



ANNEX A

Deferred prosecution agreements: financial penalty methodology

Step 1

- 1) What is the maximum penalty for the offence?

This is determined by the statutory maxima in relation to each specified offence in Schedule 1.

Step 2

- 2) What is the level of seriousness of the admitted conduct taken together?

This part of the process requires a survey of relevant sentencing decisions. The starting point is a search for relevant Jersey, Guernsey and Isle of Man cases dealing with the misconduct. It is then permissible to look at coordinate jurisdictions such as the UK or other Commonwealth jurisdictions, as well as any relevant sanctions imposed by a regulator either as a prosecutor in its own right or as part of some other sanction, such as a civil penalty. The range of penalties the JFSC might impose for similar conduct under its civil penalty regime may also be used to evaluate the reasonableness of any financial penalty proposed by a DPA.

The purpose here is not to attempt to find a factual template with a view to placing a case within that framework, and from there work out the penalty. However, it is helpful to examine how Courts have treated similar features in the past and to what degree those features have influenced the Court, if at all, in arriving at the just financial penalty. For example, it is correct to recognise how the Court has dealt with deterrence, or the removal of financial gain. Or, how the Court would treat consecutive or concurrent sentence. Or, more centrally, how the Court treats conduct close to but distinct from substantive money laundering, and whether in such a case a further reduction in the starting point is required.

Step 3

- 3) What are the Entity's means?

At this stage of the DPA proceedings the Attorney General has determined that a DPA is likely to be and is in the interests of justice rather than a prosecution. It will also likely be the case that it is not in the interests of justice for the Entity to be made insolvent, or brought to the brink of, insolvency by the penalty. The DPA envisages

and requires that the Entity remains a going concern that is capable of rehabilitation, i.e. that it will be placed in the position it was before it engaged in the conduct, but with better and more robust procedures in place to prevent future potential offending.

The fact that the Entity has incurred internal costs as a result of the DPA process and/or will pay the reasonable costs of the Attorney General is unlikely to be a relevant factor when considering its means.

Therefore, the Entity's means, and its current and future solvency will be relevant at this stage in fixing the notional starting point. In this regard it is vital that an accurate affidavit of means is filed producing the Entity's audited accounts and financial statements for the last five years.

Arrive at notional starting point for financial penalty

Each count on the indictment must attract a sentence or penalty and consideration will need to be given to whether concurrent or consecutive sentence would be appropriate.

Step 4

4) What is the benefit from the offending?

This step will only directly affect the financial penalty where, for example there is a necessary connection between the criminality and some measurable commercial advantage to the Entity. For example, in bribery and corruption cases. In all other cases, it is relevant to determine whether at Step 5 (the balancing adjustment) there should be an increase to remove all gain from the offending that occurred.

Step 5

5) The balancing adjustment invites the Court, to impose a financial penalty which will ultimately achieve:

- a) the removal of all gain;
- b) appropriate additional punishment; and
- c) additional deterrence in the context of an international finance centre.

This part of the process is a discretionary balancing tool. There may be cases where no increase is necessary or required. Equally, there may be cases where although the conduct was not serious, the Entity made a large profit. On the other hand, there may be cases where the overall conduct was not serious, but the behaviour of a regulated business was so far below industry standards in Jersey that a significant additional increase for deterrence is necessary.

The type of case where c) would apply is usually, but not exclusively reserved for cases where the Entity has admitted serious intentional wrongdoing (i.e. not reckless breaches of the Money Laundering Order 2008 or purely offences of omission).

The fact that the terms of a DPA may require disgorgement of profit is not factored in at this stage, since the terms of the DPA are consensual and will not usually be relevant

to the overall penalty, albeit they are relevant to the test in Article 6 (4) of the DPA Law. An Entity may not be able to meet both a penalty and disgorgement. In that case the financial penalty will take priority, which will reflect the Entity's means. It may also be the case that an Entity at a senior level has itself directly encouraged or taken part in the misconduct, rather than simply through its human actors and/or agent/s. These features all require a balancing adjustment to take account the objectives the final penalty must, in the final analysis achieve.

Step 6

6) Equivalent reduction for a guilty plea and exceptional further 'DPA' reduction.

This step is straightforward and simply reflects paragraph 44 of the Guidance. There may be cases where it is appropriate not to provide a full one third reduction. For example, where there is an unjustifiable significant delay between the conduct and the self-report. Or, where the entity does not cooperate and agree the statement of facts or otherwise does not conduct the DPA negotiations in a transparent or constructive way.

A further reduction to reflect a self-report and engagement in the DPA process is usually not appropriate, and this is also reflected at paragraph 44 of the Guidance. In many cases no further discount will be appropriate at all since the Entity will have avoided the consequences of a criminal conviction with the impact on its business that such a conviction would otherwise have.

However, cooperation beyond the ordinary, which includes disclosing widespread or systemic criminal misconduct by individual employees or disclosing serious additional criminality of others in Jersey or another jurisdiction about which the investigation was unaware, may merit a further discount. In particular, if those disclosures involve waiving privilege or the revelation of details of internal investigations about the individuals concerned. A further discount should only be applied, where there is a tangible and quantifiable benefit to a criminal investigation and/or the DPA process.

Arrive at final financial penalty figure

16 April 2025