Ministry of JUSTICE

Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations:

Deferred prosecution agreements

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Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements

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Foreword

1. Corporate economic crime causes serious harm to its direct victims and grave damage to our economy. In 2012, the National Fraud Authority estimated that fraud committed by all types of offenders costs the UK £73 billion per year.

2. Successive governments have talked about tackling white collar crime, and this administration strongly supports this objective. But in practice, despite years of good intentions and some high profile cases, previous attempts to prosecute economic crime have been only intermittently successful.

3. The obstacles are familiar. Investigations and trials are forbiddingly long, expensive and complicated – particularly where offences occur across multiple jurisdictions. Identifying wrongdoing in hidden, specialist or technical fields often depends on commercial organisations cooperating or whistleblowers coming forward, but organisations have little incentive to self-report. Law enforcement agencies complain that they have a relatively narrow range of tools available to identify and bring corporate offenders to justice. In modern corporations, where responsibility for decision-making is distributed quite widely, it is very difficult to prove criminal liability, which depends on establishing that the 'directing mind and will' of an organisation was at fault. The consequence of all of this has been too few organisations held to account for their crimes, and too many victims waiting in vain for restitution.[1]

4. The Government is clear that more needs to be done and that white collar crime should be treated as seriously as any other kind of offending. That is why we have already implemented the Bribery Act 2010, updating laws that were over a century old to ensure that the UK is once again a world-leader in efforts to tackle the scourge of corruption. In 2011, the National Fraud Authority enacted *Fighting Fraud Together*, a national strategic plan aimed at reducing fraud. The Government is also creating the National Crime Agency (NCA), which will include within it a specific Economic Crime Command. The NCA will spearhead the fight against serious and complex crime and organised criminality. This will give us a stronger focus on tackling economic crime and ensure efforts are better coordinated across the whole of the law enforcement response.

5. However our efforts need to go further still and, in particular, we need to look again at the range of tools open to prosecutors when dealing with certain types of economic crime. We believe that deferred prosecution agreements (DPA), on which we are consulting in this paper, can make a valuable contribution to efforts to identify and address corporate economic crime. A DPA would sit alongside existing means of tackling crime, criminal prosecution and civil

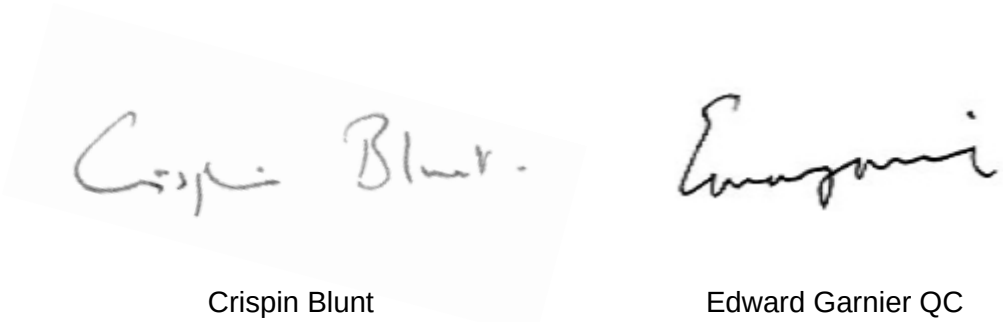
[1] In this paper, we use 'restitution' to refer to any payment or other action taken by a commercial organisation to benefit the victim(s) of the wrongdoing which has been admitted under a deferred prosecution agreement.

proceedings. Under its terms, a prosecutor would lay but would not immediately proceed with criminal charges against a company pending successful compliance with tough requirements such as financial penalties, restitution for victims, confiscation of the profits of wrongdoing and measures to prevent future offending.

6. DPAs would be a fair and pragmatic approach to tackling a serious problem and would need to be used judiciously. Where the alleged wrongdoing is most serious, or the public interest would otherwise require it, a criminal prosecution would continue to be the most appropriate course of action. As DPAs would be sanctioned by judges, the judiciary would be able to block DPAs which they do not think would serve the interests of justice, for example where prosecution would be the appropriate response. Entering into a DPA will be voluntary both for companies accused of wrongdoing and for prosecutors.

7. DPAs would contribute to a just outcome, enabling prosecutors to secure penalties for and the surrendering of the proceeds of wrongdoing, and providing benefits for victims in a way that is sanctioned by a judge, without the uncertainty, expense, complexity or length of a full criminal trial. They also enable commercial organisations to be held to account – but without unfairly affecting employees, customers, pensioners, suppliers and investors who were not involved in the behaviour that is being penalised. The process will be transparent; as DPAs will be public, the public will always know what wrongdoing has taken place, and the penalty that has been paid.

8. Our ambition is to ensure that a higher proportion of economic crime is identified, investigated and dealt with. DPAs are a tool that seeks to achieve these goals whilst being transparent, clear and consistent. We hope that you will consider our proposals carefully to help ensure that they are sensible, proportionate and will make a genuine difference when they are introduced.



Crispin Blunt
Parliamentary Under-Secretary of State

Edward Garnier QC
H.M. Solicitor General

Executive summary

9. Options for dealing with offending by commercial organisations are currently limited and the number of outcomes each year, through both criminal and civil proceedings, is relatively low.

10. In part, this is because of difficulties with the law of corporate criminal liability, which does not reflect the 21st century commercial organisation. It is also because offending in the area of economic crime is becoming increasingly sophisticated. As the size of commercial organisations and the reach of their interests grow, so too do the difficulties of identifying criminal activity and of prosecution at a national level for what can often be wrongdoing across a number of jurisdictions.[2]

11. This calls for increasingly close working with international law enforcement agencies. Although the creation under the Bribery Act 2010 of criminal liability for a commercial organisation that fails to prevent bribery is a notable improvement and although prosecuting agencies are taking more pro-active approaches in identifying and investigating serious economic crime, more needs to be done.[3]

12. There is a general recognition that economic crime committed by commercial organisations needs to be dealt with more effectively in England and Wales. The Coalition Government is committed to treating white collar and economic crime as seriously as other crime.

13. Work is being carried out, both amongst the main prosecutors of economic crime and at judicial level, to improve the effectiveness of law enforcement in this area, such as possible revisions to guidelines on plea agreements and disclosure issues. However, these will go only some way towards dealing with problems that prosecuting agencies face in trying to successfully bring offending commercial organisations to justice.

14. This consultation paper sets out proposals for an additional tool for prosecutors, the deferred prosecution agreement (DPA), to deal with serious economic crime committed by commercial organisations. We believe this proposal will overcome many of the current difficulties associated with prosecuting commercial organisations. Currently, commercial organisations have little incentive to self-report offending to investigating and prosecuting

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[2] Throughout this paper we make reference to 'commercial organisations' but many of the difficulties apply with equal force to large partnerships or trusts.

[3] The Bribery Act 2010 introduces a wide form of liability for acts of those 'associated' with the commercial organisation unless the commercial organisation had in place adequate procedures to prevent bribery by those associated with it.

agencies, especially if such self-reporting may result in a criminal conviction and all that entails.

15. Under a DPA, the prosecutor would lay, but would not immediately proceed with, criminal charges pending successful compliance with agreed terms and conditions stated in the DPA. The terms and conditions might include:

    - payment of a financial penalty;
    - restitution for victims;
    - disgorgement of the profits of wrongdoing; and
    - measures to prevent future offending (a monitoring or reporting requirement).

16. These would be discussed and agreed between the parties and then placed before a judge for consideration and approval. Time limits would be attached to the terms and conditions so that compliance can be managed and it will be clear when the agreement should cease.

17. Our intention is that this new tool will enhance prosecutors' ability to detect and pursue economic crime committed by commercial organisations and to ensure economic offending which takes place across more than one jurisdiction is dealt with more effectively, as well as achieving better outcomes for victims.

Introduction

18. This paper sets out for consultation proposals for the introduction of a new approach to allow prosecuting authorities and commercial organisations to enter into an agreement whereby a prosecution for a criminal offence would be deferred, during which time certain conditions would need to be met – referred to as a deferred prosecution agreement (DPA). The consultation is aimed at members of the public, including justice system professionals and practitioners, service providers, users and other interested parties in England and Wales.

19. This consultation is conducted in line with the Government's Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 46, have been followed.

20. An Impact Assessment indicates that the Ministry of Justice, the Attorney General's Office, the Serious Fraud Office, the Crown Prosecution Service (CPS), other prosecuting agencies, Her Majesty's Courts and Tribunal Service (HMCTS), the Judiciary, National Offender Management Service (NOMS), Legal Services Commission (LSC), Her Majesty's Revenue and Customs (HMRC), the planned National Crime Agency, the Home Office, the Police, commercial organisations, individuals working in the commercial organisations, victims of economic crime, lawyers, those engaged in monitoring[4] and the public are likely to be particularly affected. We are publishing an Impact Assessment and an Equality Impact Assessment alongside this document.

21. Comments on the Impact Assessment and the Equality Impact Assessment are very welcome.

[4] A potential provision of DPAs is the appointment of an independent "monitor" who is tasked with supervising the company's compliance with the terms of the agreement and reporting to the government the company's progress under, or its breach of, the agreement.

Chapter 1 - The case for change and need for new enforcement approaches

22. Treating economic crime as seriously as other crime and taking steps to combat it effectively are key commitments in the Coalition Agreement. Economic crime is increasingly sophisticated. As the size of commercial organisations and the reach of their interests grow, so too do the difficulties of identifying criminal activity and of prosecution at national level for what can often be wrongdoing across a number of jurisdictions. It is in the interests of justice and of economic well-being that investigators and prosecutors should be equipped with the right tools to tackle economic crime.

23. The present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime. [5] The system's deficiencies pose problems for prosecutors, defendants and judges and can have adverse impacts on victims, customers, suppliers and the wider economy. The increasing internationalisation of both the crime and the offending commercial organisations exacerbates the existing problems.

24. The proposals in this paper would apply only to England and Wales.[6] In Northern Ireland and Scotland, much of the criminal justice system is devolved, but matters relating to corporate law are broadly reserved. We will therefore discuss further with the Scottish and Northern Ireland administrations whether, and if so how, these proposals could be extended to those jurisdictions.

25. Prosecutors tackling economic crime (principally the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS)) currently have two key approaches available to them: criminal prosecution or, where this is not appropriate, pursuing a civil recovery order against the commercial organisation. Both involve lengthy investigation, while criminal prosecution involves protracted court proceedings to reach a conclusion. The resource and financial costs for prosecutors can be high, and ultimately the number of cases that can be pursued to an outcome is limited.

26. In addition the law of corporate criminal liability poses some problems. Under the current law, in order to obtain a conviction a prosecutor must show that the "directing mind and will" of the commercial organisation had the necessary fault element or "*mens rea*" for the offence. However, this is often difficult to prove, especially in increasingly large and more sophisticated modern commercial organisations. While the new offence in connection with the failure of a

[5] For the purposes of this paper, economic crime includes fraud, bribery and money-laundering.

[6] It should be noted that while the remit of the CPS is confined to England and Wales, the SFO's remit covers England, Wales and Northern Ireland.

commercial organisation to prevent bribery under section 7 of the Bribery Act 2010 will help, more needs to be done, especially in relation to other types of economic offending.

27. While criminal prosecution can effectively punish a commercial organisation using existing criminal penalties, it can also end up having unintended detrimental consequences, such as adverse share price movements and failure of organisations, which in turn can impact on blameless employees, customers, pensioners, suppliers and investors. A criminal conviction can also mean the organisation is unable to bid for EU and US public procurement tenders, which may be disproportionate and particularly damaging.

28. Occasionally, a criminal investigation and prosecution can lead to the commercial organisation going out of business, leading to job losses and wider damage to the economy. The global collapse of Arthur Andersen in 2002 within weeks of indictment (which was subsequently overturned in 2005 by the US Supreme Court) is a graphic illustration of the problem. In some cases the impact of criminal prosecution, both on the offending commercial organisation and in the wider sense described above, can therefore be disproportionate to the culpability of the conduct involved.

29. The alternative civil recovery route can be effective in relation to recovery of proceeds of unlawful conduct (which go to the Government) and, from the perspective of the organisation, the making of such an order does not necessarily cause them to be excluded from EU and US public procurement tenders. However, victims may not be compensated and commercial organisations are ultimately not penalised for their conduct. While criminal prosecution and civil recovery will remain useful tools, especially where it is in the public interest to pursue such outcomes, it is clear that there are certain limitations in their use and in the outcomes they produce.

30. If more offending commercial organisations are to be brought to justice and if offending is to be dealt with more quickly and efficiently, the SFO and other prosecuting agencies need additional tools. In order to tackle the spectrum of serious economic crime more effectively and efficiently, any new tool should:

    - be effective in tackling economic crime and maintaining confidence in the justice system of England and Wales;
    - have swifter, more efficient and cost effective processes;
    - produce proportionate and effective penalties for wrongdoing;
    - provide flexibility and innovation in outcomes, such as restitution for victims, protection of employees, customers and suppliers, and compliance audits;
    - drive prevention, compliance, self-policing and self-reporting; and
    - enable greater cooperation between international crime agencies.

Barriers to improving outcomes and effectiveness

Commercial organisations' behaviour

31. There are currently insufficient incentives for commercial organisations to engage and cooperate with UK authorities at earlier stages to achieve better outcomes. At present, the general criminal law proceeds on the basis that the only circumstances in which an organisation can make admissions of wrongdoing and be punished are in the context of criminal proceedings which result in a conviction and sentence by a competent court.[7]

32. Restitution and punishment will only occur where commercial organisations are prepared to engage and plead guilty to a criminal charge or against whom the legal and evidential difficulties of proving corporate liability can be overcome. From the perspective of victims, no order can be made for restitution until the offender has been convicted, and there are limited opportunities to pursue civil remedies against a commercial organisation.

33. As set out in paragraph 27 above, the conviction of a commercial organisation can have wide ranging effects: impact on share price, investor and customer confidence, possible exclusion from EU[8] and US public procurement tenders, and in some cases putting the commercial organisation out of business. A conviction may also make the possibility of civil claims against the organisation more likely to succeed.[9]

34. Commercial organisations are therefore likely to be deterred from engaging with prosecution authorities to deal with wrongdoing within the organisation and to conclude investigations quickly. The absence of cooperation also affects the ability of prosecutors to target and prosecute more culpable individuals successfully. In some cases it will be appropriate only to pursue the organisation itself; but in others prosecution of individuals may be the better outcome.

35. The activities and offending of commercial organisations can be spread across several jurisdictions. Some of those jurisdictions, having a wider and more flexible range of enforcement tools, are better equipped to deal with the wrongdoing. We believe that the absence of such tools in England and Wales impacts negatively upon:

    - encouragement to engage early with UK authorities;
    - certainty as to the possible outcomes from such engagement;
    - achieving finality as to outcomes in a shorter time frame; and

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[7] With the exception of liability for taxation and duties, in which this is no longer the case.

[8] For example, Article 45 of Directive 2004/18/EC implemented by Regulation 23 of the Public Contract Regulations 2006 provides the circumstances in which a UK commercial organisation is excluded from EU tenders for public procurements and the offences which qualify for this purpose.

[9] Claimants may seek to rely upon section 11 of the Civil Evidence Act 1968, which provides that a criminal conviction is admissible as evidence in civil proceedings.

- enabling closer cooperation between foreign jurisdictions and the UK, and achieving resolution across several jurisdictions.

Ultimately, commercial organisations wish to survive and flourish and thus minimise investor disquiet or share-price impacts. Removing uncertainty from business operations is a vital factor influencing behaviour.

36. Another factor weighing against engagement by commercial organisations is the uncertainty of any penalty that may be imposed. While there is some guidance on calculation of fines for corporate offenders, there is not at present a framework for doing so set out in sentencing guidelines as there is for individual offenders.[10] Sentencing guidelines exist for some but by no means all offences which are capable of being committed by a commercial organisation. This can limit the ability of prosecutors to discuss the potential sentence with such offenders.

37. Taking all of these circumstances together, the prosecutor at present has little to offer the commercial organisation by way of encouragement to engage, cooperate or plead. The organisation has no real incentive of its own to resolve issues with the prosecutor, particularly as there will be significant uncertainty over where the process will lead.

Multiple jurisdictions

38. As economic crime grows more sophisticated, the wrongdoing can cross international boundaries and have wide-ranging impacts. In many cases multiple jurisdictions will have an interest in investigating organisations and individuals for the same or similar wrongdoing. It is therefore important to ensure that there are as few barriers to multi-jurisdictional cooperation as possible. Agencies need to engage with their international counterparts[11] and consider and resolve the following issues as early as possible:

    - where and how investigations may be most effectively pursued;
    - where and how prosecutions or other alternative disposals should be initiated, continued or discontinued;
    - whether and how aspects of the case should be pursued in the different jurisdictions; and
    - early sharing of information between investigators and prosecutors.

39. Without such early cooperation, once another jurisdiction has commenced proceedings, the ability of authorities in England and Wales to prosecute can be limited. Under English law there is a bar to prosecuting someone who has already been convicted or acquitted of the same offence.[12] This is particularly

[10] *R v Innospec* [2010] Crim L. R. 665 *per* Thomas LJ.

[11] In cases involving European countries it is important that facilities such as Eurojust, Europol and OLAF are utilised, whilst in cases involving the US, the Attorney General's "Guidance For Handling Criminal Cases With Concurrent Jurisdiction Between The United Kingdom And The United States Of America" should be followed.

[12] Known as "double jeopardy".

relevant in cases involving the US, where US law in the context of serious economic crime has wide extra-territorial reach. However, there is not a similar bar under US law when it comes to prosecuting a person who has already been convicted or acquitted in a foreign jurisdiction, so US prosecutors are not restricted in the same way as their UK counterparts.[13]

40. 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. Resolving a case in the US may also be attractive given the wider and more flexible range of enforcement tools, including non-prosecution agreements (NPAs) and DPAs which do not result in a criminal conviction. The lack of equivalent enforcement tools for UK prosecutors makes negotiations between UK and US prosecutors, and ultimately resolution of the case, difficult.

Length and cost of proceedings

41. It is usually in the interests of justice to avoid expensive and lengthy proceedings, particularly in relation to commercial organisations which are prepared to admit wrongdoing and accept the penalty (unless the extent of such admissions does not reflect the criminality alleged). In addition, investigations and prosecutions are expensive and time-consuming; for example investigating and then prosecuting a case which results in a late guilty plea costs the SFO around £1.6 million and takes around eight years to conclude, including any monitoring and reporting requirements.

42. The length of time in investigation and prosecution can also give rise to uncertainty and reputational damage, which can be significant and affect share price, employees, clients and suppliers. It is also in the interests of victims that enforcement action is taken swiftly and leads to compliance. Having an alternative tool could have benefits for all parties involved, while at the same time ensuring more effective justice.

Conclusion

43. The current system does not allow for swifter alternatives to prosecution which can deal with wrongdoing effectively, proportionately and with a greater degree of certainty. We need to look afresh at prosecutorial and other enforcement options for dealing with offending by commercial organisations. The justice system needs to:

    - improve the flexibility of the system for dealing with economic crime committed by commercial organisations, resulting in more timely and effective processes and best use of resources; and

[13] *Bartkus v Illinois* 1959, 359 US 121, 128-29; *US v Wheeler* 1978 435, US 313 (Supreme Court); *US v Martin* 1978 574 F. 2d 1359. For a detailed review of the origins and development of the law of double jeopardy in the US, and its international impact see *'Double Jeopardy and multiple sovereigns: a jurisdictional theory'* by Anthony Colangelo (Washington University Law Review 86 No.4 2009).

- bring more offending commercial organisations to justice, including through incentivising self-policing, self-reporting and admission of wrongdoing, with appropriate and proportionate penalties for offenders and restitution for victims.

Chapter 2 - Models for new approaches

44. In this chapter we explore some of the alternative disposals that already exist in England and Wales, and consider whether these might offer useful tools for tackling serious economic crimes. We also look at the models for NPAs and DPAs in the US, and how they may be used effectively in England and Wales.

Examples of UK models of alternative disposals

Conditional cautions

45. There are two main alternative disposals for certain criminal offending which do not involve court proceedings: the first is the system of cautions (simple cautions and conditional cautions); and the second is fixed penalty notices. At present, these alternatives are available only for individual offenders and the offences to which they can be applied are limited, as prescribed in legislation and guidance.[14]

46. Fixed penalty notices do not involve a formal admission of guilt and they are used for low level motoring and criminal offences. As such they would not be suitable for consideration in relation to dealing with serious economic crime by commercial organisations.

47. A conditional caution is defined as 'a caution which is given in respect of an offence committed by the offender and which has conditions attached to it'. The offender signs a document which contains details of the offence, an admission that he committed it, his consent to the conditional caution, and the conditions that are attached to the caution. The conditions must be rehabilitative or reparative and the current scheme does not provide for the imposition of punitive financial penalties. Although a conditional caution is not a criminal conviction, if imposed for a recordable offence it is entered on the Police National Computer and forms part of the offender's criminal record.

48. To be capable of being applied to non-individual offenders, the existing conditional caution tool would have to be amended or a new type of disposal developed explicitly for commercial organisations, based on conditional cautions.

Civil recovery

49. Under the Proceeds of Crime Act 2002, civil recovery can be used to recover the proceeds of unlawful conduct, ensuring that commercial organisations and individuals do not profit from wrongdoing. In general, criminal investigation and recovery takes priority over civil recovery,[15] and to date this option has only

[14] Criminal Justice Act 2003, s. 22; and *Conditional Cautioning: Code Of Practice & associated annexes*: www.cps.gov.uk/publications/others/conditionalcautioning04.html.

[15] Attorney General's Guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002, issued 5 November 2009.

been considered where criminal prosecution and confiscation has no, or limited, prospects of success.

50. Although civil recovery is a useful option as an enforcement sanction, there has been some criticism of its use in the context of serious economic crime.[16] Civil recovery is solely a mechanism to recover the proceeds of "unlawful conduct" and does not enable punishment of wrongdoing, or compensation of victims of the unlawful conduct. Victims must therefore seek a declaration[17] that they own property which is subject to a pending civil recovery order, and then initiate their own proceedings to recover such property.

51. Civil Recovery Orders (CROs) cannot include conditions to cater for issues such as monitoring and compliance training unless there is agreement between the parties or a Serious Crime Prevention Order[18] in place. However, of the five CROs made by the SFO to date, four have included monitoring arrangements.

Compounding

52. For financial or economic crimes in the tax/excise field, HMRC has at its disposal a system of 'compounding', based on the primary desirability of collecting outstanding tax.[19] In essence, HMRC offers a financial penalty (a compound) to offenders in lieu of prosecution, not exceeding the maximum penalty that a court could impose through prosecution. To offer a compound, HMRC must have sufficient evidence with which to support criminal proceedings in accordance with the Code for Crown Prosecutors. The offender must agree to the offer of settlement and thereafter comply with those terms. The financial penalty takes into account a number of relevant factors in relation to both the offence and the offender.

53. Compound settlements have traditionally been used for low level offending by small commercial organisations, although it has been used for more serious offending such as strategic arms cases. It offers a means of recouping the revenue lost and punishing the offender in a proportionate manner with the majority of cases settled pre-charge without any prosecutorial involvement. Detailed guidance as to the cases in which compounding is suitable has been developed by HMRC, setting out a range of factors that HMRC officers are required to consider. The level of transparency offered by compounding agreements is limited by the regular incorporation of confidentiality

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[16] See the comments of Thomas LJ in *R v Innospec 2010* and the report "Deterring and punishing corporate bribery" published by Transparency International in December 2011.

[17] Proceeds of Crime Act 2002, ss.281-284.

[18] Serious Crime Prevention Orders were introduced under the Serious Crime Act 2007 and may be used to impose "prohibitions, restrictions or requirements" on commercial organisations including in relation to financial, property or business dealings and activities, and on access and use of premises.

[19] Customs and Excise Management Act 1979, s.152.

requirements within the terms of the agreement, usually due to issues of taxpayer confidentiality specific to this kind of offence.

54. In general, once HMRC decides to refer the case to CPS for prosecution, it is assumed that the matter is not suitable to be compounded, although in some instances there can be a decision to compound post-charge where agreed by the Director, Revenue and Customs Prosecutions.[20] In those cases, where the terms of the compound settlement are not complied with, the re-institution of proceedings will be considered.

55. To a limited extent, therefore, there are systems in place in England and Wales by which prosecutors may decide not to initiate criminal proceedings, on the basis of an agreed penalty with a taxpayer. This system works successfully, generally against small commercial organisations in a customs and excise setting.[21]

The US approach

56. US authorities have placed an increasing focus on crime committed by commercial organisations and the enforcement of the Foreign Corrupt Practices Act (FCPA),[22] through a deliberate policy of giving organisations meaningful credit for voluntarily disclosing their conduct and cooperating with Department of Justice (DOJ) investigations by self reporting.

57. Over the past decade, the DOJ has recognised the potentially harmful effects that prosecuting a commercial organisation can have on investors, employees, pensioners, suppliers, customers and associated communities who were not involved in the organisation's criminal behaviour. This concern was highlighted by the Arthur Anderson case, and has prompted the use of alternatives to prosecution including NPAs and DPAs.

58. In return for prosecutors either deferring their decision to prosecute or deciding not to prosecute, NPAs and DPAs require commercial organisations to comply with a set of terms that may include significant monetary penalties (which averaged over $100 million in 2011, across 29 NPAs and DPAs[23]), requirements to improve governance structures and internal compliance, make reparations, and the appointment of independent monitors (at the organisation's expense) to review the effectiveness of any compliance programme. Commercial organisations may also agree to act as

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[20] This is set out in Annex A to the Memorandum of Understanding signed between the Attorney General, the DRCP, HMRC Commissioners and Treasury ministers in April 2005. The DRCP is also presently the DPP.

[21] Some £652,000 has been levied on exporting controlled goods since April 2009, for example, though this is distorted by a large one off payment of £575,000.

[22] The *2011 Year-End Update on Corporate Deferred Prosecution Agreements and Non Prosecution Agreements*, by the American law firm Gibson Dunn, illustrates the variety of offences in relation to which DPAs and NPAs are used. A notable category is FCPA violations, which accounted for 41% of the total agreements in 2011, compared with about 44 % in 2010, 24% in 2009, 37% in 2008, 26% in 2007, and 9% in 2006.

[23] Ibid.

whistleblowers for other commercial organisations which have committed offences in their sector. Commercial organisations also agree not to appeal, or to appeal only specified aspects, of a DPA. If, at the end of the deferral period for a DPA, the prosecutor is satisfied that the commercial organisation has fulfilled its obligations, then the prosecutor will make an application to dismiss or withdraw the charges.

59. NPAs and DPAs have been successfully adopted in a variety of circumstances. For example, in 2011 Johnson & Johnson entered into a DPA in relation to a violation in connection with the Foreign Corrupt Practices Act. The DPA included a penalty of over $70 million,[24] and an agreement to self report on their compliance with the terms of the DPA. In the same year, Maxim Healthcare Services Inc. entered into a DPA in relation to a violation in connection with healthcare fraud and agreed a penalty of over $151 million.[25] They also agreed to external monitoring of their compliance with the terms of the DPA as part of the agreement. DPAs have been used by a variety of prosecutors in addition to the DOJ, including a number of District Attorneys and the Securities and Exchange Commission (SEC).[26]

60. The availability of NPAs and DPAs, coupled with the risk of prosecution, incentivises commercial organisations to cooperate with investigations, reducing the likelihood of a trial and of a criminal conviction. In general, once a commercial organisation comes to the attention of authorities in the US, it is common for the organisation to conduct its own internal investigation, and to submit a report to the prosecutor setting out its conclusions. As documents provided to prosecutors by organisations are disclosed for all purposes, except where that document could not have been obtained pursuant to a Grand Jury subpoena,[27] the prosecutor can use them as the basis for their own investigation. The use of DPAs and NPAs therefore supports an existing culture of self-reporting of serious economic crimes in the US.

61. To date it appears that there has been only one prosecution brought as a result of an organisation breaching its DPA.[28] In the event of a breach, the US Government is able to resuscitate the already filed charges and make use of the factual admissions the organisation made in the agreement, making the process more straightforward, and most likely leading to an organisation pleading guilty. More commonly, the DOJ may renegotiate the terms of a DPA to reflect the fact of the breach; perhaps, for example, increasing a penalty or

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[24] Gibson Dunn, *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, January 2012.

[25] Ibid.

[26] Ibid.

[27] Material that attracts legal professional privilege could not be used, but is not often produced. In the US, legal professional privilege extends to 'attorney work products' which would include internal witness statements taken by an attorney, which would not attract privilege in England and Wales.

[28] The DOJ revoked a DPA against Aibel Group in November 2008 when it 'failed to meet its obligations' 21 months into the agreement.

other conditions, for minor breaches. In the case of a breached NPA, the government may simply file charges for the first time.

62. Neither NPAs nor DPAs have a statutory basis, relying instead on the United States Attorney's manual, *Principles of Federal Prosecution of Business Organisations*, which sets out the circumstances in which they are appropriate and the factors to consider when investigating, charging, and discussing an agreement with respect to corporate crimes. These factors include the nature and seriousness of the offence, whether there was disclosure of wrongdoing and a willingness to cooperate, and consideration of collateral consequences.[29]

63. There has been increasing scrutiny of the use of NPAs and DPAs as an enforcement tool, with concerns over the lack of transparency around the factors that determine whether the DOJ grants a NPA or DPA, and that they inappropriately excuse criminal behaviour. The DOJ has sought to address these criticisms and has continued to use these agreements to conclude a variety of investigations.

The extent of judicial involvement

64. The principles governing NPAs permit an agreement to be formed and maintained by the parties without court involvement, in exchange for an organisation's timely cooperation, where that appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or unlikely to be effective. This arrangement leaves substantial power in the hands of the prosecution with no judicial oversight.

65. In contrast, a DPA is typically predicated upon the filing of both a 'charging document' (an 'information', but not formal charges as they would be understood in England and Wales) and the agreement itself with the appropriate court.[30] In the US, the judiciary do not take any part in plea negotiations for any type of criminal behaviour and the judiciary are only involved with the approval of the deferral of prosecution once the substance of it (and in particular any factual admissions document) has been agreed between the prosecutor and the defendant organisation. Judges do not approve the contents of agreements themselves, and the organisation therefore assumes at this stage that the DPA will be approved.[31] There are some grounds in the federal rules for judicial rejection of DPAs, where the prosecution can be sent away to reconsider, although this is not common.

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[29] US Department of Justice Publication *Principles of Federal Prosecution of Business Organizations,* pp 3-4.

[30] The charges are filed on a consent basis and the commercial organisation waives its right to be indicted by a Grand Jury: so if the defendant's agreement to the DPA were withdrawn before it was approved, for example, the charges would be treated as withdrawn. Cf the position in the UK.

[31] See comments by Judge Jed S Rakoff criticising this arrangement in *SEC v Vitesse Semiconductor Corp.* No 10 Civ 9239(JSR) and *SEC v Bank of America* No 9 Civ 6829(JSR), 10 Civ 0215 (JSR).

66. There has been little, or no, direct judicial involvement in the US in the question of breach. Clearly, in some limited cases, prosecutions might follow that would otherwise not have occurred, and judges would be called upon to consider the use to be made of admissions made and disclosure given by organisation as part of an NPA or DPA arrangement. However, DPA agreements in the US usually give the prosecution the right to determine breach themselves without recourse to the courts. Prosecutors must seek judicial approval for further deferral of a prosecution (for example to extend the period by 12 months) since this is within the court's control. In other respects though, the courts would expect simply that the prosecutor who alleges breach should resurrect the original proceedings.

67. In practice the extent of judicial involvement generally appears to be limited in the US model, and despite the effectiveness of the process, is unlikely to be at a level suitable for the UK's constitutional arrangements. The advantages of possible greater court involvement include the court's ability to act as an arbiter of disputes, or to handle significant events in the DPA process such as the determination of a breach. However, this places additional pressures on the time and resources available to judges in the DPA process; and presents concerns over the constitutional appropriateness of judges playing a larger role in the DPA process.

Conclusion

68. The examples of alternatives to criminal prosecution already in place in England and Wales provide a useful illustration of the existing use of enforcement tools for different forms and degrees of economic wrongdoing by commercial organisations. It is clear that there is an opportunity to develop a model for dealing with serious economic crime that improves reparation for victims, whilst offering greater levels of transparency and consistency.

69. Despite the effectiveness of the US model, the lack of judicial oversight is likely to make it unsuitable for the constitutional arrangements and legal traditions in England and Wales. We have concluded that non-prosecution agreements are not suitable for this jurisdiction due to their markedly lesser degree of transparency, including the absence of judicial oversight.

70. There are opportunities to learn from the US model of deferred prosecution agreements and to develop a bespoke model for England and Wales that provides for better transparency and greater judicial involvement in the process. This would utilise the court's ability to act as an arbiter of disputes or to handle significant events in the DPA process such as the determination of a breach, but places additional pressures on the time and resources available to judges and the court.

Chapter 3 – Purpose and principles

71. In this chapter we set out the principles which underlie our proposals for DPAs. Our proposals are based on the system that operates in the US, but are adapted to make it suitable and appropriate for the specific context of the UK.

72. The DPA process would be used to deal with offending behaviour by commercial organisations that can be classified as economic crime. By this we mean fraud (which includes any financial, fiscal or commercial misconduct or corruption[32]), bribery (specifically offences under the Bribery Act 2010), and money laundering. The ability to use the process and pursue a DPA outcome will be available to all prosecuting agencies, including the SFO and CPS, which prosecute the majority of economic crime committed by commercial organisations.

73. Engaging with the prosecutor in relation to a proposed deferred prosecution disposal would be, on the part of the organisation in question, entirely voluntary. This means that the body could withdraw from discussions with the prosecutor at any time until the DPA had been judicially approved at the final stage.

74. The rest of this chapter sets out the purposes and principles underpinning DPAs. The following chapter addresses the detail of the DPA model and process.

The purpose of DPAs

75. A DPA will not be, and is not intended to be, a sentence upon conviction for an offence. However, depending on the circumstances of an individual case, a DPA might fulfil some or all of the purposes of a sentence. Currently courts must have regard to five different purposes when dealing with an offender (whether an individual or an organisation) in respect of the offence committed:

    - punishment;
    - reduction of crime (including by deterrence);
    - rehabilitation of offenders;
    - public protection;
    - restitution to victims.[33]

76. We consider that a DPA should fulfil similar purposes, and that the parties and court should be required to have regard to these purposes when agreeing a DPA. However, these matters would need to be considered in light of the fact that there will not have been a prosecution or a conviction.

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[32] As described in the Attorney General's *Guidelines on Plea discussions in cases of serious or complex fraud*, 18 March 2009.

[33] Criminal Justice Act 2003, s. 142 (1).

77. The terms and penalties that could be required under a DPA would be framed to address purposes that are relevant to the individual offence. For example:

- our assumption is that the most common type of condition under a DPA would be a financial penalty.
- reduction of crime (including by deterrence): conditions to deter future offending might include changes to organisational governance or disciplinary procedures within a commercial organisation that enters into a DPA.
- reparation to victims: a condition might include compensatory payments to those affected by a commercial organisation's offending behaviour, or an organisation's staff meeting with those affected to discuss the impact of the wrongdoing, be held directly to account and to apologise.

Key principles underpinning DPAs

78. We believe that DPAs need to have two key principles to be effective in commanding public confidence and tackling economic crime committed by commercial organisations:

- transparency: to provide a process which encourages potential defendants to discuss 'without prejudice' and to ensure that the operation of justice is transparent to the public; and
- consistency: to ensure both prosecutor and commercial organisation are working from common principles when entering into the DPA process, and to give both an indication of the likely package of terms, including a penalty, which a court would approve.

Transparency

79. A DPA is not intended to be a criminal conviction. It would, however, involve admission of certain facts and wrongdoing and the obtaining of certain documents. These admissions and documents may in some cases be sufficient (if made or submitted as evidence at a subsequent criminal trial) to prove a particular offence, and in other cases could contribute to a criminal conviction. There would therefore be risks for both the prosecutor and the commercial organisation in engaging in a DPA process, and clarity would be required over matters such as how information obtained or generated as a result of discussions would be treated in future.

80. Public confidence in the justice system is vital. The public need to have confidence that a prosecutor is not entering into a "cosy deal" with a commercial organisation "behind closed doors". We therefore believe that there should be judicial involvement from an early stage whereby the proposed DPA is considered at a preliminary hearing before it returns for final judicial approval.

81. Once a DPA is finalised and approved, we believe that details of the agreement should be published, as would most court proceedings (whether held in private or in open court), subject only to restrictions relating to, for example, other ongoing prosecutions.

82. Nonetheless, we consider it important that the initial stages of the process (i.e. until the point at which the DPA has been approved in principle by the court) are not conducted in public. The prosecutor and the commercial organisation should be able to have free and frank discussions without the fear of potential adverse consequences which might arise were it to become known that a DPA was being considered. This would be analogous to current practice, such as the confidentiality agreements which can be used in plea discussions on serious and complex fraud cases, and the "without prejudice" discussions which can take place in civil disputes.[34]

Consistency

83. A prosecutor beginning discussions with a commercial organisation on the nature, scale and jurisdiction of any criminality has to have some confidence at the outset that the terms and conditions it is offering for entering into the DPA are proportionate to the conduct and circumstances at issue. Likewise the commercial organisation considering whether to enter into the process will want to know what it might be agreeing to, whether this would be acceptable to a court considering the DPA at a later stage and ultimately what the alternative sanctions might be if it decided not to enter into the agreement. Judicial involvement at this stage would be premature and inappropriate.

84. However, to ensure a consistent framework under which decisions are made there would need to be a Code of Practice, procedural rules and operational guidance in place to assist the parties. These would provide an indication of the potential content of a DPA and relevant considerations. For the purposes of transparency, all such guidance should be readily and publicly accessible.

85. An indication of the financial penalty as a condition of the DPA is one of the key matters that a commercial organisation is likely to want to discuss at an early stage. A guideline that covers calculation of financial terms and conditions of a DPA would allow for such an early indication, and could balance judicial discretion while still allowing for the application of consistent principles across DPAs for different offending behaviour. We consider below (see paragraph 96) the desirability of guidelines for DPAs, akin to sentencing guidelines, which the parties and court could have regard to, and which would be publicly available.

Q1. 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?

Q2. Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?

[34] Prosecutors give undertakings about the use to which information obtained during discussions on plea agreements can be put in any subsequent prosecution of either the commercial organisation or others: see the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud C6-C10 (2009).

Chapter 4 – The proposed model

86. This chapter sets out the model for a deferred prosecution agreement, both what a DPA would look like and the proposed stages involved in the making of a DPA.

Composition of a DPA

87. The terms and conditions of a DPA would need to be tailored to particular wrongdoing and would vary on a case by case basis. However, in all cases we propose that there would be:

    - a **statement of facts** negotiated by the commercial organisation and prosecutor and signed by the official representatives of the organisation, to be appended to the agreement. The organisation would undertake not to contest the admissions made or facts agreed during any later proceedings (see discussion on admissions and disclosure below at paragraph 146), and
    - a **time period** for the duration of the agreement. We expect this would be between one and three years. Shorter or longer periods would be possible depending upon the amount of remedial work, reporting, or payments that the organisation would be required to undertake during this time period. If the terms and conditions were adhered to, the prosecutor would discontinue the potential prosecution at the end of the deferral period.

88. The terms and conditions of a DPA would be specific to individual cases and to the purposes to be addressed, but would include some or all of the following:

    - a **financial penalty** (commensurate with guidelines), to be paid, within a specified time period;
    - **disgorgement of profits, or benefit** (the financial benefit to the organisation) to be paid within a specified time period;
    - **reparation to victims** which may comprise repayment of monies, a charitable donation or actions such as reinstatement of a sacked employee, to be paid or carried out within a specified time period;
    - where the organisation is prepared to co-operate with the prosecutor in relation to investigations against individual wrongdoers, the organisation could be obliged to use all reasonable efforts to **make available to the prosecutor all relevant, non-privileged information and material, and to provide access to witnesses**;
    - where the organisation agrees that the management team in place at the time of the wrongdoing, or criminal conduct, was implicated in this conduct, then conditions could be agreed obliging the organisation to **replace implicated individuals, or to pull out from the market in which the wrongdoing is admitted**;
    - where the organisation agrees that it does not have proper **anti-corruption or anti-fraud policies, procedures, or training**, in place, then conditions could be agreed for such policies, procedures or training to be created. The organisation would be required to **certify** that these had been successfully

instituted and regularly reviewed and modified. Further the organisation could be requested to provide **periodic reports** detailing the review of the policies, procedures and training, and detailing the level of compliance. In those cases where the level of the problem is more deep seated, or more intractable, then an **independent monitor** could be agreed to formally review the organisation's policies, procedures, training and compliance.

The DPA process

89. We envisage that the DPA process would be comprised of:

- a decision by prosecutors following investigation on whether to offer and enter into a DPA;
- commencement of DPA proceedings before a judge;
- judicial approval of the content of a DPA;
- monitoring and action for non-compliance or breach (including prosecution); and
- withdrawal of prosecution in the case of full compliance.

90. Below we set out detailed proposals for the main aspects of this process together with issues that would be relevant to the operation of such a system within the criminal justice system in England and Wales. In addition, we consider matters in relation to admissions, disclosure and judicial review.

The decision by prosecutors on whether to offer and enter into a DPA

91. Once an allegation of criminal wrongdoing has come to light, and investigation taken place, prosecutors should consider whether it is in the interests of justice to enter into a DPA or prosecute.

92. Guidance on whether to pursue a prosecution is currently set out in the Code for Crown Prosecutors ('the Code').[35] For the purposes of pursuing a DPA we consider that there should be a separate approach, and propose to enable the Director of Public Prosecutions (DPP) and the Director of the SFO to issue a Code of Practice setting out the factors prosecutors should take into account in deciding whether to enter into a DPA.

93. The Code of Practice (which would be publicly available) would set out the circumstances in which a prosecutor could legitimately consider entering into a DPA with a commercial organisation, the principles applying to such a decision, the permissible parameters and circumstances which might suggest a DPA was unsuitable. In relation to offences under the Bribery Act 2010, decisions to prosecute must be taken by the DPP or Director of SFO personally. It is intended that a decision to enter into a DPA in relation to an offence under the Bribery Act should be consistent with that approach.

[35] Prosecution of Offences Act 1985, s.10. The Code is issued by the Director of Public Prosecutions. The Code is also applied by the Director of the SFO.

94. We envisage that regard would be had to factors such as:

- the nature and seriousness of the offence;
- the level of premeditation and whether any attempt was made to hide the wrongdoing;
- how widespread within the commercial organisation the wrongdoing was and the seniority and number of the perpetrators;
- any losses to innocent third parties e.g. commercial organisation pensioners;
- the likely impact on the commercial organisation of prosecution and its financial health;
- any action being taken in relation to the wrongdoing in other jurisdictions;
- what action has been taken by the commercial organisation and the level of commitment to resolving the issues, recovery and restitution of benefits and improving compliance; and
- previous convictions and previous DPAs.

95. Such 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. In addition, it should deal with decisions to prosecute following termination of an agreement following breach.

Q3. Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?

Q4. Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?

Guideline for DPAs

96. We consider that it would be desirable for a guideline to be available regarding deferred prosecution agreements to ensure clarity and consistency. This would benefit the prosecutor, the party entering into the DPA, the court, and ultimately wider society.

97. We believe that any such guideline should be issued by an independent expert body. Whilst a DPA would not be a sentence, and any guideline would not be intended solely for use by the judiciary, there are sufficient commonalities with the guidelines issued by the Sentencing Council to make it an appropriate body to have responsibility for issuing a DPA guideline.

98. In the absence of a specific DPA guideline, there is scope for the Sentencing Council to develop guidance in relation to the approach and principles for sentencing commercial organisations convicted of any of the very wide range of corporate crimes. The parties and judge would be able to have regard to

such a sentencing guideline when considering the terms of a DPA and amounts of any financial aspect.

99. There are two broad forms that a DPA guideline might take:

- an overarching narrative guideline on the principles of a DPA (both financial penalties and any other conditions); or
- offence-specific guidelines giving more detailed starting points or ranges for financial penalties and perhaps other conditions.

100. A narrative guideline could lay down principles for courts to follow when determining the appropriateness of a particular DPA and reference relevant sentencing guidelines where appropriate. Such a guideline might include material on relevant factors to consider when assessing the seriousness of the offending behaviour, and how the penalty should relate to any hypothetical sentence that might have been imposed had the commercial organisation been convicted of an offence. It could also give a non-exhaustive set of examples of penalties or conditions that may be appropriate for particular types of offending behaviour.

101. This approach would have the benefit of giving courts and prosecutors a set of principles to follow while leaving discretion to tailor conditions to the circumstances of each case. However, it would not necessarily give commercial organisations a detailed indication of possible penalties to take account of when deciding whether or not to enter into the DPA process.

102. The alternative would be guidelines structured on an offence by offence basis – perhaps setting out ranges, categories and starting points for DPA penalties and conditions in the same way that sentencing guidelines currently do. This would ensure greater certainty in terms of potential outcomes for all parties when entering into discussions about a possible DPA. However, it could reduce the degree of discretion in individual cases.

103. We propose that the parties would have regard to any DPA guideline when considering the proposal to be made, and judges would be required to follow any DPA guideline – but with the ability to depart from it if that is in the interests of justice – in the same way as they are currently required to follow sentencing guidelines.

Q5. Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?

Q6. What do you think would be most useful in a guideline for DPAs?

Commencement of proceedings before a judge

104. Having made a decision in principle that a DPA was likely to be suitable and having secured initial agreement of the commercial organisation to enter into a DPA, the prosecutor would begin DPA proceedings before the Crown Court.

105. The preliminary hearing would give the judge notice of the prosecutor's provisional decision to enter into a DPA. This hearing(s), at which both the prosecution and the commercial organisation would be represented, would be held in private. This would enable the judge to take an early view on whether or not it is in the interest of justice to proceed with an individual DPA, thereby safeguarding the public interest.

106. At the hearing(s), the prosecutor would present to the judge an outline of the agreed basic facts and wrongdoing, a list of the likely charges or a draft indictment, the agreed or contemplated conditions to be attached to the DPA and an outline of the areas that were currently subject to discussion. If relevant, the prosecutor would also be able to indicate to the judge any international aspects of the case, such as how two jurisdictions were intending to split any identified criminality or set out discussions on any financial penalties.

107. We propose that the test for a judge to apply in considering whether a DPA would, in principle, be appropriate should be whether the DPA would be 'in the interests of justice'. This should help to ensure that the judge is not simply asked to rubber-stamp a DPA, but to consider whether, taking into account the circumstances of the case, a DPA is the appropriate course of action. This will give the judge an opportunity to say whether the facts are such that an approach other than DPAs might be more appropriate, thereby preventing DPAs which do not adequately reflect the wrongdoing that has taken place.

108. The judge would be able to give an indication to the parties whether the emerging terms, including financial considerations, are likely to be appropriate. We propose that the test for this should be whether the conditions are 'fair, reasonable and proportionate'. In the US, the courts apply the test of whether a proposed consent agreement put forward by the Securities and Exchange Commission (SEC) is 'fair, reasonable, adequate, and in the public interest'.[36] We feel that the proposed wording reflects the legal traditions of England and Wales, and will ensure that wrongdoing is penalised, victims are compensated and the public interest protected.

109. An indication might be given at the end of the preliminary hearing, which would be confidential to the parties at this stage, specifying, for example, whether or not a DPA was appropriate in principle. We do not intend that a finding that a DPA was in principle appropriate would bind the judge to approve such an agreement at any final hearing. We do not propose that there should be a right of appeal in relation to the outcome of a preliminary hearing.

110. Holding a preliminary hearing would enable the judge to express views about the proposed DPA early in the process, including about its focus and the potential interplay between investigations in England and Wales and other jurisdictions. It would also assist the prosecutor, and commercial organisation, in any discussions with other jurisdictions.

[36] SEC v Bank of America Corp., No. 09-CV-6829 (JSR), 2009 WL 2842940.

111. The Crown Court has power, in suitable cases, to request the Attorney General to appoint an Advocate to the Court, to represent the public interest, who could assist the judge with any aspect of the case. Requests would be made in accordance with current practice and it is not expected that advocates would appear in every case.

Q7. Do you agree that the preliminary hearing should take place in private?

Q8. 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'?

Q9. 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'?

Content and judicial approval of final agreement

112. The final approval stage would start in private to allow the full proposed agreement to be set out before the judge and to enable any final issues to be resolved and information to be given about the progress of relevant prosecutions in other jurisdictions. The judge would then be invited to approve the DPA in open court, thereby ensuring openness and transparency. Before approving the DPA, the judge would determine whether its approval would be in the interests of justice and, whether the agreement and its constituent parts were fair, reasonable and proportionate.[37] As discussed above (paragraph 88), the terms and conditions of a DPA will be specific to individual cases and to the purposes to be addressed, but would include some or all of the following:

- a **financial penalty** (commensurate with guidelines), to be paid, within a specified time period;
- **disgorgement of profits, or benefit** (the financial benefit to the company) to be paid within a specified time period;
- **reparation to victims** which may comprise repayment of monies, a charitable donation or actions such as reinstatement of a sacked employee, to be paid or carried out within a specified time period;
- where the company is prepared to co-operate with the prosecutor in relation to investigations against individual wrongdoers, the company could be obliged to use all reasonable efforts to **make available to the prosecutor all relevant, non-privileged information and material, and to provide access to witnesses**;
- where the company agrees that the management team in place at the time of the wrongdoing, or criminal conduct, was implicated in this conduct, then conditions could be agreed obliging the company to **replace implicated**

[37] The US courts apply to consent agreements put forward by the Securities and Exchange Commission (SEC), the test of whether the proposal is "fair, reasonable, adequate, and in the public interest." (SEC v Bank of America Corp., No. 09-CV-6829 (JSR), 2009 WL 2842940.)

individuals, or to pull out from the market in which the wrongdoing is admitted;

- where the company agrees that it does not have proper **anti-corruption or anti-fraud policies, procedures, or training**, in place, then conditions can be agreed for such policies, procedures or training to be created. The company would be required to **certify** that these had been successfully instituted and regularly reviewed and modified. Further the company could be requested to provide **periodic reports** detailing the review of the policies, procedures and training, and detailing the level of company compliance. In those cases where the level of the problem is more deep seated, or more intractable, then an **independent monitor** can be agreed to formally review the company's policies, procedures, training and compliance.

113. Taking into account the relevant facts, previous discussions, and the views of the prosecutor, the financial penalty and other terms and conditions would be a matter for the judge to approve. This would be subject to the contents of a guideline for DPAs, such as the circumstances of the behaviour and wrongdoing, the means of the commercial organisation and any financial arrangements with other jurisdictions.

Q10. Do you agree with the proposed possible contents of a DPA as outlined?

114. In relation to the financial penalty condition of a DPA, we propose that there should be a principle of reduction of the penalty amount for cooperation by the commercial organisation in proceeding to a DPA outcome. This would be akin to the principle in criminal proceedings that a sentence is reduced where a guilty plea is entered. Such a principle would apply only to the penalty that might be contained in a DPA and not to other financial terms and conditions such as disgorgement of profits or benefits or reparation to victims.

115. In our view such a principle would be vital to incentivising commercial organisations to co-operate, and would reflect the time and resource savings for the prosecutor and for the courts that would follow as they would for a guilty plea in a case that was prosecuted. However, we consider that there should be a maximum reduction, in the region of one third of the penalty that would have been imposed on conviction in a contested case. A reduction of one third combined with the fact that the commercial organisation will not have a conviction recorded would be sufficient to incentivise cooperation, whilst ensuring that the penalty imposed would properly reflect the seriousness of the wrongdoing. However, we welcome views on whether a maximum reduction of one third is the correct level.

Q11. 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?

116. If approved, there would be an open court hearing, the timing of which might be arranged to coincide or fit with other relevant disposals which may be overseas, at which the agreement could be publicly outlined and explained. Once signed, the agreement and statement of facts would be binding on the commercial organisation and would be admissible in subsequent proceedings.

117. When the agreement is formally approved in open court, at the same time, the formal laying of the charge or indictment would happen. At the conclusion of the hearing, the charges would be left to lie on file, not to be proceeded with further without the consent of the court and subject to the terms agreed in the DPA.

118. At or after any final hearing, details of rulings given at any earlier hearings involving the commercial organisation would be made public, subject to any necessary protections in respect of any ongoing related prosecutions or investigations, for example involving directors or employees of the commercial organisation or an associated commercial organisation.

119. If a DPA is not concluded for any reason and the matter is not subsequently prosecuted, the confidentiality of any potential admissions made by a commercial organisation during discussions should be protected, as they are at present in connection with plea agreement discussions (see discussion on the status of admissions, statement of facts, and evidence or material provided by the commercial organisation in the DPA process at paragraphs 146 to 154 below. Any other conclusion would in our view risk serious prejudice and reputational damage to the commercial organisation which they would be unable to contest.

120. If a draft DPA is not approved at a final hearing, the prosecutor would need to be given a period of time to reflect on whether to bring a prosecution instead, and if so on what basis. Any court judgments or rulings would, during that period, remain confidential.

121. In voluntarily entering into a DPA, commercial organisations themselves would have to balance the risk of self-reporting issues to prosecutors which are likely to be put into the public domain at some point, against the risk of discovery, and potential prosecution, if they do not self-report at all.

122. Once a DPA has been approved by a judge in open court, a commercial organisation would be expected to abide by its terms. If the terms are fulfilled, we propose that on the expiry of the agreement the prosecutor would write to the court, inform it of the successful completion of the DPA and offer no evidence in relation to the charges which had been adjourned. At that point, the court would no longer be seized of the criminal charges and the prosecution, which had been deferred, would cease.

Q12. Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?

Non-compliance with or breach of the DPA

123. If the commercial organisation fails to comply (fully or partially) or to comply in time with any aspect of a deferred prosecution agreement, or breaches the agreement, the question arises as to what tools and options should be available to react to and deal with this.

124. As a DPA is a form of 'agreement' (even if one subject to approval and monitoring), it is proposed that there should be a range of options available for considering and dealing with non-compliance and breach situations, and we are inviting views about whether they should all require judicial involvement and consideration. The options might include:

- reconsideration and amendment of the terms and conditions of the DPA;
- formal breach proceedings; and
- revival of the substantive prosecution.

125. Even if the terms of the agreement have been complied with, it may become evident that the agreement has been negotiated or based on assumptions that are untrue. If this takes place in circumstances where there is some culpability on the part of the organisation itself, which would likely represent a breach of an underlying condition of the agreement: that the commercial organisation made full and frank disclosure of all material circumstances prior to entering into the agreement.

Reconsideration and amendment of terms and conditions of the DPA

126. The duration of a DPA is likely to be one to three years, with terms and conditions to be fulfilled throughout the operational period. A commercial organisation's position may change over time and certain conditions may become inappropriate, or cease to be appropriate - for example if its turnover dropped substantially, or if it was unable to comply with some other requirement.

127. We consider that there should be mechanisms to provide for reconsideration of the terms of an agreement on the basis that it can no longer be complied with or within the stated time frames, which could lead to amendment of the DPA. We believe that these mechanisms should be open and transparent. Options to achieve this, which would be set out in the DPA, include: discussion and agreement between the parties, prosecutorial powers to make amendments, or application to a judge. We would welcome your views about the options, which we set out below.

128. One approach would be to enable the commercial organisation to make an application to a judge to consider variation to the DPA due to a change in circumstances. The availability of this mechanism could be set out in the DPA. This approach would safeguard not only the transparency of the process, but also its fairness, in that the application would need to be sanctioned by the judge. The availability of the mechanism could be limited so that an application could only be made to the judge after discussion with the prosecutor if agreement cannot be reached (were option three to be available as well as this option), or where the ability of the commercial

organisation to fulfil the terms of the DPA has changed substantially. On such an application, the court would be able to hear submissions from both sides and be empowered to vary the agreement.[38]

Q13. 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?

129. The second approach would be to write provisions into the DPA empowering the prosecutor to vary the terms and conditions in respect of admitted non-compliance without recourse to the court, and as discussed below (paragraph 131), could extend to imposing additional penalties.

130. In effect, such a term would look something like a penalty clause: if the organisation fails to comply or breaches the agreement in defined ways, specified consequences follow, perhaps punitive in nature.[39] The advantage of including such a term in the DPA would be that it would not necessitate a further court hearing, provides certainty for all concerned and offers an additional incentive to the company to comply with the terms of the agreement in the first place.

Q14. Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?

131. A third approach would be for the DPA to provide that the parties to it would be able to reconsider the terms and conditions where the circumstances of the commercial organisation change. It could be open to those parties to make mutually agreed amendments to an agreement to ensure compliance with the terms and conditions, such as extending the duration of the agreement. Potentially such an option could go further and enable the prosecutor and organisation to agree potential consequences for non-compliance or breach such as additional penalties or further or more intrusive monitoring.

132. Any such amendment would be an extension of the terms and conditions of the agreement and should be notified to the court and attached to the original DPA records. The aim would be to ensure that the organisation is protected from any suggestion of undue prosecutorial pressure, and to guard against any allegations that the public interest had not been properly protected (for example, if a condition or requirement were simply dropped). As with option two, it would not necessitate a further court hearing, provide certainty for all

[38] Or presumably, if there was a cross-application for breach, to simply find the company in breach instead.

[39] So for example, an obligation to pay £5million by way of penalty in accordance with a payment schedule, could also be accompanied by provision for interest or default payments to be made if the payments are not made, and/or not made on time.

concerned and could offer an additional incentive to the company to comply with the terms of the agreement in the first place.

Q15. 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?

Formal breach proceedings

133. In the event of a dispute in relation to whether a breach has occurred, the extent of a potential breach, or where for some other reason the commercial organisation was unwilling to agree to a variation, it is proposed that the matter should be put before the judge for determination. We do not believe that granting the prosecutor the right to determine a breach would fit with the legal traditions of England and Wales.

134. It is anticipated that the determination of a breach would require a factual finding proved to the criminal standard (i.e. beyond a reasonable doubt), but would not amount to a conviction or to a criminal offence. Following a finding against the commercial organisation, the powers available would include:

- a financial penalty;
- additional or varied conditions;
- extension of the period of the DPA; and/or
- termination of the DPA.[40]

135. We have considered, but rejected, proposing that a breach of a DPA should be a criminal offence. We expect that formal proceedings for breaches would be relatively uncommon, as we anticipate that if there was a substantial breach, the prosecutor would elect to resurrect the deferred charges and prosecute. If that assumption is correct, making breach a criminal offence would lead to prosecution of minor breaches, but not more substantial ones.

136. Breach proceedings would likely be most useful if a commercial organisation had paid all, or substantially all, of a penalty payment and/or any reparatory payments to victims. In such cases it is unlikely to be cost effective to pursue the original prosecution.

137. Such proceedings would focus on the failure of the commercial organisation to abide by the terms of the DPA, rather than on the original offending, and any additional penalty imposed by a judge if the breach were proved would be based on the level of default, not on the original offending. In such circumstances there would be no need to reduce any future sentence imposed following revival of the prosecution, and there would be no element of potential double punishment. If the commercial organisation had failed to

[40] This is discussed in the section on proceeding on the substantive offence at paragraph 127 *et seq* below.

pay the penalty or reparation, however, this might well justify the resumption of the original prosecution.

Q16. Do you agree that there should be provision for formal breach proceedings and that it should operate as described?

Revival of the substantive prosecution

138. In some circumstances it would be necessary to terminate a DPA and commence prosecution proceedings. A prosecutor could ask a judge to terminate an agreement where, following breach or non-compliance a decision has been made to prosecute. A termination could also be sought where a decision to enter into a DPA by the prosecutor had successfully been challenged by a third party in the Administrative Court (see below, paragraph 159) and the prosecutor's decision had been quashed. If formal beach proceedings were brought, discretion might lie with the judge to insist that the agreement be terminated.

139. Termination by whatever means would have implications for the prosecutor, requiring them to consider whether to bring a prosecution.[41] If a prosecution were to proceed, further investigation could be required, together with the possibility of the costs and expense of a prosecution. The prosecutor could need a substantial further period in which to put together the evidence required and be in a position to proceed. This may result in evidence being gathered a considerable time after the incidents being investigated occurred.

140. The prosecutor would also be required to assess what impact the DPA may already have had and whether this can (and should) be reversed. If a DPA is terminated for any reason after it has been agreed, the commercial organisation would, to a greater or lesser extent, already have complied with some of the terms of the agreement. We consider that powers might be needed so that provision can be made in relation to the terms of the DPA which have already been complied with; for example it may be appropriate for certain sums of money to be repaid.

141. For the purposes of a prosecution following termination of a DPA, the statement of facts made as part of a DPA process would be admissible against the commercial organisation, as would the fact that the commercial organisation had entered into a DPA in the first place. The commercial organisation would not be able to adduce evidence which sought to contradict those admitted facts. Issues about admissibility are considered at paragraph 146 below.

142. If the commercial organisation is subsequently prosecuted and acquitted of the substantive offence, which may result for a number of reasons, it does not follow that the organisation should be entitled to restitution of the money paid as a result only of that fact. The organisation will have entered into the DPA

[41] The Code of Practice for Prosecutors would provide guidance on making decisions to prosecute following breach.

voluntarily and accepted the appropriateness of a penalty and of the other financial conditions.

143. If the commercial organisation was ultimately convicted of the substantive offence, the judge would need to consider the extent to which any partial compliance with the conditions of the DPA might be taken into account in mitigation, balanced against the aggravation of having breached the DPA. We would expect this to be included in a guideline for DPAs.

Q17. Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?

Appeals from findings of breach

144. When a commercial organisation agrees to enter into a DPA or agrees a variation with a prosecutor which is then approved by the court, there seems no real purpose in providing for an appeal mechanism. The defendant and prosecutor have voluntarily entered into an arrangement to settle the proceedings, and either the commercial organisation can choose not to enter into DPA arrangements at all or it can refuse to renegotiate the terms requiring the prosecution to follow some breach procedure or pursue a prosecution.

145. If, as we propose, a court may adjudicate on breach and impose additional sanctions on the defendant, we also propose that any determination made by a judge consequent on breach (depending on the format adopted) would be subject to appeal, by either party, to the Court of Appeal (Criminal Division).

Admissions

Criminal proceedings

146. It is strongly in the public interest that individual DPAs are open and transparent. Since the final DPA will be publicly available and will have received judicial approval we believe that any limitations on the uses to which the facts or the substance of an Agreement can be put in other legal proceedings should be kept to a minimum.

147. The terms of a DPA, the fact a commercial organisation agreed to it, and any information provided should therefore be admissible in principle in any subsequent criminal proceedings against that commercial organisation.

148. In criminal proceedings against an individual, we propose that information provided by the commercial organisation could be used against that person, although admissions made by the commercial organisation could not.

149. A draft unsigned DPA could not form the basis of any admissions in subsequent proceedings, whether against a commercial organisation or an individual. However, the prosecutor would not be precluded from relying on any evidence obtained from enquiries made as a result of the admission in an unsigned agreement.

150. Where pre-existing documents have been provided by a commercial organisation in a DPA process which does not result in a signed agreement, we propose that those documents will be admissible in subsequent criminal proceedings, whether against a commercial organisation or an individual.

151. We propose that prosecutors should treat documents created by the commercial organisation in the course of DPA discussions as if obtained under compulsion[42] 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 applies.[43] The prosecutor would be able to rely on this evidence:

- in a subsequent prosecution for the offence which is the subject of the DPA, where the commercial organisation adduces evidence in relation to a statement given in the course of DPA discussions and makes a statement inconsistent with it;
- in the prosecution of the commercial organisation or an individual for an offence other than the wrongdoing or offences which are the subject of DPA discussions, and any offence which is consequent upon it; or
- to make enquiries, which may result in the gathering of further evidence to be used in proceedings against the commercial organisation or any individual.

Civil proceedings

152. A DPA would not be a criminal conviction, nor would it be equivalent to one. That would be the case even when a signed agreement includes admissions which, if considered on the prosecution of a signatory commercial organisation, might tend to show an offence has been committed by that commercial organisation or on its behalf.

153. That said, such admissions could be relevant to alleged civil liability of the person making them, or of another person or individual (an affiliated commercial organisation or an officer of the commercial organisation, for example). It follows that both the fact and terms of a signed DPA should be admissible in principle in civil proceedings in the usual way, in particular, as hearsay by virtue of section 1 of the Civil Evidence Act 1995. The weight to be attached to such evidence would of course be a matter for the civil court.

154. Although a DPA would not be a conviction, the seriousness and implications are such that in some circumstances we think they should be treated as seriously as a criminal conviction. In particular, we think that where a DPA is admitted as evidence in civil proceedings then the agreed facts should be taken to be true unless the contrary is proved.

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[42] Under Criminal Justice Act 1987, s. 2.

[43] Ibid.

Q18. Do you agree that the above proposals regarding admissibility are appropriate?

Disclosure

Disclosure of unused material to the defence

155. We believe that common law principles regarding disclosure of evidence to the defence by the prosecution should be applied to the DPA process. This would be similar to the existing Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud, which note "the prosecutor's existing duties in relation to the disclosure of unused material", and that in pre-charge discussions "the prosecutor should ensure that the suspect is not misled as to the strength of the prosecution case".

156. The common law disclosure rules are applicable where the statutory obligation to disclose evidence has not been triggered, for instance, prior to committal in Crown Court cases.[44] The prosecutor must consider what disclosure justice and fairness require in the particular circumstances of the case. The Attorney General's Guidelines on Disclosure (2005) mirror these common law rules.

157. By contrast, statutory disclosure obligations on the prosecutor do not arise until after criminal proceedings have begun, and would therefore not be relevant to DPA discussions.[45]

Q19. What are your views on the appropriate approach to disclosure in the context of DPAs?

Onward disclosure of material provided by the commercial organisation to the prosecutor

158. We believe it is right that the prosecutor should undertake that any information provided by the commercial organisation in the course of the DPA discussions will be treated as confidential and will not be disclosed to any other party other than for the purposes of the DPA process, or as required or permissible by law. This mirrors the position under the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud.

Judicial review issues

159. At present, "matters relating to trials on indictment" (i.e. which take place in the Crown Court) cannot be the subject of judicial review proceedings.[46] We

[44] *R v DPP, ex parte Lee [1999]* 2 Cr.App.R. 304, DC.

[45] Criminal Procedure and Investigations Act 1996.

[46] Senior Courts Act 1981, s. 29 (3). Although this is not statutorily defined it is clear that if the decision sought to be reviewed is one arising in the issue between the Crown and the defendant formulated by the indictment, then judicial review will not be permitted. The formulation is that of Lord Browne-Wilkinson in R v Manchester Crown Court ex p

would wish to ensure that decisions of a court to approve a DPA were covered by the same prohibition. In our view, the same reasons as exist for the prohibition in the first place would apply to a decision of the Crown Court to approve a DPA.

160. However, a decision not to prosecute is susceptible to judicial review[47] if that decision is founded on some unlawful policy, results from a failure to act in accordance with a prosecutor's own settled policy, or is perverse.[48] We do not propose to alter the existing law on when a prosecutor's decision (including a decision not to prosecute and instead enter into a DPA) may be challenged by way of judicial review.

Q20. Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?

Introduction and application of DPAs

161. We recognise that new legislation is generally used only in relation to conduct that takes place after commencement of the legislation. However, DPAs may bring significant advantages, and, rather than introducing a new offence, they offer an additional mechanism for dealing with behaviour that is at present susceptible to sanction. We therefore believe that the benefits of DPAs should be realised as soon as possible.

162. We therefore propose that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them, including in relation to any investigations or proceedings commenced before introduction of the scheme.

Q21. Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

Q22. 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?

Q23. Do you have any further comments in relation to the subject of this consultation?

DPP [1994] 98 Cr. App. R 461 HL. This includes any verdict or sentence passed and includes pre-trial directions (the leading case is Re Smalley [1985] AC 622 HL). Errors of jurisdiction by the Crown Court are reviewable (R (Kenneally) v Crown Court at Snaresbrook [2002] QB 1169 DC).

[47] R v DPP ex parte C [1995] 1 Cr. App. R. 136.

[48] Per Kennedy LJ in ex parte C. And presumably, *a fortiori* if there was bad faith or improper motives.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper. Please support your answers with reasons.

Q1. 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?

Q2. Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?

Q3. Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?

Q4. Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?

Q5. Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?

Q6. What do you think would be most useful in a guideline for DPAs?

Q7. Do you agree that the preliminary hearing should take place in private?

Q8. 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'?

Q9. 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'?

Q10. Do you agree with the proposed possible contents of a DPA as outlined?

Q11. 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?

Q12. Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?

Q13. 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?

Q14. Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?

Q15. 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?

Q16. Do you agree that there should be provision for formal breach proceedings and that it should operate as described?

Q17. Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?

Q18. Do you agree that the above proposals regarding admissibility are appropriate?

Q19. What are your views on the appropriate approach to disclosure in the context of DPAs?

Q20. Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?

Q21. Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

Q22. 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?

Q23. Do you have any further comments in relation to the subject of this consultation?

Q24. Do you have any comments in relation to our impact assessment?

Q25. Could you provide any evidence or sources of information that will help us to understand and assess those impacts further?

Q26. What do you consider to be the positive or negative equality impacts of the proposals?

Q27. Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

Q28. Do you have any suggestions on how potential adverse equality impacts could be mitigated?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Commercial organisation name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 9 August 2012 to:

Matthew Grey
Ministry of Justice
Law and Rights, Judicial Policy and Criminal Trials
6th Floor
102 Petty France
London SW1H 9AJ

Tel: 020 3545 8632
Fax: 020 3334 5518
Email: dpasconsultation@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from dpasconsultation@justice.gsi.gov.uk / 020 3545 8632.

Publication of response

A paper summarising the responses to this consultation will be published in October 2012. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all

circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

An impact assessment has been published alongside this Command Paper and is available at www.justice.gov.uk/consultations.

Q24. Do you have any comments in relation to our impact assessment?

Q25. Could you provide any evidence or sources of information that will help us to understand and assess those impacts further?

Equality Impact Assessment

An equality impact assessment has been published alongside this Command Paper and is available at www.justice.gov.uk/consultations. We have concluded that the evidence suggests that there would be an unquantifiable beneficial impact for everyone. It has not been possible to determine the impacts on people with protected characteristics. However, we will reconsider if evidence should come to light during consultation.

Q26. What do you consider to be the positive or negative equality impacts of the proposals?

Q27. Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

Q28. Do you have any suggestions on how potential adverse equality impacts could be mitigated?

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact Sheila Morson on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
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102 Petty France
London SW1H 9AJ

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