Response to the Ministry of Justice consultation paper

A new enforcement tool to deal with economic crime committed by commercial organisations:

Deferred prosecution agreements

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Fraud Advisory Panel
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DEFERRED PROSECUTION AGREEMENTS

Response submitted on 09 August 2012 by the Fraud Advisory Panel to the Ministry of Justice's consultation paper CP9/2012 'consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: deferred prosecution agreements' published in May 2012.

Contents **Paragraph[s]**

INTRODUCTION

1. The Fraud Advisory Panel (the 'Panel') welcomes the opportunity to comment on the 'consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: deferred prosecution agreements', published by the Ministry of Justice (MoJ) on 17 May 2012, a copy of which is available from this link.

WHO WE ARE

2. The Fraud Advisory Panel is a registered charity and membership organisation which acts as an independent voice and leader of the counter fraud community in the United Kingdom.

3. Established in 1998, the Panel works to encourage a truly multi-disciplinary perspective on fraud. It has almost 300 corporate and individual members, drawn from the public, private and third sectors and across a variety of professions.

4. The Panel's role is to raise awareness of the immense human, social and economic damage caused by fraud and financial crime and to help individuals and organisations to develop effective strategies to prevent it.

5. This response has been prepared on behalf of the Fraud Advisory Panel by a special project group of interested members from the Fraud Investigation and Legal Process Working Group, and in particular Allison Clare, Anthony Farries, Kate McMahon, Andrew Price, Rik Workman and Rosalind Wright CB QC (chairman).

6. The Fraud Investigation and Legal Process Working Group comprises representatives from the business community, law enforcement, and the legal and accountancy professions and considers issues relating to the investigation process, criminal and civil procedures, arbitration and mediation.

SUMMARY OF MAJOR POINTS

7. The Fraud Advisory Panel is mindful of the lack of success in bringing to book commercial organisations (COs) which are alleged to have committed offences of dishonesty. While it is acknowledged that it is individuals ('natural persons') who commit crime, in some cases, it is clear that the CO bears equal responsibility and should be prosecuted with the culpable individuals within and outside the CO.

8. Regulators have no difficulty bringing regulatory action against COs and the criminal process should be no less disadvantaged. The restriction on prosecutors in bringing proceedings against COs has been the obligation to prove that the 'directing mind and will' of a corporate entity was culpable. This has, in most cases, proved an insuperable obstacle. It should be pointed out that a DPA will only have 'teeth' where the likelihood of a prosecution being brought in the event of failure to comply with conditions imposed is a real one; therefore, this barrier will have to be overcome as part and parcel of the deferred prosecution agreement (the 'DPA') regime. The Panel consider that without any legislative change in corporate criminal liability there will be a limited impact on DPAs due to an unwillingness by COs to self-report and any significant fear of prosecution. The MoJ are invited to give further consideration to this issue.

9. DPAs may be a useful additional tool for prosecutors in cases where there is sufficient evidence to proceed against an organisation. However, the Panel is concerned to emphasise that DPAs should not be used as a substitute for immediate prosecution of a CO where the evidence is sufficient and the public interest requires it.

10. The Panel also sounds a note of warning as far as any misplaced enthusiasm for the introduction of DPAs as a means of saving time and money. The greatest amount of expenditure in a criminal fraud case occurs during the investigation phase and, in order to have a potentially prosecutable case, a full investigation will inevitably have to be carried out.

11. Lastly, and perhaps, most importantly, any system of dealing with criminal offences

must command public confidence. It is probably unnecessary to remind the Ministry of Justice of the opprobrium[1] suffered by the Serious Fraud Office (the 'SFO') in its attempts to deal with allegations of corporate bribery in the cases of Balfour Beatty (October 2008) and, later, Innospec (March 2010). The irresistible inference of cosy deals behind closed doors, and COs getting off lightly was inevitably drawn by press and public. The Panel therefore urges the MoJ to do all it can to emphasise transparency in the DPA process and ensure that the judiciary is involved fully throughout.

12. It must also be pointed out that, even where the courts or prosecuting or regulatory authorities deal with corporate offenders with seeming rigour, the fines imposed and agreed by the CO inevitably fall on its customers and shareholders, and not on the directors themselves who, in many cases are viewed, perhaps cynically by some sections of the press, as continuing to prosper.

13. The Panel extends guarded support for DPAs, but suggests that their deployment may be limited to only a very few cases each year. Their application appears to be limited to cases where:

- The CO has been set up for the purpose of legitimate trading, rather than one set up purely for the purpose of fraud;
- The CO wishes to continue to trade so that conditions on its future trading activities are realistic and can be enforced;
- The prosecuting authorities are in a position to go down the traditional route of charge and immediate prosecution.

[1] http://www.cityam.com/city-focus/the-americanisation-the-sfo-not-the-way-stamp-out-uk-fraud, 2 December 2009.

RESPONSES TO SPECIFIC QUESTIONS

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?

14. Yes, in a limited number of cases; further particulars are set out below.

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?

15. Yes, in a limited number of cases; further particulars are set out below. They could also be used in cases of corporate manslaughter, fiscal and cartel offences and breaches of health and safety legislation.

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

16. Broadly, yes. But the Panel draws attention to Article 5 of the OECD Convention on Combating Bribery, which stipulates that financial interests should not be taken into account when deciding to prosecute. This would apply equally to DPAs. A further consideration would be the likely effect on employees of the CO.

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

17. The Panel takes the view that reference to legal professional privilege made in paragraph 95 of the consultation paper is inappropriate in a Code and would be better made the subject of judicial ruling.

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

18. Yes. The Sentencing Council would be an appropriate, disinterested and authoritative body.

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

19. The US model provides interesting and apt precedents, which could be adapted to fit the case here. They should be dynamic documents, capable of occasional variation where circumstances change.

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

20. The Panel does not agree that the preliminary hearing should take place in private. The circumstances in which hearings are held in private are extremely limited. The Panel considers that the hearing might properly be heard with appropriate reporting restrictions being made to prevent publication of the hearing until an appropriate stage in the proceedings has been reached.

21. Paragraph 118 of the consultation paper states that, 'at or after any final hearing details of rulings given at any earlier hearings involving the commercial organisation would be made public...' which appears to suggest that the Panel's proposal has already been contemplated and considered for adoption. Whilst there may be on-going proceedings against other corporate bodies and individual defendants publication may prejudice future trials and so it is the Panel's opinion that any legislative provision should not provide for immediate publication of a DPA.

Q8: Do you agree that the test for a judge to apply at a preliminary hearing is whether a DPA is 'in the interests of justice'?

22. Yes. The Panel agrees that the first test for a judge to apply about a DPA is whether it is in the interests of justice. The Panel considers that this provides the necessary discretion to the judiciary.

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'?

23. The Panel agrees that the appropriate test to be applied is that the terms of the DPA should be 'fair, reasonable and proportionate'.

24. Paragraph 108 dismisses the test ('fair, reasonable, adequate and in the public interest') applied in the US for Securities and Exchange Commission proposed consent agreements. The contention that the wording 'fair, reasonable and proportionate' reflects the legal traditions of England and Wales is a moot point. Certainly, it is used in a number of tribunals but it is not a formal test that is applied in criminal proceedings.

25. Whilst sentences imposed in criminal courts are lawful so long as they are not manifestly excessive and the confiscation regime may often be described as draconian[2], whatever the form of statutory language is adopted there may be a perception that this is light touch regulation rather than merely an alternative to prosecution, *in the public interest*.

26. Whilst it is understood that DPAs are intended to provide certainty to the likely penalties and outcome in a case, and thereby encourage self-reporting, the Panel's experience causes it to be doubtful of COs being enticed in that way. It appears to the Panel that with particularly lenient guidance it may have that affect but the Panel questions whether such a system would command public confidence.

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

27. Yes, broadly.

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?

28. The availability of DPA's in the UK as an additional prosecutorial tool in the criminal settlement of bribery and corruption violations (only referring to these) can encourage / incentivise companies to self-report criminal violations to the UK authorities. The potential sanctions under a DPA, in particular, the potential 'benefits' to a CO, do offer

[2] The frequently cited dicta of Lord Rodger of Earlsferry in R v Smith (David) [2002] 1 WLR 54.

an offending CO an alternative route beyond (a) non-disclosure and hoping to evade detection, and (b) voluntary disclosure and a criminal conviction, with all the consequences that would flow from that. The current use of civil recovery orders sidesteps the UK criminal process, not necessarily endearing the authorities to our judiciary; there is no transparency to the process, no public awareness of the transgressions and the question as to whether or not justice has been served.

29. The sanction for such misconduct is of course primarily financial and a CO voluntarily disclosing its misconduct to the authorities would be incentivised to do so were it to know that a financial benefit would accrue to it for this proactive decision. The other side of the coin can be equally persuasive; that to reject voluntary disclosure would result in larger and more punitive financial penalties.

30. However, a CO might also weigh the risk of making a disclosure against the chances of actually being caught.

31. The key to any reduction principle is that it is transparent to all concerned parties; the criminal authorities, the CO, the public and the judiciary. It offers COs a degree of certainty over the nature and magnitude of the penalties it will ultimately face and its affects can be felt far and wide, by encouraging all companies to address their failings and take steps to improve their business culture.

32. Rather than considering whether the UK should allow a maximum of a one-third discount if a CO entered into a DPA, perhaps it would be better to approach this issue from a flexibility standpoint as regards the scale of a financial discount. Calculating a financial penalty which incorporates a range of mitigating factors might well be a more equitable approach to adopt in that business and the wider public can see how heavily certain conduct is penalised and the extent of the benefit that is gained through cooperation and remediation. In the US, with its penalties illustrated through a series of maximum and minimum ranges, the ultimate financial penalty can be 40% of the maximum amount possible (the maximum fine possible though represents amongst others, a non-disclosing, uncooperative CO, an attitude that would be financially short-sighted once under investigation).

33. Accordingly, the scale of any reduction in the financial penalty as a result of a DPA should reflect a prosecutorial assessment of a number of key factors, including:

    (a) Did the CO voluntarily disclose?

    (b) When did it voluntarily disclose?

    (c) The thoroughness of any internal investigation

    (d) The nature and scale of its cooperation with the authorities

    (e) The extent of its remediation

    (f) Any existing compliance programme.

34. Public transparency of these mitigating factors, alongside public transparency of the aggravating factors, can be a significant factor in encouraging companies to self-report their misconduct. The US Sentencing Guidelines consider these and other determining factors, attaching a 'weight' to both the original misconduct and the subsequent corporate steps taken by the CO to address its problems. They give a clear road map to companies of the construction of any potential financial penalty.

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

35. Yes.

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?

36. The Court should be made aware of material and/or substantial variations (for example, inability to pay). When the Court is made aware of this material variation, there may be scope for judicial recommendation of possible discharge and prosecution may be considered at the point if it is a material breach.

37. Prosecutors should be able to make minor, non-material variations (for example, acceptance of monitor report one week later than due).

38. Variation could be defined as something which materially changes the sanctions imposed (for example, failure/inability to complete; non-occurrence of project, for example, terms being 'you must report on China situation every 3 months' and China contract is lost).

39. If the change is temporary or immaterial (for example, the CO's compliance officer must be aware of all projects and the CO loses their compliance officer and cannot find a replacement for 1.5 weeks – it is a variation due to change of circumstances, but is it material? However, if there was no compliance officer for 6 months, that is material).

40. We do not think that an oral hearing should necessarily be required for material changes in circumstances. There should be scope for it to be done administratively on the papers with judicial approval, and the consent of both parties.

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

41. The Panel believes that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA.

42. We consider that there needs to be some flexibility and, as per comment above, that that flexibility should be allowed in non-material circumstances.

43. Where there is a material variation due to change of circumstance, the prosecutor and party should be able to submit their (agreed) views to the judge and when and if there are judicial concerns, the material change should be ventilated at Court.

44. Clearly, where there is a material change of circumstances and there is no agreement, judicial intervention shall be required.

45. We consider that it is a good idea to stipulate terms of non-compliance (for example, extra interest for late payment) to ensure transparency and certainty.

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?

46. The Panel believes that it should be possible for the parties to a DPA to be able to make amendments to it, within limits defined by the DPA. The capability to make amendments is required and sensible, especially if these agreements cover a three year term. Any number of organisational, economic and social changes can occur within this period, especially in businesses which are usually involved in bribery and corruption prosecutions.

47. We think additional penalties for non-compliance and breach should be monitored. In an adversarial system where prosecutors and defence solicitors have been working together for what is often many years, relationships may become too aggressive or too accommodating, particularly with co-operators. It is our opinion that judicial oversight is required for penalty change.

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

48. The Panel agrees that there must be provision for formal breach proceedings as the threat of prosecution on non-compliance must be real and actionable. We also agree with the considered penalties.

49. However we disagree that the standard should be beyond reasonable doubt; the Panel prefers a balance of probabilities. Our reasoning for this is as follows: it may be difficult for the breach to be independently assessed if it is internal which it will often be. To prove a breach to such a high standard, a s2 Order[3] (for example at the SFO) would be required. It is considered that a s2 would not be granted, as this would be considered post investigation stage. Investigatory powers are curtailed after the acceptance of a DPA. Further, it is not currently considered that a breach will be a criminal offence therefore, why is the beyond reasonable doubt standard applied as if it were? If the

[3] Section 2, Criminal Justice Act 1987.

prosecution considers, objectively, a breach is likely, it should be for the party given the benefit of a DPA to prove it wasn't.

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

50. The Panel agrees that judges should have discretion, following a breach, to insist that a DPA should be terminated, but what is the appeal process if any?

51. The reasons are as above. In an adversarial system where prosecutors and defence solicitors have been working together for what is often many years, relationships may become too aggressive or too accommodating, particularly with co-operators. Judicial oversight enhances the work done by prosecuting departments.

52. Some reasons which may be given by the prosecutor must be subject to something similar to public interest immunity (PII) in disclosure (for example, we could not bring a prosecution as the department has no money; the material is now lost due to fire; the witnesses have all moved and we don't know where they are and it will be disproportionately expensive to find them).

53. We consider it should only be done in extreme cases, after very detailed submissions (although full and frank) from the prosecutor.

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

54. Paragraph 147 of the consultation paper states that the finalised terms of the DPA should be admissible in any subsequent criminal proceedings against that CO.

55. As a general rule, this would seem to be appropriate subject to the normal rules of evidence about the effect on the fairness of proceedings. However such a document may have a prejudicial effect on co-defendants if the terms of that admission touch upon them or their role (even if it is not adduced as evidence against them). This may result in applications for separate trials.

56. The general rule may not be appropriate if the agreed DPA was a matter of history vis a vis the current criminal proceedings. If a CO agreed a DPA five years previously with a certain prosecution agency but was then subject some time later to a subsequent prosecution, it should not necessarily follow that the historic DPA would be admissible. Effectively in those circumstances the prosecution would be making a bad character application. Therefore consideration should be given to 'any subsequent criminal proceedings' being restricted by reference to a failure to comply with the DPA or the allegations the subject matter of the DPA. Otherwise CO may feel that the terms of the DPA would forever be open season for a prosecuting agency in terms of future misconduct and this would reduce the incentive to participate in the DPA process.

57. Paragraph 148 goes on to state that information provided by a CO could be used against an individual although admissions could not. It is assumed this relates to a finalised DPA. However it is not clear whether 'information' refers to something over and above pre-existing documents. If it does, this provision is problematic. It may well be that information supplied sought to suggest that certain acts or documents could be attributed to certain individuals (for example, they would not be admissions by the CO but they would be factual representations disadvantageous to individual defendants). Very often the interest of the CO will be wholly at odds with individuals who were employed by the CO or were contractors for the CO. Under the ordinary rules of evidence, what an individual co-defendant said about another would not be admissible. There seems no logic in the position being different in respect of what a CO says about a co-defendant.

58. If this provision only applies to pre-existing documents, the paragraph should make this clear.

59. Issues may also arise in general terms about:

    (a) The actual human source of information provided by a CO

    (b) Whether individual defendants were able to have equality of arms if they no longer had access to all company documentation.

60. This provision would also inevitably lead to disclosure requests from individuals in respect of the course of the negotiation process and LPP discussions/documents.

61. In paragraph 149 whilst no admissions could be made on basis of an unsigned DPA, prosecution would not be precluded from relying on any evidence obtained from resulting enquiries. This provision seems sensible and accords with like provisions in relation other inadmissible admissions.

62. However a co-defendant could not be prevented from seeking to use such admissions against a CO in the same case. The proposed use of any such admissions may again lead to applications for separate trials.

63. Paragraph 150 proposes that pre-existing documents provided by a CO as part of an unsigned DPA process would be admissible against the CO or an individual. This seems to be a sensible provision, albeit one that will inevitably lead to a disclosure request from individuals in respect of the circumstances of the provision of the document and the process undertaken to review other documents held by the CO.

64. Paragraph 151 states that documents created by a CO in course of DPA discussions are to be treated as if obtained under compulsion. The second bullet point exception appears to go beyond the like provisions in respect of other documents obtained under compulsion for example, CJA 1987 section 2(8).

65. As above, how could one prevent a co-defendant from seeking to use such documents against a CO in the same case? The proposed use of any such documents would again lead to application for separate trials.

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

66. In respect of disclosure obligations generally (paragraph 155) it is axiomatic that the suspect must not be misled about the strength of the prosecution case. However what are the practical implications of this? It could be suggested that there must be a thorough and complete review of all prosecution material before any DPA could be finalised. However this would be a significant and costly obstacle to the process. If this

is not what the prosecution are required to do, what lesser review is adequate? It would be helpful if clear guidance were given.

67. Under paragraph 157 statutory disclosure obligations do not apply to DPAs. The CPIA scheme would not fit with a DPA process and to that extent it is obvious that this could not apply.

68. However subsequent disclosure to other parties or individual defendants may later undermine the basis of a DPA. It may therefore be wise to allow a mechanism whereby this sort of situation could be addressed.

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

69. Yes. In addition, a decision to prosecute following a breached DPA could be challenged by way of an application to have the proceedings set aside for abuse of process.

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?

70. Yes. DPA is a procedural, rather than a substantive, provision.

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?

71. The Panel has some concerns about the practicalities of monitoring the conditions imposed in the DPA. To whom would the 'monitor' report? To the prosecutor or to the Court? Where private sector firms perform this function, how will the fee structure be set and by whom? Will these be agreed in consultation with the relevant professional bodies? Again, these must raise questions as to the acceptability of the regime to the general public.

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

72. The Panel has no other comment to make at this stage.