RESPONSE TO THE CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATIONS: DEFERRED PROSECUTION AGREEMENTS

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Do you agree that deferred prosecution agreements have the potential to improve the way in which economic crime committed by commercial organisations is dealt with in England and Wales?

1. We agree that there are circumstances in which the use of a deferred prosecution agreement ("DPA") may be of assistance in dealing with crime committed by commercial organisations. We agree that the current system has been ineffective in dealing with corporate economic crime. In circumstances where a commercial organisation is prepared to admit to wrongdoing and cooperate with the prosecutor, we believe that a DPA may be an efficient way of achieving justice by dispensing with the long and costly trial process whilst allowing for transparency and considerations of public interest.

2. DPAs may be advantageous in dealing with economic crime that took place in more than one jurisdiction. We consider that the process may allow the prosecutor to reach an agreement with the commercial organisation and international prosecuting authorities whilst still allowing for the necessary judicial oversight. We note Consultation Paper CP9/2012 (the "Consultation Paper") makes reference to US rules on double jeopardy, in particular that the double jeopardy rule does not apply to convictions by sovereigns outside the United States. The Consultation Paper suggests that commercial organisations which could be prosecuted in both England and Wales and the US may choose to engage with US authorities so as to prevent action being taken in England and Wales due to English double jeopardy rules. If commercial organisations are choosing to "forum shop" in this manner, we do not consider that the introduction of DPAs will be of assistance in preventing this. However, we would not advocate any amendment to the rules on double jeopardy in England and Wales.

3. In spite of the above we believe that DPA's are not a panacea which will increase the number of organisations that self-report or cooperate. Further, in our opinion, insufficient consideration has been given to the position of individuals within the DPA process.

Self Reporting

4. It is our belief that the Consultation Paper relies upon certain assumptions as to the likely benefits to a commercial organisation of self-reporting and entering into a DPA which may prove unfounded. A number of significant concerns about the DPA process will weigh heavily on the minds of those considering self-reporting. The process is still in many respects uncertain and a decision to cooperate with the authorities could be very damaging if a DPA cannot be reached (see paragraph 9 below). Further, commercial organisations will be aware of the collateral consequences of entering into a DPA. Although they may avoid criminal conviction they are unlikely to avoid negative market reactions and exposure to civil claims (see paragraphs 43 and 44). Given the potentially very severe penalties and consequences that can accompany a DPA, there may be little take up of DPAs unless there is a genuinely credible threat of successful prosecution for those who decline to take such a path.

5. There is no doubt that the DPA regime actually imposes a more uncertain process and potentially more serious outcomes than applied under the civil recovery regime operated by the SFO in recent years. The civil process allows for considerable confidentiality to settlement terms and the ability to reach final settlement as to disgorgement of profit that is entirely non-threatening to corporate survival and includes no additional penalties. We would question whether there is likely to be a significant increase in self-reporting absent an increased threat of prosecution/conviction for those entities that do not self report. We do not consider that the introduction of DPAs alone will resolve that tension.

Realistic Threat of Conviction

6. The Consultation Paper appears to suggest that the introduction of DPAs will assist in overcoming the issues arising from the identification principle. We find it difficult to see that this will be their effect in the majority of cases. Given the potentially serious outcomes of a DPA, many commercial organisations are only likely to self report and/or enter into a DPA in circumstances where they consider conviction to otherwise be a realistic possibility. We cannot see that the DPA process in any way assists in surmounting the obstacles to conviction the identification principle continues to represent in all but bribery cases under the 2010 Act. This is in contrast to the system in the US. The success of DPAs may, at least in part, be attributable to the framework in which they operate. Under US law a commercial organisation may be held liable for the acts of a single employee. For a commercial organisation in the US, the probability that a conviction could be obtained is high from the outset.

7. As well as difficulties with establishing that an offence has been committed, motivation to self report will remain low absent a credible threat of investigation. Such threat

appears low at a time when the main prosecutor in relation to economic crime, the SFO, is not properly resourced. We note the SFO is currently operating on a much-reduced budget, down 26% from the 2008-09 fiscal year to £33.9m this year and due to fall further by 2014-15 to £30.5m. Those considering whether there is a threat that their organisation will be investigated will no doubt take comfort from the fact that in the year to 31 March 2012 the SFO did not conduct a single raid.

8. The introduction of DPAs will have limited impact in improving the UK's record for dealing with economic crime committed by commercial organisations. DPAs must be accompanied by greater investment in the prosecuting authorities. Further consideration as to the appropriateness of the identification principle may also be helpful. However, we do not seek to suggest that the US model of corporate criminal liability should be introduced in the UK.

Uncertainty

9. Whilst we agree that it is essential that the judiciary be the ultimate arbiter of sanction, there will always be a trade off between judicial pre-eminence in this regard and certainty of outcome. The process by which a commercial organisation will enter into a DPA in the UK will always afford less certainty than the position in the USA where the DPA is basically a contract between the company and the government. Although US DPAs are approved by the court, the court has generally not tended to take an active role.

10. Throughout the process there are a number of stages at which the DPA process could break down. The process can break down at anytime from the first meeting with the prosecutor until long after the DPA has been agreed (if the decision to offer DPAs is subject to judicial review) (see paragraph 46). A self-reporting or cooperating commercial organisation will need to agree a basis of facts before even the first hearing. As such that organisation faces a real risk that in initiating discussions with the prosecutor it will substantially prejudice its position with no guarantee that a DPA can be achieved.

11. In this respect, the DPA process may offer little additional certainty beyond the existing R v Goodyear[1] process. In either case, while any admissions made in the process will not themselves be admissible in any subsequent proceedings, there is nothing to prevent the prosecution using the information they have discovered to guide and inform their ongoing investigation.

[1] [2005] EWCA Crim 888

12. We consider that the, at least partial, solution in either case is the availability of detailed guidelines which will permit the parties to approach the DPA process with a reasonable degree of certainty as to likely penalty before the need arises to compromise their position evidentially.

Importance of avoiding "conviction"

13. The Consultation Paper refers to the "*unintended detrimental consequences"* of criminal prosecution "*such as adverse share price movements and failure of organisations"* and suggests that the absence of a formal criminal conviction may assist in avoiding such consequences. We do not consider that the categorisation of a penalty will necessarily be decisive as to the impact on market opinion. Corporate entities are likely to suffer similar detrimental effects in the market place whether they are prosecuted or enter into a DPA in which they avoid a formal conviction. We accept that those who wish to tender for public contracts in the EU and US will have a stronger motivation to avoid a criminal conviction. However, in its current form, the entering into a DPA may lead to further damaging collateral consequences such as an increased risk of civil litigation (see paragraphs 43 and 44) which may long outlast the term of any DPA.

14. Changes to the terms upon which a DPA is offered may provide better incentives for commercial organisations to self- report. We would question the necessity of requiring organisations that enter into a DPA explicitly to admit that an offence has been committed. Given that DPAs are intended to bring results in circumstances where prosecutors may not be in a position to secure a certain conviction, this would represent a suitable quid pro quo for both parties. A corporate entity is otherwise in little better position than if it had simply submitted an early guilty plea in the place of conclusive evidence. Where the alleged wrongdoing is most serious, or the public interest would otherwise require it, no DPA would be offered. We do not therefore consider that there would be any prejudice to the public interest in not requiring commercial organisations to admit an offence.

15. We accept that commercial organisations who agree DPAs with US prosecutors will usually admit liability. This is less troubling for an organisation in the US context than it would be in England and Wales. A commercial organisation in the US may be found liable for the acts of any of its employees. There is no need to overcome the identification principle. In a US context admitting liability is unlikely to require a company to admit much more than a set of facts concerning the commission of the offence.

Individuals

16. The Consultation Paper makes clear that in some cases prosecution of individuals may be the better outcome and that the absence of cooperation from commercial organisations *"affects the ability of prosecutors to target and prosecute more culpable individuals"*.

17. We note that, at paragraph 151, it is proposed that "*prosecutors should treat documents created by the commercial organisation in the course of DPA discussions as it obtained under compulsion and therefore subject to the same restrictions…The prosecutor would not be able to use that evidence to prosecute the commercial organisation or individual in respect of the offence which is the subject of the DPA unless an exception arises"*. It is unclear whether this would mean that records of interviews with employees in internal investigations would be inadmissible in proceedings against those employees. This point is critical and must be made clear.

18. In any event, in our view, this protection does not go far enough. In encouraging commercial organisations to self-report and requiring an agreed set of facts to be reached between the commercial organisation and prosecutor, it is likely that heavy reliance will be placed upon a commercial organisation's internal investigation. This clearly advantages the prosecutor by significantly reducing investigation costs. However, the Consultation Paper fails to deal with how the rights of individuals are to be protected in such circumstances. In circumstances where the prosecuting authority is effectively outsourcing its investigatory function to the commercial organisation, the latter should be treated as agents of the prosecution and full PACE protections applied including interviewing under caution and with the offer of legal representation.

19. While it may be argued that the observance of PACE codes may inhibit internal investigations, we do not consider that this is sufficient reason to abrogate the rights of individuals simply because potentially criminal investigations are conducted by a commercial organisation in place of a state prosecutor. Once a DPA is in place we consider that only the prosecuting authority should interview suspects (see paragraph 31).

Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?

20. DPAs should be available according to the type of offender and not the type of offence. DPAs are an appropriate tool for use against commercial organisations, as the majority of sanctions against commercial organisations are financial in nature. We see no reason

why DPAs should not be available in relation to all forms of corporate criminal offences. That is not to say that a DPA would be appropriate in relation to all instances of corporate offending, simply that the tool should be available for use when it is in the interests of justice to do so.

21. We note that the coalition government wishes to avoid sending the message that economic crime is somehow less serious than other offences. We consider that singling out economic crime will not assist this.

Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?

22. Subject to paragraph 23 below, we agree.

Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?

23. The Consultation Paper states that this code would deal with "*provision for the protection of legal professional privilege, covering both advice privilege and litigation privilege to deal with organisations' concerns about the treatment of internal investigations…"* We agree that it is essential to deal with these issues at an early stage. In the event that a commercial organisation enters into a DPA, any individual who faces prosecution must be guaranteed full access to all documents required for his/her defence that meet the statutory test for disclosure. This would include access to early accounts from witnesses given in internal investigations. A commercial organisation must understand that the duty of cooperation contained within its DPA may require it to waive privilege over such documents. This is consistent with the judgment given by Mr Justice Owen in R v George & Others (the BA case)[2].

Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?

24. We agree that the Sentencing Council is the right body to develop these guidelines. We would suggest, however, that the Sentencing Council would be assisted by wide consultation before the guidelines are finalised given the novel areas which such guidelines are likely to encompass.

[2] 7 December 2009 (unreported)

What do you think would be most useful in a guideline for DPAs?

25. The extent to which the DPA process will encourage self reporting is based to a large extent on the level of certainty it provides to corporates (see paragraphs 9 to 12). For this reason, it is essential that offence and, as far as possible, offender specific guidelines are produced. The guidance is unlikely to fetter judicial discretion if there are appropriate allowances to depart from the guidelines. Further, this model closely reflects the current position in respect of sentencing guidelines.

26. We consider, however, that guidelines for the sentencing of corporate offenders will need to include many more factors related to the offender than provided in sentencing guidelines applicable to individuals. Commercial organisations vary significantly in size, scope, and territorial reach. What is appropriate for a multinational conglomerate will not necessarily be appropriate for an SME with only one revenue stream.

Do you agree that the preliminary hearing should take place in private?

27. We agree. Any preliminary hearing should take place in private. An organisation seeking to enter into a DPA would face substantial prejudice if the hearing were to take place in public. The final public hearing should address any concerns about transparency.

Do you agree that the first test for a judge to apply at a preliminary hearing is whether a DPA is 'in the interests of justice'?

28. Yes, the only possible starting place is to balance the public interest against fairness to the defendant.

Do you agree that at a preliminary hearing the judge should also apply a test as to whether the emerging conditions of a DPA are 'fair, reasonable and proportionate'?

29. Yes. We also consider that all of the emerging conditions of the DPA (as well as the overall DPA) should be 'in the interests of justice'.

Do you agree with the proposed possible contents of a DPA as outlined?

30. We do not agree with the proposal that a company and prosecutor should be able to agree to replace "implicated" members of the management team. In reality a DPA will be entered into long before any individual is tried for offences connected with the DPA. Such an agreement would be prejudicial to the individual concerned.

31. Further, we are concerned as to what a requirement to *"provide access to witnesses"* might mean. The inclusion of this requirement within a DPA poses a serious risk that

employees of an organisation will be placed under inappropriate pressure to provide evidence. Whilst we would have no objection to the proposal that a commercial organisation identifies possible witnesses to the prosecutor, and agree not to obstruct access to them, we consider that the prosecutor should use its own powers to gain access to witnesses as these powers carry proper protections. A prosecutor should not be able to short circuit the protections available to suspects and those cooperating with an investigation simply by allowing a commercial organisation to act as its agent.

32. Further, we note the excessive costs of compliance monitoring in a number of US cases. From a US perspective, concerns have been raised that, in the event that a compliance monitor's costs are considered excessively high by a commercial organisation, the commercial organisation has no right of redress. This is because the monitor can report to the US Department of Justice that the commercial organisation is failing to cooperate (cooperation with the monitor being a standard requirement in a DPA).

33. In this regard, we consider the approach of Lord Justice Thomas in R v Innospec [3] to be correct. The Consultation Paper categorises the use of a compliance monitor as a measure to prevent re-offending. We do not consider that a court would find it in the interests of justice for the prosecutor to enter into a DPA with a commercial organisation that requires significant external monitoring (in addition to the other proposed sanctions) in order to prevent it from re-offending. Unless it can be justified why it would be appropriate to appoint a compliance monitor, the resources expended on a compliance monitor should more properly be directed to fines, confiscation and compensation. Moreover, wherever such a sanction is imposed, some form of taxation or review of the monitor's fees should be in place.

Do you agree that there should be a reduction principle, relating only to the financial penalty aspect of a DPA, and that the maximum reduction should be one third of the penalty that would have been imposed following conviction in a contested case?

34. We consider that a discount of one third is correct as it is the same position as the discount available for early pleas. However, we consider it unlikely that such a discount, without more, will induce commercial organisations to self-report unless other factors are addressed (see paragraphs 4 to 15).

Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?

[3] [2010] Crim LR 665

35. Yes. It essential to ensure transparency in the process and maintain public confidence. It is necessary for the public to be able to ascertain the agreed penalty, the acts the penalty related to and the reasons why the agreed penalty is considered appropriate.

Do you believe that it is right that the court should determine whether a variation to a DPA is appropriate, where a change of circumstances has occurred?

36. Yes, we consider that responsibility for variation of a DPA must lie with the court. Variation by any other method lacks transparency and could lead to undue pressure upon a commercial organisation to agree new terms.

Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?

37. No, in our opinion, this approach lacks transparency. We consider that the numbers of DPAs requiring amendment are unlikely to be such as to require a large amount of additional court time. In order to save time, parties could be encouraged to reach agreement where possible and then to seek the approval of the court.

Do you believe that it should be possible for the parties to a DPA to be able to make amendments to it, within limits defined by that DPA?

38. No, see paragraphs 36 and 37.

Do you agree that there should be provision for formal breach proceedings and that it should operate as described?

39. Yes, we assume "powers available" means penalties that can be imposed by the court.

Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?

40. Yes, we would agree that this discretion should never sit with the prosecutor.

Do you agree that the above proposals regarding admissibility are appropriate?

41. We have serious concerns in regard to the treatment of individuals in the DPA process. We believe that appropriate protections must be put in place when individuals are interviewed during the course of internal investigations (see paragraphs 16 to 19).

42. Further, we consider that the circumstances in which the prosecutor may use documents created by a commercial organisation during the DPA process in subsequent proceedings

to be too wide. The Consultation Paper suggests that such documents may be used in the prosecution of the corporate or an individual for an offence other than the wrongdoing or offences which are the subject of the DPA. This is problematic. A narrow interpretation of this wording would give rise to substantial unfairness in cases where the wrongdoing or offences are connected with the DPA but could not be said to be the same. If the Ministry of Justice is attempting to leave the door open to allow evidence to be used in relation to specific offences (for example perjury) then we consider that these offences should be specified. This is consistent with the approach taken by the Financial Services Authority.

43. The Consultation Paper also suggests that prosecutor may use documents created by a commercial organisation during the DPA process to make enquiries, which may result in the gathering of further evidence to be used in proceedings against the commercial organisation or any individual. We consider that this will weigh heavily on the minds of those considering self-reporting and expect it will create a significant barrier to cooperation between the commercial organisation and the prosecutor. However, it is accepted that this approach is consistent with the current law to date and consider that this is the only practical approach.

44. The admissibility of the facts and terms of a DPA in civil proceedings will be a discouraging factor for any organisation considering entering into a DPA. Organisations will not consider DPAs to provide any benefit in resolving matters quickly if entering into such agreement will give rise to a high volume of civil claims. A commercial organisation that has paid a significant fine, disgorged profits and is suffering from the inevitable loss of business brought about by publicity concerning economic crime may struggle to meet the costs of ongoing civil litigation. This will no doubt be exacerbated if a commercial organisation finds itself unable to rely on any relevant insurance policy because it has been terminated on the grounds that the commercial organisation has admitted to the commission of a criminal offence. This pressure may be reduced if an organisation is not required to explicitly to admit that an offence has been committed (see paragraph 14).

45. In regard to the weight given to DPAs in civil proceedings, the Consultation Paper appears to be inconsistent. The Consultation Paper notes in regard to the fact and terms of the DPA *"[t]he weight to be attached to such evidence would of course be a matter for the civil court"* but that the agreed facts *"should be taken to be true unless the contrary is proved"*. We consider that the correct approach is to allow the civil court to determine the appropriate weight in relation to both matters. We do not consider that any admissions in the agreement should be admissible against an individual that was not party to the DPA.

What are your views on the appropriate approach to disclosure in the context of DPAs?

46. We agree with the position set out in the Consultation Paper.

Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?

47. No, we do not believe that a decision to enter into a DPA should be susceptible to judicial review. The Consultation Paper draws an analogy between a DPA and a decision not to prosecute. Decisions not to prosecute are not subject to judicial scrutiny except through the judicial review process and it is therefore logical that they should be subject to review. However, a decision to enter into a DPA will be scrutinised by a judge and a DPA will only be entered into when it has been deemed to be in the interests of justice. It appears illogical that a decision to offer a DPA that has been adjudicated to be in the interests of justice could be judicially reviewed at a later date on the basis that it is unreasonable.

Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

48. Yes. Provided the appropriate safeguards are introduced then we consider that there is no prejudice to a defendant who is offered a DPA in relation to an offence committed before the introduction of DPAs. In the event that an organisation has already faced a penalty prior to the introduction of the DPA process, we do not consider that there is any prejudice to this commercial organisation as its conduct was dealt with according to the law that applied at the time of the commission of the offence. Finally, a DPA will only be used where it has been determined that it is in the interests of justice, therefore we do not consider that there is any prejudice to the public interest if they are applied in relation to conduct that took place before DPAs were introduced.

Do you agree with the proposed process for DPAs, as outlined in this chapter, and do you have any suggestions for improvements or amendments to it which would support the overall policy objectives?

49. It is essential that the DPA process is considered in regard to individuals. Individuals subject to investigation as part of the DPA process must be afforded the same rights as those investigated by a prosecuting authority. To take any other approach would give rise to substantial unfairness.

50. We consider that in order to encourage self-reporting there should be no requirement that a commercial organisation admits the commission of an offence when entering into a DPA.

Do you have any further comments in relation to the subject of this consultation?

51. See above.