

## **PART 51: CORPORATE ALTERNATIVE DISPUTE RESOLUTION**

### **A. Introduction**

1. Similar to the position with regard to adult offenders (see Part 7) and children in conflict with the law (see Part 48), it may be in the interests of justice to resolve matters in respect of certain corporations accused of serious corruption and related offences other than through criminal prosecution.
2. Corporate alternative dispute resolution (Corporate ADR) is generally understood as the election, in suitable and applicable cases, of a manner of disposal of a criminal case against a company other than through normal criminal court proceedings. Criminal cases are diverted away from the formal criminal justice system at pre-trial stage, with a view to disposing of the case against the company, while still being able to proceed with a prosecution and asset forfeiture against the company's directors, employees or agents.
3. The use of alternate dispute resolution mechanisms in respect of companies enables the NPA to effectively address multi-jurisdictional offences committed by multinational companies, obtain the disgorgement of the proceeds of unlawful activities, as well as compensation of victims in appropriate cases and in turn meet the country's international obligations to combat corruption and other economic offences. Additional advantages that are in the interests of justice include enhancing corporate accountability within the South African corporate sector and advancing a culture of compliance with laws and regulations within a company.

### **B. Definitions**

1. In these directives, unless the context otherwise indicates—  
**'benefits'** means the proceeds of unlawful activities as defined in section 1 of the *Prevention of Organised Crime Act, 121 of 1998* (POCA) as well as any commingled or substituted property;  
**'company'** means a company incorporated in terms of the *Companies Act, 71 of 2008*, a corporate entity established under South African law, or a foreign corporation or corporate entity incorporated in terms of the applicable legislation in such other country;  
**'compliance programme'** means an anti-corruption compliance programme; and  
**'corruption'** has the meaning set out in the *Prevention and Combating of Corrupt Activities Act, 12 of 2004* (PRECCAA).

## C. General principles

1. The following general principles apply to a decision not to prosecute and utilise Corporate ADR in respect of a company suspected of committing corruption and/or offences related to corruption:

### (a) Principle 1 – Legality and rationality

- (i) The aim of such a decision is to uphold the rule of law by promoting corporate accountability for corruption and/or offences related to corruption.
- (ii) Decisions shall be made within the confines of the power and authority conferred by law on the NPA and members of the NPA.
- (iii) Decisions shall be justifiable and reasonably predictable, while recognising that the making of such a decision necessarily involves the exercise of a multi-faceted discretion in each case.

### (b) Principle 2 – Public interest

- (i) Such a decision must be in line with objectively justifiable public interest considerations as enunciated in the prosecution policy and these policy directives.
- (ii) As guardians of the public interest, decisions must be made on the facts of each case informed by the public interest.

### (c) Principle 3 – Guided discretion

The exercise of discretion shall be guided by several principles and practical considerations, including *inter alia* whether there is—

- (i) Voluntary and effective disclosure of wrongdoing by the company and proactive remediation including, where appropriate, compensating victims.
- (ii) Full cooperation by the company with current and future investigations, asset forfeiture proceedings in terms of POCA and prosecution, of individuals and/or other implicated companies.
- (iii) Willingness and capacity of the company to implement and monitor an effective compliance programme and internal controls.
- (iv) No pervasive wrongdoing within the company.
- (v) Whether there is a likelihood that conviction might result in significant adverse collateral effects on the company's employees, shareholders, creditors or the economy.

### (d) Principle 4 – Transparency

Corporate ADR shall be recorded in writing and a summary of the contents published on the NPA's website in order to ensure transparency and accountability.

## **D. Types of cases**

1. Corporate ADR applies only to companies.
2. Such a decision may be made in respect of corruption and/or offences related to corruption.
3. The AFU must be consulted in each case, including instances where any order has been or is to be obtained in terms of POCA, is under investigation or has still to be referred to the AFU.

## **E. Criteria to be considered**

1. The following criteria must be considered collectively in deciding whether the use of Corporate ADR would be in the public interest. The weight of a consideration depends on the facts of the case. Not all criteria (or sub-criteria) will be relevant in every case.
  2. Timeous and voluntary disclosure
    - (a) Whether the company timeously and voluntarily made effective disclosure of evidence and information relating to the alleged unlawful activities.
    - (b) Disclosure of information or evidentiary material not previously known to the NPA or other law enforcement agencies, may be considered favourably in such a decision.
  3. Cooperation with investigations and prosecutions
    - (a) Whether the company timeously provides the NPA or other relevant law enforcement agencies with evidence and information, including the identity of persons both inside and outside the company suspected of committing the unlawful activities;
    - (b) preserves and provides all material evidence to the NPA or other relevant law enforcement agencies, or indicates the whereabouts of same;
    - (c) cooperates in any investigation, prosecution, or other proceedings in South Africa and elsewhere if the NPA considers it appropriate; and
    - (d) pays the cost of a private forensic or similar investigation subject to the control of the NPA or other relevant law enforcement agencies.
  4. Fair, reasonable and proportionate restitution
    - (a) Although no company may avoid prosecution merely by paying a sum of money, a company's willingness to make fair, reasonable, and proportionate restitution in the form of its disgorgement of proceeds of unlawful activities may be taken into account when determining whether to use Corporate ADR.

5. The nature, seriousness and complexity of the unlawful activities
  - (a) The nature and seriousness of the unlawful activities and the complexity of the prosecution's case, including evidentiary and other challenges, will be considered in determining whether such a decision would be in the public interest.
  - (b) The likely length of trial should prosecution be undertaken, and the availability of resources needed to conduct an effective prosecution within a reasonable time, may also be considered.
6. The pervasiveness of wrongdoing in the company
  - (a) Pervasive wrongdoing in the company weighs heavily against Corporate ADR where the offending is recurrent and represents a pattern of coordinated conduct within the company and where the culpable individuals are not disciplined or dismissed.
  - (b) Conversely, a Corporate ADR may be favourably considered where the offending represents isolated actions by individuals, for example a rogue director or officer or employee, and where such offending is not recurrent, or where the company has substantially changed its board or management team or has merged with or been acquired by another company.
7. Prior misconduct or wrongdoing
  - (a) Whether the company has any prior misconduct or wrongdoing (including civil and regulatory breaches), that constitute a pattern of misconduct or wrongdoing, should be considered.
  - (b) The nature of the misconduct and breaches, the size and complexity of the company, who was in control when the prior misconduct occurred, and whether they are still employed by the company will be relevant factors in determining the weight to be placed on prior misconduct or wrongdoing.
8. The existence of an effective compliance programme
  - (a) The existence and effectiveness of a compliance programme which prevents and detects misconduct and guides the company in complying with laws, regulations and rules will weigh in favour of a Corporate ADR.
  - (b) The company's willingness and capacity to implement, improve, monitor and report on an effective compliance programme with the necessary internal controls and its willingness to subject such a programme to review and monitoring by an external compliance evaluator paid for by the company and who will also provide the NPA with reports, will weigh in favour of a Corporate ADR.
  - (c) Another factor which may be taken into account is whether the company has undertaken appropriate disciplinary and/or civil action against responsible individuals.

- (d) It will count against a Corporate ADR if the unlawful activities were committed at a time when the company had no compliance programme or where it had such a programme which was ineffective, and the company has not since improved it significantly.
9. The likelihood of significant negative collateral effect in the event of a conviction.
- (a) The potential negative collateral effect of a prosecution and possible conviction, or asset forfeiture proceedings in terms of POCA on the company's commercial viability and the effect on the employees, shareholders, creditors, the economy, and community or broader society may be considered in evaluating whether a Corporate ADR would be in the public interest.
10. The interests of the victim/s
- (a) Regard may be had to any meaningful action taken by the company to make good the harm that it has caused, including actions to identify victims of its wrongdoing and adequately compensate them for the harm to them.

## F. Authority to issue a Corporate ADR

A Corporate ADR may only be issued by—

- (a) a DPP; and
- (b) an Investigating Director.

## G. Issue of an invitation and undertakings

### *Letter of invitation*

1. If the prosecutor assigned to a case is satisfied that there is a suspicion that a company has committed corruption or offences related to corruption and that the public interest may be served by a Corporate ADR, the prosecutor may recommend to the DPP or Investigating Director that an invitation be issued to the company.
2. Where the relevant DPP or Investigating Director decides that a Corporate ADR may be appropriate, the company may be invited to make representations as to whether a Corporate ADR should be considered.
3. The invitation should, inter alia, include:
  - (a) A summary description of allegations giving rise to the corruption and/or offence(s) related to corruption which the company is suspected of committing;
  - (b) A description of Corporate ADR;
  - (c) An indication that the NPA is considering the use of Corporate ADR in respect of the offences in question;
  - (d) Inviting the company to make representations as to whether it would be amenable to Corporate ADR;

- (e) The company should be advised that participation is voluntary and that, should the company not meet all the requirements, the case may proceed.
- (f) An indication that representations by the company must be made in good faith and that the company must make disclosure of information requested by the NPA that the company is aware of or which can be obtained through reasonable efforts, including information enabling the identification of any person/s involved in the unlawful activities;
- (g) A warning that knowingly making false or misleading statements or knowingly providing false or misleading information may lead to prosecution on charges including defeating the ends of justice and corruption and/or related offence(s) which are the subject of the representations;
- (h) An indication that either party may withdraw from the process by providing written notice to the other party;
- (i) An indication that reasonable efforts must be made by both parties to identify any victims as soon as practicable; and
- (j) A deadline for the company to accept or decline the invitation.

***Undertakings by the NPA***

4. Where the company states that it wishes to make representations, the prosecutor will send the company a letter setting out the manner in which discussions will be conducted.
5. This letter should make undertakings in respect of:
  - (a) The confidentiality of the fact that such representations are being made by the company.
  - (b) The confidentiality of information provided by the prosecutor and the company in the course of these representations.
  - (c) The use which may be made by the prosecutor of information provided by the company, including warnings that representations by the company are on the record and with prejudice; and that the information and evidence gathered through the process of issuing a Corporate ADR, whether in any self-reporting or subsequent to the issue of the invitation, may be used to prosecute directors and other individuals in the company; as well as notification that the company is entitled to legal representation.
  - (d) The practical arrangements in terms of which the representations should be conducted, including appropriate time limits.
  - (e) An indication that the Corporate ADR will be published,

***Undertakings by the company***

6. Companies making representations will be required to provide undertakings that:
  - (a) the information provided by the prosecutor during the engagements following upon such representations will be treated as confidential and will not be disclosed to any other party, other than as required by law;
  - (b) during the period when the representations are being investigated and considered, the company will fully answer questions which are raised by the

- NPA with regard to the matter, and will provide all relevant information and evidence requested by the NPA which is in its possession or which it is able to obtain through reasonable efforts, save where the answer is subject to professional legal privilege;
- (c) the company will retain all documentation or other material relevant to the matter, until the company is released by the prosecutor from the obligation to do so.
7. Companies making representations will be required to warrant that the information they provide does not knowingly contain inaccurate, misleading or incomplete information relevant to the conduct the company has disclosed, or relevant to the consideration of whether to issue a Corporate ADR.
8. The individuals acting on behalf of the company must have the necessary authority to act on behalf of the company.

## **H. Voluntary self-reporting**

1. A company may in writing approach the NPA and request that a Corporate ADR be considered.
2. The process outlined in paragraph G above should be followed in such instant.

## **I. Contents of a Corporate ADR**

1. A Corporate ADR must be reduced to writing and include the following:
  - (a) A summary description of the allegations and the particular offences the company is alleged to have committed.
  - (b) The decision not to prosecute the company for the offences in question.
  - (c) The recognition of an acknowledgement of responsibility by the company.
  - (d) The reasons why the company's conduct and undertakings satisfy the criteria for a Corporate ADR.
  - (e) Information about remediation by the company, including:
    - (i) The amount of financial remediation by the company and the due date of payment; and
    - (ii) The company's existing and future compliance programme.
  - (f) A recordal that:
    - (i) the decision not to prosecute the company does not provide any protection against prosecution of any individuals or proceedings in terms of POCA against individuals; and
    - (ii) should the NPA learn of information that materially changes its assessment of any of the criteria set out in the Corporate ADR, it may proceed with a prosecution.

2. If restitution has not been made before the decision is made, the Corporate ADR should stipulate by when it must be made.
3. The NPA may require the company to consent to an order in terms of POCA before a Corporate ADR is issued.

#### **J. Use of material in criminal and other proceedings**

1. The information and evidence gathered through the process, whether in any process of self-reporting or subsequent to the issuing of an invitation, may be used to investigate and prosecute directors and other individuals in the company, or institute proceedings in terms of POCA.
2. The information and evidence may be used in the investigation and prosecution of other companies, or institution of proceedings in terms of POCA.
3. Engagements with a company are on the record and with prejudice.

#### **K. Legal professional privilege**

1. A company has the right to legal representation in the process of engagement as to whether a Corporate ADR should be issued.
2. The NPA has no right to information which is subject to legal professional privilege.
3. The existence of a valid privilege claim must be properly established by the company.
4. A company may waive such privilege.
5. The NPA will not require a company to waive legal professional privilege in order to be considered to be co-operating.

#### **L. Guidelines for calculating financial restitution**

1. The amount of financial restitution should be calculated on a case-by-case basis in accordance with the manner in which the determination and quantification of proceeds of unlawful activities as defined herein is dealt with under POCA, with due regard to the circumstances of the case.
2. The amount of financial restitution must be calculated by the National Prosecution Service or the Investigating Directorate on the advice of the Asset Forfeiture Unit.

3. The NPA may require that the company pay for the services of an independent accountant or auditor appointed by the NPA to assess the value of the proceeds of unlawful activities as defined herein. The NPA will not be bound by the opinion of that person.
4. The amount must be calculated according to the following guidelines:
  - (a) **Determination of the upper limit of the amount of disgorgement**  
The total value of the proceeds of unlawful activities having regard to sections 1, 12, 15, 19, 22(2)(b) and 22(3)(a) and (b) of POCA.
  - (b) **Determination of an appropriate amount of disgorgement**  
Depending on the facts of the case, it may be necessary for the upper limit to be increased or decreased. Adjustments may be made taking into account various factors, including sections 12, 14, 15, 16, 18 and 20 of POCA and those indicated below.
  - (c) **Additional factors to determine appropriate amount of disgorgement**  
The final amount should be determined taking into account all relevant circumstances, including—
    - (i) the purposes of POCA, which are, amongst others, to ensure that those responsible for criminal conduct do not enjoy the fruits of this conduct;
    - (ii) the nature of the unlawful activities;
    - (iii) its effect on society;
    - (iv) the principle of proportionality;
    - (v) any repayment already made;
    - (vi) interest;
    - (vii) an undertaking by the company not to claim as an expense for tax purposes, the costs of any reparations or other costs incurred to fulfil the terms of the Corporate ADR;
    - (viii) the benefit and gross profit made by the company in the course of the business project that is the basis of the unlawful conduct; and
    - (ix) any other relevant factor including collateral impact.
5. Where profit is considered, regard will be had only to valid business expenses legitimately incurred for the specific purpose of the business project that is the basis of the unlawful conduct, and not fixed or overhead business expenses that would have been incurred in the normal course of business.

## **M. Procedural arrangements**

1. Notice of Invitation

- (a) The prosecutor assigned to the case must prepare a written recommendation to the DPP or Investigating Director as to whether an invitation should be issued, giving reasons for this.
  - (b) The recommendation must show grounds for a suspicion that the company has committed corruption and/or related offence(s), and address whether a Corporate ADR may be in the public interest.
  - (c) The DPP's or Investigating Director's agreement to issuing an invitation must be in writing.
2. Self-reporting
- (a) The prosecutor assigned to the case must consider a company's self-report, and any representations made by the company, and make a written recommendation to the DPP or Investigating Director whether to issue an invitation, giving reasons for the decision.
  - (b) Such reasons must reflect a consideration of whether a Corporate ADR, if it were to be issued at a later stage, would be in the public interest.
  - (c) The DPP's or Investigating Director's decision to issue an invitation must be in writing.
3. Issuing a Corporate ADR
- (a) The DPP or Investigating Director must consider the representations and undertakings made by the company, information obtained in the process of investigation and engagement with the company, and any recommendation made by the prosecutor and the AFU.
  - (b) The report of the prosecutor must address whether a reasonable suspicion exists that the company has committed the alleged offences of corruption and/or offences related to corruption and whether a Corporate ADR would be in the public interest, in accordance with the criteria set out in these Directives.
  - (c) If the DPP or Investigating Director is satisfied that issuing a Corporate ADR will be in accordance with these Directives, the DPP or Investigating Director may issue a Corporate ADR.
  - (d) The DPP's or Investigating Director's decision whether to issue a Corporate ADR must be in writing.
  - (e) It is the responsibility of the DPP or Investigating Director to ensure that the conditions are commensurate with the crime committed (neither too lenient, nor too harsh).
4. Where a case against the company has already been enrolled, the charges must be withdrawn against the company, the reasons for withdrawal of the case must be furnished to the presiding officer and must also be recorded on the police docket.
5. A copy of the Corporate ADR must be filed in the "B" section of the relevant docket.
6. Where the Corporate ADR has included disgorgement that impacts asset forfeiture

proceedings in terms of POCA related to the company, the proceedings shall be handled as necessary, including—

- (a) abandonment or settlement of a case according to the AFU policy;
- (b) rescission of an order;
- (c) finalisation of proceedings or institution thereof as consented to in terms of the Corporate ADR;
- (d) pursuit of further asset forfeiture related to the matter as a whole that has not been the subject matter of the ADR; and
- (e) enforcement related aspects are to be attended to as in the ordinary course in the AFU.

## **N. Publication**

1. A summary of the Corporate ADR must be published on the NPA website.
2. Such statement should be worded in such a manner as to avoid compromising any investigation or trial.

## **O. Reporting mechanisms**

Quarterly reports are to be provided to the NDPP on all engagements with companies in respect of Corporate ADR and on adherence to the terms of Corporate ADR.

## **P. General**

1. There is no right to a Corporate ADR. The decision whether to prosecute involves the exercise of a multi-faceted discretion. The NPA does not represent, by these Directives, that it will issue a Decision in respect of a company which satisfies these criteria. It remains the prerogative of the NPA to decide whether to prosecute.
2. Corporate ADR should not be utilised where this would bring the administration of justice into disrepute.
3. Any failure to comply with the Directives will be dealt with according to the disciplinary procedures of the NPA.