Wilmer Hale Response to Deferred Prosecution Agreements: Consultation on Draft Code of Practice

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Question 1: Do you agree with the test for entering into a DPA set out in paragraph 2?

1. We agree that the test should be a two stage test. We agree with the public interest stage of the test as set out in the draft code (subject to our comments below). We agree that the evidential stage of the Full Code Test in the Code for Crown Prosecutors should be satisfied.

2. We agree that DPAs should be made available in circumstances where there is a reasonable suspicion that P has committed the offence and there are reasonable grounds for believing a continued investigation would provide further evidence within a reasonable period of time.

3. It is not clear from the DPA Code to what extent the prosecutor is required to attempt to meet the first limb of the evidential stage (the Full Code Test) before it can enter into a DPA on the grounds of second limb of the evidential stage (2(i)(b)). We do not consider it necessary for the prosecutor to have exhausted all efforts to meet the Full Code Test before a DPA can be entered into. To suggest otherwise, would greatly reduce the benefits (both in time and resources) that DPAs are being introduced to confer. This requires clarification.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA, as set out at paragraphs 11-13?

4. Paragraph 11(b)(i) is unclear and should be subdivided to better reflect the two different concepts referred to within the paragraph. One sub-paragraph should relate to "remedial actions" including, but not limited to:

   (a) efforts to implement an effective corporate compliance program or improve an existing one;

(b) replacing responsible management;

(c) disciplining or terminating wrongdoers; and

(d) paying restitution.

5. The second sub-paragraph should relate to "compliance/cooperation with authorities" including, but not limited to:

(a) self-reporting;

(b) making witnesses available (subject to below); and

(c) disclosure of the details of any internal investigation.

6. The factor 'making witnesses available' is unhelpfully vague. It is unclear whether the DPA Code intends that, in order to be construed as cooperative, P would be required to attempt to compel an employee, agent or third party to be interviewed by the prosecutor. P could not compel potential witnesses to be interviewed by the prosecutor. P could identify potential witnesses and agree not to obstruct access to said witnesses. A more precise definition is required so as to protect the individual witnesses' rights and to ensure that P is not given unachievable task.

7. Paragraph 11(b)(v) states "corporate structures or processes have changed in such a way as to make a repetition of the offending impossible." To require the implementation of processes to make offending 'impossible' is, in our view, excessive and unachievable.

8. We suggest the following two additional factors to be taken into account as factors against prosecution:

(a) Collateral consequences of prosecution, including whether there is disproportionate harm to shareholders, pension holders, employees and others, as well as impact on the public arising from the prosecution.

(b) The adequacy of remedies such as civil or regulatory enforcement actions.

9. We consider that paragraph 12(ii) is unhelpful in two respects:

(a) The paragraph refers to a consideration of how early P self-reported and the extent that it involves the prosecutor in the early stages of an investigation. This is vague and no guidance is provided in relation to when P should self-report. It is assumed that the prosecutor would not want P to self-report before it had sufficiently investigated the matter. We submit that this factor should be reconsidered, focusing upon "a deliberate delay in self-reporting that prejudices investigations into P or individuals".

(b) In the same paragraph, the DPA Code suggests the prosecutor will "critically assess the manner of any internal investigation…Errors in the conduct of internal investigations which lead to such adverse consequences [material being destroyed, delays in first accounts allowing opportunity for fabrication] will militate against the use of DPAs". This raises specific concerns that the wording of this paragraph may encourage P to give individuals insufficient time to consider important documents before interview out of a fear that otherwise P may not be invited to negotiate the terms of a DPA. It should be made clear that this paragraph of the code is not intended to prevent internal investigators from giving individuals reasonable disclosure prior to being interviewed.

10. Paragraph 12(ii) may have the effect of deterring P from conducting investigations without the prosecutor's input and guidance. This will have the ultimate effect of putting further strain upon the prosecutor's resources with no guarantee of more effectively tackling economic crime. We consider that the paragraph should instead consider the extent to which the internal investigation was conducted reasonably and in good faith.

Privileged Material

11. We consider that it is vital that the DPA Code deals specifically with the issue of privileged material.

12. The DPA Code should make clear that what the authorities seek by way of cooperation is not the waiver of privilege, but rather the facts known to P about the alleged criminality. Prosecutors should be directed not to ask for privilege to be waived. P should receive the same credit for disclosing facts contained in materials

that are not protected by privilege as it would for disclosing identical facts contained in materials that are so protected.

13. The DPA Code must make provision in regard to privilege as set out in paragraph 95 of the original Ministry of Justice consultation paper:

> "*a Code of Practice would include 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, and legal advice or assistance received during the course of such investigations.*"

Undertakings

14. Paragraph 21(i) requires P to agree not to disclose any information provided by the prosecutor to any other party, thereby including P's own employees. Some latitude must be given in situations where individuals are needed to assist in an internal investigation. Failure to provide sufficient disclosure to such individuals may result in their refusal to provide such assistance.

Subsequent use of information obtained by a prosecutor during the DPA negotiation period

15. The categories of documents set out at paragraph 29(i), (ii) and (iii) should not be required by the prosecutor in the course of DPA negotiations. We consider that there should be no requirement on the part of P to provide underlying source material when making disclosures to the prosecutor. Provided that this is the case, we have no objection to the terms of the DPA Code dealing with the subsequent use of information obtained by a prosecutor during the DPA negotiation period.

Question 3: Do you agree with the approach to disclosure at paragraphs 30-35?

16. We agree with the approach to disclosure set out in the DPA Code.

Question 4: Would it assist if examples of potential terms additional to those addressed at paragraphs 40-42 are included in the Code?

17. Yes, provided it is made clear that any such terms are not a precedent that must be followed in all circumstances.

Question 5: Do you agree with the approach to the use of a monitor at paragraphs 43-51?

18. We do not agree that the prosecution should be able to veto the proposed monitor (paragraph 49). We believe that the power to veto P's preferred monitor should rest solely with the court and that the prosecution may, if it thinks appropriate, make representations to the court to that effect.

19. We are concerned that the role of the monitor in the DPA Code is drawn too broadly. It suffers from a lack of precision as to the monitor's task. The DPA Code states that a monitor's primary responsibility is to "assess and monitor P's internal controls and advise of necessary compliance improvements". In contrast, the US Department of Justice memorandum 163 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations' states at paragraph B 3:

> "A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct."

20. We consider the US Department of Justice description of the role of the monitor to be preferable. Monitorship can potentially result in excessive costs that P must meet. There is no mechanism for review of the monitor's costs, this leaves P without redress. The broad definition of the monitor's role within the DPA Code increases the risk of excessive costs being incurred.

21. We do not agree with the provision in paragraph 50 that the term of the monitorship can be extended as a result of agreement between the monitor and the prosecutor. Any extension of the term of the monitorship should be subject to the jurisdiction of the court.

Question 6: Do you agree that the examples of the policies and procedures at paragraph 52 that the monitor may be tasked to identify are in place is sufficiently comprehensive?

22. Yes

Question 7: Is the approach to determining an appropriate level of a financial penalty term in paragraphs 53 to 57 clear?

23. Yes

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice? Please refer to the relevant section of the draft Code when responding.

24. No