) The statutory disclosure obligations and standard directions with time limits for compliance will only apply if the suspension is lifted in the event of termination of the DPA and the subsequent removal of the suspension of the indictment.

H. Independent Monitor: appointment, role, and eligibility

68) The appointment and duties of the IM represent an essential aspect of the DPA process. The content of the DPA must provide for the appointment of the IM. Duties are imposed upon the Entity with respect to its relationship with the IM under Article 9 of the Law. It should be noted that the duties on the Entity extend to connected persons as defined in Article 1 (2). These duties are considered to be of such importance that it is a criminal offence for an Entity who fails, without reasonable excuse, to comply with an obligation imposed upon it in Article 9 (1).

69) The Attorney General expects the Entity shall afford to the IM complete access to all relevant aspects of its business during the course of the period as requested by the IM and as set out in Article 3 (1) (f).

70) Under Article 6 (5) the Attorney General must nominate a person to carry out the functions of the IM as set out in Article 8 and the proposed terms of any DPA must include the name of the proposed IM and specify the times or intervals at which the independent monitor is to report (under Article 8(1)(b)). The terms of the DPA must also specify the remuneration that the parties have agreed that IM is entitled to receive. It is also a requirement of the DPA that may be imposed on an Entity that it pays for the remuneration of the IM (Article 3 (1) (g)).

71) Candidates for appointment to the approved list of IMs are directed to the Attorney General's call for applications from 3 March 2023.

72) If the Royal Court decides to make a declaration under Article 7 (2)(a) it must, when making the declaration, make the appointment of the IM under Article 2 (2)(b). It is therefore intended that the IM will be identified at an early stage according to the facts of the particular case and experience of the IM relevant to a particular DPA. It is expected that the approved list will include both individuals and businesses with appropriate qualifications in and experience of legal, accountancy, regulatory work and financial services. An IM, as a court appointed official owes a duty to the Court to discharge properly their functions under Article 8. An IM who fails, without reasonable excuse, to carry out the functions described in Article 8, is at risk of removal under Article 7 (11).

The IM can also be removed under that Article if it is necessary in all the circumstances of the case to terminate the appointment.

- 73) An IM is expected to produce a high standard of work when producing reports to the Court and Attorney General under Article 8 (1) (b). Equally, there is an obligation on the IM under Article 8 (1) (c) to report to the Attorney General if it appears to them that in the submission of the self-report, in negotiations with a view to entering into the DPA, or at any time while the DPA is in force, the Entity or a connected person in relation to the Entity has – (i) provided inaccurate, misleading, or incomplete information to the Court, the Attorney General, or the IM, (ii) committed an offence under this Law, or (iii) committed a criminal offence.
- 74) In addition, the IM must, in reporting on the progress the Entity has made in meeting the terms of the DPA under Article 8 (1) (b) specify any breach of the terms of the DPA by the Entity during the period covered by the report. The IM must also notify the Court and the Attorney General if, in their opinion the Entity is likely to fail to comply and the reasons why the Entity is likely to fail to comply with any term of the DPA.
- 75) Before preparing the statutory reports, the IM should identify with the Entity the scope of their report and the terms of the DPA that they will be monitoring and how and whether the IM will require the provision of information and evidence from the Entity or a connected person. If an Entity has been made subject to a requirement under Article 3 (3) (e), the IM must clearly explain their roles and responsibilities as well as their expectations of the Entity and how progress and effectiveness will be measured. An Entity should not be set up to fail but must realise the consequences with non-compliance with or breach of the terms of the DPA. An Entity must be prepared to explain in detail their compliance with specific terms and where appropriate expect to be challenged on their explanations.
- 76) Significant powers are available to the IM upon application by the Attorney General to the Court under Article 8 (5) (a) and (b) and it is anticipated that such powers will be exercised by the IM in discharge of their important function in the DPA process as a whole.
- 77) Where the IM is of the view that a variation of the DPA due to the circumstances in Article 11 (1) (b) may apply to the Entity's compliance with the terms of the DPA the IM should take a proactive approach. The IM should raise this matter with the Entity and the Attorney General and suggest, where appropriate the terms of any variation that should be sought to ensure the Entity continues to comply with the DPA. An entity has no independent right outside of Article 11 to request a variation to the DPA.

I. Disclosure of information by the Independent Monitor

- 78) The IM must not disclose any information or documents received or obtained in the course of carrying out his or her functions as specified in the Law as part of the DPA process. This does not apply to information or documents the IM wishes to share with the Attorney General (Article 8 (9) (a)), or where the disclosure to another person is reasonably necessary to enable the IM to carry out those functions (Article 8 (9) (b)).
- 79) There is a wide variety of circumstances where permitted disclosures would be necessary. For example, the IM may wish to report conduct disclosing offences that may have been committed under Article 9 (2) or 9 (5) of the Law or where there has been material non-compliance or lack of co-operation by the Entity subject to a DPA. As to Article 8 (9) (b), in respect of regulated businesses, the IM may need to disclose the conduct of the Entity and its level of engagement with the terms of the DPA with its supervisor at the Jersey Financial Services Commission.

J. Breaches

- 80) Article 10 of the Law provides that the Attorney General may make an application to the Court if, at any time while a DPA is in force, he has reasonable grounds to suspect that the Entity has failed to comply with the terms of the DPA. Factors which may influence the exercise of the Attorney General's discretion under Article 10 include the contents and findings of the reports made by the IM.
- 81) Breach proceedings should be rare, and in the case of minor or unintentional breaches it is hoped that a full written explanation and apology will resolve matters. What constitutes a minor breach in these circumstances is a matter for the Attorney General to determine on the facts of each individual case. It is in the interests of all parties that the DPA concludes successfully, and its terms are met.
- 82) In circumstances where Article 10 applies, where possible, the Attorney General will write to the Entity to ask them to immediately rectify the breach that has been identified. This is not intended to constitute a trial of or satellite litigation about the Attorney General's grounds to suspect that a breach has occurred. The Entity should be aware however, that a decision not to bring breach proceedings may still be reported in the public domain under Article 13 (2) (b) if the Royal Court considers this to be in the public interest.

- 83) If breach proceedings are brought, the Royal Court must decide on the balance of probabilities whether the Entity has failed to comply with the terms of the DPA. If the Court finds that the entity has failed to comply with the terms of the DPA, it may invite the Attorney General and the Entity to agree proposals to remedy the Entity's failure to comply or terminate the DPA.
- 84) If the Royal Court orders termination, the DPA shall cease to take effect from that point onwards, and the Attorney General may apply to progress proceedings under Article 81A (1) of the Criminal Procedure Law 2018. Leave of the Court is required.
- 85) Whether to bring breach proceedings will be in the Attorney General's discretion. It is not necessary to set out a list of breaches that will merit commencement of proceedings under Article 10. The Attorney General will assess the general attitude of the Entity to its obligations to comply with the terms and requirements of the DPA and the nature and seriousness of the breach alleged. Any breach which involves, intentional or dishonest or misleading conduct will usually lead to the commencement of breach proceedings.

K. Termination

- 86) If the DPA is terminated, the Attorney General will apply to progress proceedings under Article 81A (1) and for the Entity to be indicted. If leave is granted by the Court, the progression of the proceedings will have the effect of reinstating criminal proceedings against the Entity.
- 87) The Attorney General may not be in a position to make an application under Article 81A (1) immediately. If the Attorney General requires time before being in a position to progress proceedings against the Entity under this Article, the Court should be informed in writing of the proposed course of action and the matter listed as soon as reasonably practicable thereafter.
- 88) Before making an application under Article 81A the Attorney General will apply the Code on the decision to prosecute in the same way as if a fresh decision to prosecute was being made in relation to the same facts, but as at the date the DPA was terminated.
- 89) Article 12 of the Law directs that where a DPA remains in force until its expiry date then, after the expiry of the DPA, the Attorney General must discontinue the proceedings in relation to the offences by giving notice to the Court under Article 81A (2) of the Criminal Procedure Law 2018. Fresh criminal proceedings may not be instituted against the Entity

in relation to the offences specified in the indictment unless the Attorney General finds that during the course of the negotiations for the DPA the Entity provided inaccurate, misleading, or incomplete information to the Attorney General and knew or ought to have known that the information was inaccurate, misleading, or incomplete.

90) The notice to the Court concerning discontinuance of the DPA proceedings will state:

- a. the date of discontinuance;
- b. the offences on the indictment to be discontinued;
- c. confirmation that the DPA has expired.

91) A DPA will ordinarily expire on the date specified in the agreement. Article 12 (4) to (7) of the Law sets out the circumstances where the DPA is deemed as having or not having expired.

L. Variation

92) The Attorney General and the Entity may agree to vary the terms of the DPA whilst it is in force under Article 11 of the Law. There are specified circumstances where this can occur.

93) Firstly, by Article 11 (1) in the course of breach proceedings under Article 10, where the Court has found that a breach has occurred save, that the Entity may be permitted to remedy its failure to comply with the DPA through a variation at the Court's direction.

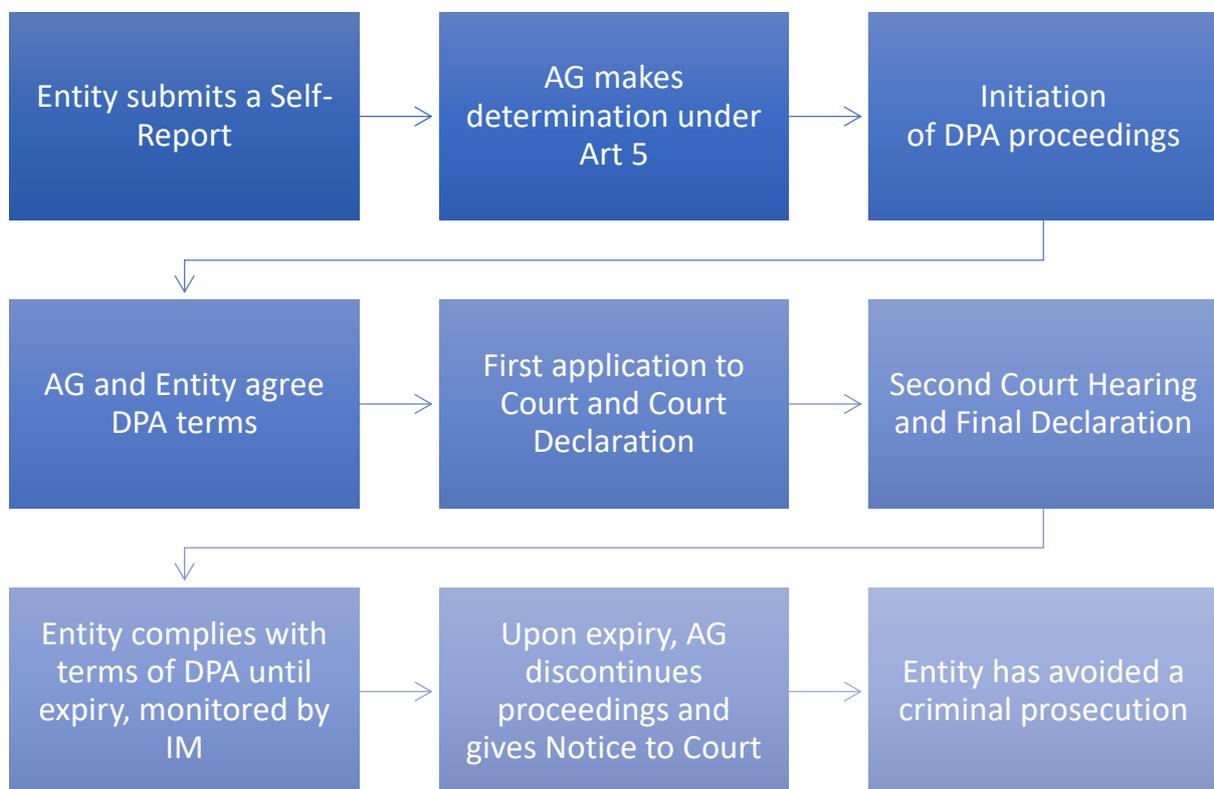
94) Secondly, where the Attorney General and the Entity agree to vary the terms of the DPA. This would only be permissible if the Court is satisfied of the requirements in Article 11 (2) (a) and (b). For example, where circumstances have arisen which make a term of the DPA unworkable, bound to fail or redundant. Or, where the Entity is no longer sufficiently resourced to comply with the terms of the DPA as originally ordered. It is expected that variations under these provisions of the Law will be rare.

Note

This DPA Guidance will be revised in the light of experience. If Entities or their legal representatives have comments concerning the Guidance these should be sent in writing to the Attorney General at the Law Officers' Department.

Appendix: Simplified Overview

The below flowchart is a simplified, high-level overview of how the process is intended to work, based on compliance. Cases of non-compliance, which would lead to breaches, and/or variations as outlined above, are not considered for the purpose of providing this overview because they will need to be dealt with on a case-by-case basis.



3 March 2023