



## **Variation of the Attorney General's Guidance on Deferred Prosecution Agreements**

### **Introduction**

- 1) The Attorney General's Guidance on Deferred Prosecution Agreements (the "DPA Guidance") was issued on 3 March 2023 pursuant to Article 14 of the Criminal Justice (Deferred Prosecution Agreements) (Jersey) Law 2023 (the "DPA Law").
- 2) Pursuant to Article 14 (2) of the DPA Law, the Attorney General may at any time vary, or withdraw and replace, the DPA Guidance.
- 3) Under Article 14 (2) of the DPA Law the Attorney General hereby varies the DPA Guidance in two respects:
  - a) In relation to Article 14 (f) of the DPA Law: the content of a DPA including the requirements that a DPA may impose on an entity, and the amount of any financial penalty or costs which may be imposed; and
  - b) In relation to the identity of individuals named in a DPA or in DPA proceedings.
- 4) These amendments take effect on the date upon which they are issued. They only apply to DPA Proceedings and do not apply to criminal cases in Jersey. All other defined terms in the DPA Guidance are adopted herein.

### **Calculation of the financial penalty**

- 5) It is essential that the financial penalty achieves the objectives of deterrence and punishment. It must also have a real impact on the entity, whilst reflecting the correct discount and any other appropriate reductions within the latter stages of the DPA process.
- 6) The Attorney General has carefully considered the judgment of the Inferior Number of the Royal Court in *Attorney General v Afex Offshore (Jersey) Limited* [2024]JRC271. In particular, the Attorney General has considered the reasoning of the Court set out at paragraphs [77] – [92] and at paragraphs [106] - [113].
- 7) The Attorney General recognises that although the quantum of the financial penalty will be the subject of agreement between the parties, the final determination as to whether the DPA and its terms are in the interests of justice and are fair, reasonable, and proportionate, is a matter for the Court to determine.
- 8) The Attorney General considers that it is important for an entity to understand the means by which the Attorney General will seek to calculate the financial penalty in a particular case (see paragraphs [42] – [47] of the DPA Guidance). In general, it is in

the public interest that a financial penalty is decided according to a principled framework in which the relevant factors are accorded proper weight and will ultimately, enable the parties to arrive at a fair calculation of the penalty.

- 9) The Attorney General considers that it is therefore appropriate to include at Annex A to this amended DPA Guidance, a staged process explaining the methodology used to calculate the financial penalty (“the Methodology”). Publication of the Methodology ensures that an entity (or an entity considering a self-report), as well as the public, understand how it is intended this part of the DPA process will work.
- 10) It is a matter ultimately for the Royal Court whether it considers it necessary or appropriate to adopt the Methodology when giving its reasons pursuant either to Article 6 (6) or Article 7 (4) of the DPA Law.

## **The identity of individuals named in a DPA**

### **The starting point**

- 11) Once Article 7 (8) of the DPA Law applies, there is no general prohibition on naming individuals in a DPA, in the Statement of Facts (“SOF”), in the indictment or by reference to the DPA proceedings generally. This is the starting point.
- 12) Subject to the Court’s powers in Article 13 (1) of the DPA Law, upon the grant of the Royal Court’s approval to the DPA in accordance with Article 7, the Attorney General must publish the materials listed in Article 7 (8) (a)-(d) of the DPA Law. The following documents will also be published in full:
  - a) The signed indictment; and
  - b) The SOF.
- 13) Publication of these documents is in accordance with the principles of open justice.

### **The nature of DPA proceedings and the public interest**

- 14) It is in the public interest that there is proper scrutiny of the DPA process and of the parties to a DPA when reaching agreement. This will involve publication of the facts upon which the DPA was sought and the terms as advanced to the Royal Court when seeking its approval. This will usually involve identifying individuals.
- 15) Therefore, it is not appropriate to limit the ability for the press or members of the public to comment freely on the DPA and its background, all of which is a matter of public interest.
- 16) A DPA is an agreement between the Attorney General and an entity. The SOF is the basis of that agreement. It is specifically agreed by the entity as part of the process. In some cases, the SOF will refer to individuals, none of whom may have taken part in the process whereby the DPA was concluded.
- 17) A DPA however, is not to be taken as indicating criminal liability of any kind on the part of any named individual. In DPA proceedings the indictment will be indorsed with words to that effect, if not be explicitly explained in the issued judgment of the Royal

Court when it gives reasons pursuant to either Article 6 (6) or Article 7 (4) of the DPA Law.

## **Postponement of publication**

- 18) The Royal Court alone has jurisdiction over the final form of its published judgment. It is a matter for the Royal Court alone to determine whether, and to what extent, an order under Article 13 should be granted or maintained with respect to the material that should otherwise be published in full under Article 7 (8).
- 19) There will be circumstances (as envisaged by Article 13 of the DPA Law), where it will not be appropriate to publish immediately the documents referred to in paragraph 12 above, either in their original form or at all. These circumstances include but are not limited to cases where individuals may be suspected of or charged with offences arising from the facts of the DPA or, where trials of those individuals are ongoing and are yet to conclude. It may also include cases where a criminal investigation is ongoing in Jersey or elsewhere.
- 20) Against that background and in addition to those matters, where the Attorney General seeks an order under Article 13 of the DPA Law, the following (non-exhaustive) factors will be of relevance (all cases are fact specific):
  - a) Jersey is a small jurisdiction where the publication of the names of individuals in the facts connected to a DPA (whether their conduct is criticised or not) subject to the Court's decision, may not always be in the public interest;
  - b) in the case of employees performing their work in a non-public role, who have a reasonable expectation of privacy there may be no legitimate interest in identifying persons who have performed their work at the instruction of the entity. Subject to the Court's decision, if the DPA and importantly, the reasoning in the final judgment can easily be understood without naming them, then this is a factor weighing against identification;
  - c) whether and to what extent there is a risk that an employee of the entity involved in the facts giving rise to the DPA, may be thought to be responsible for or at least indifferent to the conduct of the entity in the DPA. That is not the purpose of a DPA nor, where the Royal Court makes a declaration or grants final approval to the terms of the DPA agreed between the parties, is it indicative of a finding to that effect, save where the Court expressly makes such a finding;
  - d) whether an order seeking time-limited postponement would be more appropriate than indefinite postponement;
  - e) consideration should be given more generally to the necessity for and impact of the identities of third parties being published; and
  - f) whether identifying a third party would comply with the Data Protection (Jersey) Law 2018 and the European Convention on Human Rights.

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