

EXPLANATORY MEMORANDUM TO

THE CRIME AND COURTS ACT 2013 (DEFERRED PROSECUTION AGREEMENTS) (AMENDMENT OF SPECIFIED OFFENCES) ORDER 2018

2018 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Order corrects a statutory anomaly created by an error in consequential amendments to Part 2 of Schedule 17 to the Crime and Courts Act 2013 and thereby allows for Deferred Prosecution Agreements premised on the commission of financial crime offences involving misleading information, impressions and practices. A Deferred Prosecution Agreement (“DPA”) is a voluntary alternative to adjudication reached between a prosecutor and an organisation accused of an alleged economic or financial offence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 This entire instrument is subject to affirmative resolution and applies only to England and Wales.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Legislative Context

- 4.1 Part 2 of Schedule 17 to the Crime and Courts Act 2013 lists financial and economic crime offences in relation to which a DPA may be approved and currently includes a reference to an offence at section 397 Financial Services and Markets Act 2000 (misleading statements and practices). That offence was repealed by the relevant provisions of the Financial Services Act 2012. The conduct falling within the scope of the repealed offence was thereafter covered by three new offences at sections 89 (misleading statements), 90 (misleading impressions) and 91 (misleading statements regarding relevant benchmarks and misleading impressions as to the value of investments or interest rates that apply to a transaction) of the Financial Services Act.
- 4.2 Paragraph 31 of Schedule 17 to the 2013 Act provides that the Secretary of State may by order amend the Part 2 list of offences by adding an offence of financial or economic crime and/or removing one. Section 58 (4) of the Act provides that the

Parliamentary procedure for such an order is affirmative, requiring a draft of the instrument to be laid before, and approved by a resolution of, each House of Parliament.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

6. European Convention on Human Rights

- 6.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Crime and Courts Act 2013 (Deferred Prosecution Agreements) (Amendment of Specified Offences) Order 2018 are compatible with the Convention rights.

7. Policy background

What is being done and why

- 7.1 This Order replaces the reference in Part 2 of Schedule 17 to the Crime and Courts Act 2013 to the offence at section 397 of the Financial Services and Markets Act, with references to the offences at section 89, 90 and 91 of the Financial Services Act 2012.
- 7.2 Schedule 17 of the Crime and Courts Act 2013 sets out the scheme for Deferred Prosecution Agreements, pursuant to section 45 of the Act. ADPA is a court-approved agreement between an organisation (not individual) and a designated prosecutor who is considering prosecuting the organisation for an offence listed in Part 2 of the schedule.
- 7.3 Under the scheme set out in Part 1 of Schedule 17 the organisation will be charged with the offence, but upon a court declaration that the DPA is in the interest of justice; is fair, reasonable and proportionate, the indictment will be suspended for the duration of the agreement (usually) two or three years. Upon the expiry of the DPA the proceedings are discontinued. The prosecution proceedings can only be reinstated if the DPA is terminated by the court before expiry because of a serious breach of the terms of the agreement.
- 7.4 There are no mandatory terms of a DPA but they are likely to include a financial penalty, disgorging any profits made from the offence, cooperating with investigations into the conduct of individuals and the implementation and external monitoring of a compliance programme. The ability to influence the future conduct of an organisation, rather than just penalise past failures, makes a DPA an appropriate tool for addressing corporate economic and financial crime. There have been four DPAs approved by the court since section 45 and Schedule 17 came in to force in February 2014.
- 7.5 The Crime and Courts Act received Royal Assent on 25 April 2013. Paragraph 22 (e) of Schedule 17 to that Act lists the offence at section 397 Financial Services and Markets Act 2000 (misleading statements and practices). The relevant provisions of Financial Services Act 2012 were commenced on 01 April 2013 (The Financial Services Act 2012 (Commencement No. 2) Order 2013). Sections 89, 90 and 91 of the Financial Services Act created new offences of misleading statements, misleading

impressions and misleading statements etc. in relation to benchmarks, respectively. These offences were intended to replace the single offence at section 397 Financial Services and Markets Act 2000, which was duly repealed by section 95 Financial Services Act 2012. This repeal was not however reflected in the final text of Schedule 17 to the Crime and Courts Act 2013.

- 7.6 The absence of the three offences at sections 89, 90 and 91 Financial Services Act 2012 from Part 2 of Schedule 17 means that without the amendment made by this order, a designated prosecutor cannot enter into, and a court cannot approve, a DPA premised upon offending involving misleading statements and misleading impressions in respect a range of financial products, including loans and investments. This lacuna in the law therefore prevents the use of what may be the most appropriate disposal in a case involving offending of this kind.

Consolidation

- 7.7 This Order does not amend another statutory instrument, so no consolidation required.

8. Consultation outcome

- 8.1 No separate consultation exercise was conducted as this instrument corrects a drafting error and does not change the policy. The consultation exercise on the introduction of DPA can be found at: <https://www.gov.uk/government/publications/consultation-on-a-new-enforcement-tool-to-deal-with-economic-crime-committed-by-commercial-organisations>

- 8.2 The Government Response to the consultation can be found at: <https://www.gov.uk/government/publications/deferred-prosecution-agreements-government-response>

9. Guidance

- 9.1 No separate guidance is required as this instrument amends only the list of offences in in respect of which a DPA can be concluded. The Code of Practice published by the Director of Public Prosecutions and the Director of the Serious Fraud Office in February 2014 does not vary by reference to specific offences in describing how prosecutors will use DPAs. The Code of Practice can be found at: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies over and above that of the general scheme for DPAs.
- 10.2 There is no impact on the public sector over and above that of the general scheme for DPAs.
- 10.3 An Impact Assessment has, therefore, not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses but has no impact on such businesses over and above the impact of the general scheme for DPAs.

12. Monitoring & review

- 12.1 This order will not be subject to separate monitoring and review because it concerns the correction of a drafting error and does not have any effect on the general scheme for DPAs. The general scheme for DPAs established by section 45 and Schedule 17 of the Crime and Courts Act 2013 will be subject to review under arrangements for post-legislative scrutiny of the Act.

13. Contact

- 13.1 Roderick Macauley or Kate Manson at the Ministry of Justice on 020 3334 5010 and 020 3334 3146 and at roderick.macauley@justice.gov.uk and kate.manson@justice.gsi.gov.uk can answer any queries regarding the instrument.