Ministry of JUSTICE

Deferred Prosecution Agreements

Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations

Response to Consultation CP(R)18/2012

23 October 2012

Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2012

Cm 8463 £10.75

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This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN: 9780101846325

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID 2518481 10/12

Printed on paper containing 75% recycled fibre content minimum.

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Foreword – DPAs consultation response

Economic crime by commercial organisations does serious damage both to its immediate victims and the economy, costing billions of pounds to the taxpayer and to those directly affected. This government is clear that white collar crime is just as serious as any other kind of offending and needs the same tough response. We've already shown our commitment to introducing new and robust measures, whether by implementing the Bribery Act 2010, publishing a national strategic plan – Fighting Fraud Together or legislating to create a National Crime Agency with a strong focus on economic crime. But more still needs to be done.

Deferred Prosecution Agreements (DPAs) are the next instrument in the battle against economic crime. As our consultation of May 2012 set out, DPAs will provide prosecutors with an extra tool to tackle economic crime in England and Wales which currently too often goes without redress.

Under a DPA, a prosecutor will lay but not immediately proceed with criminal charges against an organisation, pending successful compliance with tough requirements including a financial penalty, reparation to victims, repayment of profits and measures to prevent future offending.

The objective is that the DPA will allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity or length of a criminal trial.

Often of course full criminal proceedings are the only just course of action, and prosecution will continue to be the priority where a DPA would not be in the public interest or an organisation's alleged wrongdoing is very serious. As respondents to our consultation recognised, prosecution can pose significant challenges because of the very nature of corporate crime. In a globalised and specialised business environment, offences can take place across multiple jurisdictions and in complex technical fields. Investigation and prosecution can often take many years and cost millions of pounds.

By encouraging organisations to self-report not only their own wrongdoing, but also wrongdoing within their business sector or market, DPAs have the potential to ensure that the Serious Fraud Office and the Crown Prosecution Service are made aware of more crimes and obtain better evidence of them. Prosecutors will be able to bring more cases to justice, and secure restitution for more victims.

But of course safeguards must always apply. That is why, under our plans, the judiciary will play a vital independent role in this process to ensure that DPAs are properly scrutinised, transparent and in the interests of justice. They will be empowered to block them if they do not agree that they are an appropriate response to the organisation's wrongdoing.

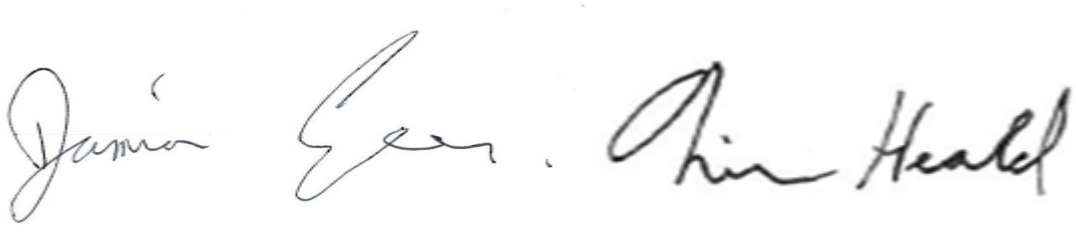
Equally important, there will be public scrutiny of the process – the public will know what wrongdoing has taken place and the sanctions for it, including any penalty that has been paid. The final hearing will be held in open court and the final agreement will be published by the prosecutor.

Respondents to our consultation agreed that DPAs can play a vital role in helping to overcome those challenges. There was widespread support for an approach ensuring that redress is available, with wrongdoing seeing the light of day, victims properly compensated and offending firms facing a serious penalty. Respondents also endorsed our proposed operational model and processes.

The Government has considered carefully the responses to our consultation in finalising and refining our policy proposals. The Government particularly welcomes the support of the Serious Fraud Office and Crown Prosecution Service, who will play a vital role in the successful implementation and operation of DPAs. We are grateful for their additional insight, expertise and suggestions.

All told, we believe, and the consultation responses confirm, that the DPA model is a sensible and pragmatic means of identifying and penalising more corporate offenders. DPAs will help protect the public by tackling economic crime that currently too often goes without remedy.

We will now bring forward legislative provisions to introduce DPAs in England and Wales in the Crime and Courts Bill, which is currently making its way through Parliament. The prize will be a more just and effective system for dealing with economic crime, where wrongdoers are identified and brought to justice as commonly as for other offences.



Rt Hon Damian Green MP

Minister of State for Policing and Criminal Justice

Oliver Heald QC MP

H.M. Solicitor General

Introduction

This document is the post-consultation report for the command paper *Consultation on a new tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements* consultation paper.

It covers:

- The background to the consultation
- A summary of the responses to the consultation
- A detailed response to the specific questions raised in the report; and
- The next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Matt Grey** at the address below:

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Executive Summary

1. The command paper *Consultation on a new tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements* was published on 17 May 2012. It invited comments on Government proposals to introduce a new approach to dealing with economic crime, referred to as Deferred Prosecution Agreements (DPAs). These proposals would enable prosecuting authorities and 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 by organisations.

2. During the consultation, the Solicitor General participated in an event with interested parties to explain our proposals in further detail and to discuss specific issues raised by attendees. The feedback from this session has been considered as part of the development of the Government's final proposals.

3. The consultation period closed on 09 August 2012 and this report summarises the responses. It also sets out in detail the Government's final position on the proposals and the reasons for any change in approach following consideration of the consultation responses.

4. The Impact Assessment and Equality Impact Assessment accompanying the consultation document have been updated to take account of evidence provided by respondents to the consultation, as well as policy developments that occurred following the consultation period.

Background

5. Corporate economic crime is far from victimless and has a pernicious and damaging effect on our economy and on that of the wider world. In 2012, the National Fraud Authority estimated that fraud committed by all types of offenders cost the UK £73 billion per year.[1] It creates an unfair playing field for companies that comply with the law and can destroy the reputation and integrity of any business, industry, employee or market sector.

6. There is general recognition that 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 too low. As the complexity and size of commercial organisations grow, so too do the difficulties of investigating criminal activity and of bringing commercial organisations to justice. Although prosecution will continue to be prioritised, prosecutors need new tools to enable them to take quicker and more effective action against organisations that commit wrongdoing.

7. The Government's consultation paper set out its proposals for an additional tool for prosecutors, the Deferred Prosecution Agreement (DPA). DPAs have the potential to ensure that the Serious Fraud Office and Crown Prosecution Service find out about more crimes and are able to bring more cases to justice, and secure restitution for victims.

The case for change and the need for new enforcement approaches

8. This section of the consultation paper set out the deficiencies in the current system for dealing with offending by commercial organisations in the field of economic crime and the adverse impact this can have on victims, customers, suppliers and the wider economy. It explained that there were currently a number of significant barriers preventing any improvement on the outcomes and effectiveness of tackling corporate economic crime, including:

    - The behaviour of commercial organisations
    - Co-operation with prosecutors in other jurisdictions
    - The length and cost of proceedings

9. We explained that the justice system needs to improve the flexibility of the system for dealing with economic crime committed by commercial organisations to bring more offending organisations to justice, incentivise

[1] *Annual Fraud Indicator* National Fraud Authority (2012).

self-reporting and secure reparation for victims, whilst ensuring harsh penalties are paid.

10. The consultation did not ask any specific questions on this section. However, it is clear from the responses to the consultation that there is general agreement that prosecutors need more effective and robust methods for dealing with economic crime in order to bring more offending organisations to justice.

Models for new approaches

11. In this section we explored some of the alternative approaches to disposal that already exist in England and Wales, as well as the models for DPAs and Non-Prosecution Agreements in use in the United States (US) and how they might be usefully applied in England and Wales.

12. The examples of alternatives to criminal prosecution already in place in England and Wales provide a useful starting point in considering a model to deal with more serious economic offending. Although the US model has been in use for over 20 years, in its current form it would not be suitable for the constitutional arrangements and legal traditions in England and Wales. However, there are opportunities to learn from these models and to develop a bespoke approach to DPAs for England and Wales that provides for better transparency and greater judicial involvement in the process.

13. The consultation did not ask any specific questions on this section. However, a number of respondents helpfully commented on the US model for DPAs, including its method of operation, and made suggestions on how a DPA scheme in England and Wales should differ from that in the US.

14. Having considered the comments from respondents the Government remains of the view that the US model offers a good example of the effective use of a voluntary agreement approach, albeit in a very different legislative context. However, our proposals will ensure a greater level of judicial involvement and transparency throughout the DPA process in order to command public confidence.

Purpose and principles

15. This section dealt with the principles on which our proposals for DPAs were based. It made clear that DPAs would be available in relation to economic crime committed by organisations, and that whether to agree to enter into a DPA would be an entirely voluntary decision on the part of the organisation in question. Although a DPA is not a sentence upon conviction and should not be viewed as such, in many cases it might fulfil some or all of the purposes of a sentence. We explained that the court might have regard to these purposes when agreeing a DPA.

16. We set out the Government's view that in order to be effective in tackling economic crime committed by organisations and to command public confidence, DPAs and the process for their creation should be based on the key principles of transparency and consistency. The public need to have the confidence that a prosecutor is not entering into a "cosy deal" with an organisation behind closed doors, and parties entering into a DPA need to know what to expect of the DPA process and the likely outcome.

17. We asked whether our proposals had the potential to improve the way that economic crime committed by organisations is dealt with, and whether DPAs should be applied only in cases of economic crime.

18. Respondents overwhelmingly welcomed the proposals to create a new tool for prosecutors to tackle economic crime, with 86% of respondents agreeing that Deferred Prosecution Agreements have the potential to improve the way in which corporate economic crime is dealt with and would enable prosecutors to bring more cases to justice. However, eight respondents (11%) were of the opinion that a full criminal prosecution would always be the most appropriate response to commercial wrongdoing.

19. The majority of respondents to the consultation agreed that the use of DPAs should, at least initially, be limited to economic crimes, as the challenges posed in prosecuting economic crime were not replicated elsewhere. There was also support for an extension of the scope of DPAs in future to other types of crime, depending on their success in relation to economic crime. We will therefore work towards the creation of DPAs as a new tool for prosecutors to tackle economic crime, and review the relevant economic offences which they encompass. However, the Government currently has no plans to extend DPAs to other types of crime.

The proposed model

20. In this section we set out the model for a Deferred Prosecution Agreement, including its composition, the process for entering into one, the role of the judge in approving an Agreement, and the consequences of non-compliance or breach of a DPA by an organisation. We also dealt with the status of any admissions made by an organisation during the creation of a DPA, and how any unused information ought to be disclosed. We welcomed comments on a range of questions covering detailed aspects of our proposals, and invited suggestions as to how the proposals could be improved.

21. There was clear support from respondents for the proposed process for entering into a DPA, with the majority (92%) agreeing that the initial hearing should take place in private, to allow the prosecutor and organisation to discuss the proposed terms openly and without fear of jeopardising future prosecutions. Over 90% of respondents also agreed that the final hearing to approve the creation of the DPA should be held in public. They recognised that it is essential for transparency, consistency

and for maintaining public trust in the process that DPAs be scrutinised and properly approved by a Crown Court judge in a public forum.

22. Respondents agreed with the proposals for the judicial scrutiny tests, whereby a judge would consider whether entering into a DPA would be in the "interests of justice" and whether the proposed terms are "fair, reasonable and proportionate".

23. The responses to the consultation strongly supported the creation of supporting guidance, taking the view that this would help to provide certainty for parties entering into a DPA and greater transparency in the DPA process. Respondents suggested a range of topics that could usefully be included in a DPA Code of Practice for Prosecutors. In light of the comments received from respondents, the Government expects that the proposed contents of the DPA Code of Practice will be consulted on separately and in further detail by the Director of Public Prosecutions and Director of the SFO to provide interested parties with the opportunity to shape its contents. The ideas and suggestions on the DPA Code of Practice for Prosecutors offered by respondents to this consultation will also be shared with those responsible for producing the Code.

24. Over three quarters of respondents agreed with the proposed possible contents of a DPA as outlined in the consultation document. Respondents provided detailed comments on how each of these terms would operate in practice, and suggested a number of additional terms. There was support for the fact that judicial scrutiny will provide the check and balance on the terms and conditions in each case.

25. We proposed a range of options for dealing with circumstances in which an organisation is not compliant with the terms of the DPA and invited comments on the most appropriate approach. The majority of respondents (69%) felt that it was appropriate that the court should determine whether a variation to a DPA is appropriate, where a change of circumstances has occurred. There was limited support for the proposal that the prosecutor should have some powers to vary the terms of the DPA of their own accord (36%), but a clear majority of respondents (72%) agreed that the agreement itself should set out circumstances where it would be appropriate for the parties to a DPA to make amendments to it.

Summary of responses

26. In total we received 75 responses to the consultation from a range of organisations and individuals including members of the judiciary, representative bodies, companies, non-governmental organisations and members of the public. The following table sets out the type of person/organisation that responded to the consultation.

Category	Number of Respondents
Key Prosecutors (Serious Fraud Office and Crown Prosecution Service)	2
Judiciary	5
Commercial Organisations	11
Representative Bodies	11
Legal Professions (including representative bodies)	32
Academics	5
Non-Governmental Organisations	2
Members of the public	6
MPs/Peers	1

A list of respondents is at Annex A.

27. As well as answers to the specific questions, we have considered fully respondents' overall views on the proposals. This included whether they agreed with the level of judicial involvement in the DPA process, and their thoughts on how DPAs would interact with any action being taken in other jurisdictions.

28. Not all the respondents chose to answer all the questions and some respondents opted to submit their response in the form of a more general extended letter or article. In these cases, where comments appear to be in response to particular questions in the consultation paper, these contributions have been treated as answers to those questions for the purposes of analysis.

The purpose and principles of DPAs

29. The case for change was set out in the consultation and is summarised briefly here.

30. Treating economic crime more seriously and taking steps to combat it effectively are key commitments in the Coalition agreement. 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.

31. We described how the current system poses problems for prosecutors, defendants and judges; can have unintended detrimental consequences for victims, customers, suppliers and the wider economy; and in extreme cases may result in an organisation going out of business. There is currently little incentive for organisations who have committed wrongdoing to come forward and engage with prosecutors, and the length and cost of a full-scale investigation and prosecution can give rise to uncertainty and reputational damage.

32. We believe that it is therefore 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. We proposed that prosecutors (principally the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS)) should therefore be given a new tool with which to bring commercial organisations to account: Deferred Prosecution Agreements (DPAs). DPAs have the potential to ensure that the SFO and CPS will be made aware of more wrongdoing and able to obtain better evidence of them. Ultimately we consider that DPAs could further contribute to the current trend of an increase in self-reporting by organisations. By having the option of using DPAs alongside existing criminal and civil approaches, prosecutors will be able to bring more cases to justice, and secure outcomes, including restitution for victims, more quickly and efficiently.

33. As set out in the Government's consultation paper, a DPA is a voluntary agreement between a prosecutor and a commercial organisation whereby, in return for complying with a range of tough and stringent conditions including, for example, the payment of a substantial penalty, requirements to make reparation to victims and participate in monitoring for a set period, the prosecutor will defer a criminal prosecution. A judge would oversee the development of the agreement to ensure it is fair and in the interests of justice. The final agreement will be made in open court and published so that the wrongdoing and sanctions for it will be in the public domain. If, at the end of the deferral period, the prosecutor is satisfied that the organisation has fulfilled its obligations, there would be no prosecution on the charges laid. If, on the other hand, the organisation

fails to meet its obligations, the prosecutor could seek to prosecute the original wrongdoing at issue.

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

    - Transparency: The DPA process must be sufficiently clear to encourage companies to come forward and self report, and ensure that the operation of justice is transparent and open to public scrutiny.
    - Consistency: Parties should be able to work from common principles when entering into the DPA process, with a clear indication of the likely package of terms which a commercial organisation might be required to agree to.

We asked:

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?

35. The responses to the consultation were strongly supportive of our proposals. 86% of respondents agreed that DPAs will assist prosecutors in tackling economic crime and dealing with cases appropriately.

36. Twelve respondents (16%) supported the introduction of DPAs, but emphasised that they should be seen as only one of several tools for tackling economic crime and addressing corporate criminal liability. Several responses welcomed the proposals set out in the consultation but emphasised the need for supporting guidance to be produced to provide further clarity over the details of how the process would operate.

37. We received ten responses (13%) that did not agree that DPAs were likely to be effective in combating white collar crime. Eight of these respondents expressed concern at the risk of injustice posed by DPAs for the public and for the organisation involved, with the majority of those emphasising the need for criminal prosecution of any wrongdoing. The remaining two responses questioned whether the proposals offered a sufficient incentive for commercial organisations to consider entering into a DPA, particularly given the difficulty in obtaining convictions for serious economic crime.

38. Having considered the responses to the consultation, the Government remains of the opinion that the justice system needs to improve the way that economic crime is dealt with and more organisations that commit wrongdoing need to be brought to justice. It is committed to the introduction of DPAs as an additional tool available to prosecutors to deal with economic crime and hold organisations to account. DPAs will allow prosecutors to bring organisations to justice, with tough and stringent penalties for wrongdoers which are commensurate to the likely sentence upon conviction and with measures to ensure victims are compensated.

The scope of DPAs

39. We proposed that Deferred Prosecution Agreements (DPAs) should be used to deal with offending behaviour by commercial organisations that can be classified as economic crime, in particular fraud, bribery (specifically offences under the Bribery Act 2010), and money laundering.

40. It was not proposed that DPAs should be available to individuals, whether for individual crimes or for action undertaken on behalf of an organisation.

We asked:

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?

41. There were 63 responses to this question. The majority of respondents (77%) agreed that economic crime committed by commercial organisations is the right focus for DPAs, at least initially. Almost half of respondents (48%) supported a wider application of DPAs to other areas of corporate offending, and potentially to other groups, including:

    - Health and Safety offences
    - Environmental offences
    - Offences under the Companies Act 2006
    - All corporate wrongdoing, including regulatory offences
    - Individuals accused of economic crime and/or working within a commercial organisation that is party to a DPA
    - Use by any prosecuting authority, including the Financial Services Authority, as well as the CPS and SFO.

42. Seventeen responses (27%) agreed that DPAs are most appropriate in cases of economic crime but voiced no opposition to an extension to other areas of corporate offending in principle. All these responses advised that no extension should be made until the DPA process has been fully tested in England and Wales and was shown to be effective.

43. Eleven respondents (17%) opposed a wider application of DPAs to cases other than corporate economic crime. Respondents noted that the challenges posed in prosecuting economic crime by commercial organisations are not replicated in other areas and so an extension of DPAs to other forms of offending would not be appropriate, particularly where there is direct physical harm caused to individuals or to the environment by the commercial organisation's wrongdoing. Two responses made the same point that any extension of DPAs to individuals would privilege those accused of white collar crime as opposed to those accused of other offences.

44. Five respondents (8%) who were opposed to DPAs in principle also responded to this question, commenting that they would not support any extension of their scope.

45. We welcome the clear support for DPAs to be available as an additional tool for cases of economic crime committed by commercial organisations, and the recognition that the same prosecutorial challenges and impacts of economic crime do not exist in the same way for other types of offence.

46. We therefore do not intend to broaden the scope of the offences for which DPAs will be available at this time, to ensure that they do not become a way for organisations to avoid prosecution for offences that we would not consider suitable for a DPA, such as those in which physical harm is caused. However, we recognise the need to maintain flexibility in the way that DPAs are used to deal with economic crime, and will review the list of offences which they encompass before considering whether there is a case to broaden the range of economic crimes for which they should be available.

47. DPAs have been developed to provide an additional tool to overcome many of the current difficulties associated with prosecuting organisations to ensure that wrongdoing by organisations results in tough and effective penalties. However, we recognise that there is no principled distinction between commercial organisations and other organisations and that excluding the latter from the scope of DPAs may be arbitrary. We therefore intend that only individuals will be excluded from the scope of DPAs. The Government remains of the view that this tool should only be available to deal with organisations. DPAs should not be used as a means for individuals to avoid being prosecuted for their crimes. Criminal prosecution is effective in dealing with individuals who commit economic crime, and there is a range of punishments and sanctions for their behaviour, including the ultimate punishment of imprisonment.

We will:

- Limit the application of DPAs to any party who is not an individual who commits offences that can be encompassed by a DPA.
- Limit the application of DPAs to economic crimes, but provide for the list of economic crimes for which a DPA is available to be amended.

Supporting guidance

DPA Code of Practice for Prosecutors

48. Once an allegation of criminal wrongdoing has come to light, and following appropriate investigation, the prosecutor should consider whether it is appropriate to offer a DPA to the commercial organisation. We proposed a range of potential factors to which prosecutors could have regard in deciding whether to enter into a DPA, and invited suggestions on these, or any other factors which may be appropriate.

49. To assist prosecutors in the task of considering whether to prosecute or to offer a DPA, and to ensure that the DPA process is transparent and offers greater certainty to commercial organisations and the public, we believe that clear supporting guidance ought to be made available. We proposed that the Director of Public Prosecutions (DPP) and the Director of the Serious Fraud Office (DSFO) should issue a statutory DPA Code of Practice for Prosecutors. This would be publicly available, separate from the Code for Crown Prosecutors, and would set out the circumstances in which a prosecutor may consider entering into a DPA, the principles applying to such a decision, and any factors which might suggest a DPA was unsuitable.

50. We also proposed that such a code should contain a number of additional elements, including a provision for the protection of legal professional privilege, guidance as to the process to be followed by the prosecutor, and advice on how prosecutors ought to deal with decisions to prosecute upon termination of an agreement as a result of breach. We invited comments on whether it would be appropriate for the code to set out any additional components.

We asked:

Question 3: Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?

Question 4: Do you think that it would be appropriate to include any further components in a DPA Code of Practice for Prosecutors?

51. Out of the sixty one responses to this question, a clear majority (82%) felt that the factors proposed in the consultation to which prosecutors should have regard when considering whether to enter into a DPA were in principle the right ones. However, almost half (48%) of respondents suggested additional or alternative factors for prosecutors to consider. Suggestions included:

    - Whether the wrongdoing was self-reported
    - The degree to which the organisation cooperated with prosecutors

- The extent of the dishonesty throughout the organisation
- The impact of the wrongdoing on third parties
- Behaviour of the organisation since offending and whether any action has already been taken by the organisation to put right the wrongdoing
- The ability of organisations to pay a financial penalty and meet other financial obligations

52. Five respondents (8%) questioned the weight that ought to be attached to each factor. We believe that this ought to be addressed in further detail during the development of the DPA Code of Practice for Prosecutors.

53. A further five responses disagreed with the proposed factors. Of those, three considered that any DPA Code of Practice should form part of the Code for Crown Prosecutors and two suggested that the factors considered by prosecutors ought to be non-exhaustive, with each case considered on its merits. However, we believe that in order to provide the public and parties to a DPA with sufficient clarity and certainty as to the general principles to be applied by prosecutors in determining whether a DPA is likely to be appropriate in a given case, there should be a separate Code with a non-exhaustive list of relevant factors and considerations.

54. Respondents also commented on whether it would be appropriate to include further components in a DPA Code of Practice for Prosecutors, with over half suggesting additional elements including, but not limited to, the following:

- Further information on the level of protection for legal professional privilege (LPP)
- The status of admissions, and obligations relating to disclosure of evidence
- Guidance on how action in other jurisdictions will be taken into account, including provisions on double jeopardy
- Guidance for commercial organisations on conducting internal investigations
- The rights and responsibilities of all parties to a DPA

55. Eight respondents (13%) felt that the contents of a DPA Code of Practice should be a matter for consultation in its own right.

56. There were eleven responses (18%) that commented on the appropriate level of evidence that prosecutors would need in order to satisfy themselves that entering into a DPA would be appropriate. There was disagreement as to whether this ought to be the same test as for bringing a prosecution (a “realistic prospect of conviction”), or whether a lower evidential threshold would suffice.

57. We have considered the responses to these questions and recognise the clear support for the development of specific guidance on the factors to which prosecutors ought to pay regard when considering whether to enter into a DPA. We also note the volume and range of additional factors suggested by consultation respondents and the number of suggested additional components for any Code of Practice.

58. The Government remains of the opinion that a DPA Code of Practice for Prosecutors is essential for ensuring that DPAs are both transparent and consistent, and that further consideration ought to be given to its contents. To ensure the code provides the certainty which respondents have sought, we expect that the DPP and the DSFO will take into account the responses to this consultation and that the proposed contents of the DPA Code of Practice will be consulted on to provide interested parties with the opportunity to shape its contents.

59. With regards to the evidential test, we consider that this should be included in the DPA Code of Practice for Prosecutors and must set a sufficiently high threshold to establish a real threat of future prosecution for the other party. However, the exact contents of the DPA Code of Practice for Prosecutors will be a matter for those responsible for developing it.

We will:

- Require the Director of Public Prosecutions and the Director of the Serious Fraud Office to produce a Code of Practice for Prosecutors on DPAs.

Guideline for DPAs

60. We proposed that to ensure clarity and consistency for the prosecutor, the court, the commercial organisation and the public, it would be desirable for there to be a guideline regarding the terms of any DPA. Whilst a DPA would not be a sentence, and should not be viewed as such, we were of the view that there are sufficient commonalities with the guidelines issued by the independent Sentencing Council to make it the appropriate body to have responsibility for issuing a DPA guideline. Both the judge and the parties to any agreement would be able to have regard to such a guideline when considering the terms of a DPA and the amount of any financial penalty.

61. In the consultation, we explained that there were two broad forms that a DPA guideline might take, and asked for views as to the appropriate approach. These were:

    - 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.

62. We also noted that, in the absence of a specific DPA guideline, the Sentencing Council could still develop sentencing guidelines to be applied in the event of conviction for any of the offences which may be encompassed by a DPA, which the parties and the court would also be able to have regard.

We asked:

Question 5: Do you agree that the Sentencing Council is the right body to develop such a guideline?

Question 6: What do you think would be most useful in a guideline for DPAs?

63. Of the responses to these questions, 96% agreed that the Sentencing Council would be the appropriate body to develop a DPA guideline. There were a range of suggestions as to what any guideline ought to contain, with general support either for the development of offence-specific guidelines, as it would allow for greater certainty for parties entering into a DPA, or for a mixture of both a narrative and offence-specific element.

64. Three responses made reference to the US model under which penalties are calculated against a detailed sentencing matrix and suggested that this approach be adopted for England and Wales. However, the Sentencing Council does not produce matrices in any of its guidelines as this would risk undermining judicial discretion to set penalties.

65. Three responses suggested that a DPA guideline would not be necessary, as each DPA would be formulated on an individual basis depending on the specific facts of the case. One response noted that sentencing guidelines for economic crimes produced by the Sentencing Council would be a sufficient basis on which to consider the appropriate levels of penalties, whilst another suggested that the Council ought instead to develop guidance on the approach to calculating any penalty. A third response suggested that it would be more appropriate for judges to develop appropriate principles for calculating penalties on a case by case basis.

66. Having considered the responses to the consultation, the Government remains of the view that the absence of any sort of guideline would not provide sufficient certainty to prosecutors and the organisations entering into a DPA, such that it may deter an organisation from engaging in the process. We therefore believe that a guideline is necessary to provide parties to a DPA with the transparency and certainty of outcome they need, whilst continuing to offer an element of flexibility. A guideline will provide a useful tool for both parties when negotiating the terms of the DPA, in particular the level of a financial penalty and will be a reference point for the judge when considering whether the terms and conditions of a proposed DPA are ‘fair, reasonable and proportionate’ at both the preliminary and final hearings.

67. However, we recognise that, as presently constituted, it would not be within the Sentencing Council's remit to produce a DPA guideline, and that amendments to primary legislation would be required to enable it to do so. More importantly, the Council has indicated that it is currently intending to produce guidelines on appropriate penalties after conviction for offences likely to be encompassed by a DPA when committed by an organisation. We believe that these guidelines are very likely to provide the certainty that we intended to achieve through a guideline for DPAs. In view of the Council's plans, we therefore see no need for the Council to be empowered or obliged to create DPA specific guideline.

68. A number of respondents suggested that in developing a guideline, the Sentencing Council would benefit from input from prosecuting authorities, the judiciary and industry to ensure that all aspects of the DPA guideline are practical and workable. The Council already consults widely on any guidelines it intends to issue and we would expect them to do so in this instance.

We will:

- Support the Sentencing Council to produce sentencing guidelines for offences that are likely to be encompassed by DPAs when committed by an organisation.

The proposed model

Commencement of proceedings before a judge

69. Having made a decision in principle that a DPA was likely to be suitable and secured initial agreement with the commercial organisation to enter into a DPA, we proposed that the prosecutor would begin proceedings in the Crown Court. We suggested that the initial hearing should be held in private and would give the judge notice of the prosecutor's provisional decision to enter into a DPA. The judge would therefore be able to take an early view on whether or not it is in the interests of justice to proceed with a DPA in the particular case.

70. We proposed that at the preliminary hearing(s), the prosecutor would present to the judge an outline of the agreed basic facts and alleged 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.

71. We suggested 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'. The judge would be able to indicate to the parties whether the emerging terms are likely to be appropriate. We proposed that the test for this should be whether the conditions are 'fair, reasonable and proportionate'.

72. We proposed that a finding that a DPA was in principle appropriate should not bind the judge to approve such an Agreement at any final hearing.

Question 7: Do you agree that the preliminary hearing should take place in private?

Question 8: 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'?

Question 9: 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'?

73. The comments provided by eleven of the responses to these questions reflected on the role of the judge in the DPA process more generally. Two emphasised the need for strong judicial involvement in the DPA process and highlighted that the judge should not simply participate in a tick-box exercise.

74. The other nine respondents who commented on the role of the judge voiced concern about the judge assuming anything more than a supervisory role, and opposed to a substantive decision-making role for the courts. Concerns were raised that an agreement with a prosecutor could be revisited by a judge and possibly rejected. Respondents suggested that the level of judicial oversight should be limited to a review, not of the decision to conclude a DPA, but of the process followed in reaching it, more in the nature of judicial review to provide confidence and certainty in the process. Respondents reiterated the need for the prosecutor to retain primacy as the decision-maker in the process.

75. It is important to be clear that the proposed role of the judge in the DPA process is to provide independent scrutiny of the process in order to instil certainty and public confidence and ensure the proposed terms suitably address the alleged wrongdoing. We intend to build this judicial scrutiny into the entirety of the DPA process. The judge will not be trying an offence nor will they be sentencing the organisation. As a DPA is fundamentally based upon a voluntary agreement between parties, we do not propose that the judge would have any particular order-making powers or wider powers to amend the DPA or draft indictment themselves. They would, however, be able to suggest to the prosecutor ways in which the draft DPA might be amended which would then need to be agreed by both parties.

The preliminary hearing

76. There was strong support for the proposal that the preliminary hearing should take place in private, with 92% of respondents agreeing that this would be necessary to limit risks to organisations and the market in which they operate, and to ensure that any future prosecution is not jeopardised.

77. Five respondents were opposed to holding the preliminary hearing in private, emphasising the need for transparency and of ensuring public confidence in DPAs. A further response suggested that absolute judicial discretion should be retained to insist on a public hearing when in the interests of justice.

78. We recognise that a careful balance needs to be struck between the key importance of ensuring public confidence in the Agreement as a robust prosecutorial approach to criminal wrongdoing, and the need to provide parties with a level of certainty and confidentiality to negotiate the details of any Agreement. Having considered the responses to the consultation, we continue to be of the opinion that commercial organisations will be very unlikely to take the risk of engaging with the DPA process if it is possible that their position could be compromised prior to an Agreement being reached with the prosecution.

79. We consider that any decision by a prosecutor to enter into a DPA should be personally approved by the Director of Public Prosecutions or the Director of the Serious Fraud Office. This ensures that DPAs, which may

deal with offences of bribery, are aligned with the Bribery Act 2010 which requires the consent of the Directors before any prosecution can be launched. This approach also ensures that there is prosecutorial oversight of each Agreement at the highest level.

80. Holding the initial hearing before a judge will provide independent oversight of the process and appropriateness of a DPA. To ensure that the DPA process remains transparent, the judge will be able to provide reasons at the end of the preliminary hearing setting out whether they were satisfied that a DPA was, in principle, appropriate. This would remain confidential to the parties during negotiations, but would be made publicly available after a DPA had been approved, subject to any restrictions necessary to protect ongoing or future prosecutions.

We will

- make provision in legislation to ensure that that the Director of Public Prosecutions or the Director of the Serious Fraud Office must personally exercise the power to enter into a DPA
- formalise the process for holding the preliminary hearing(s) in private and before a judge in legislation

Judicial tests: 'in the interests of justice'

81. Three quarters of the responses to this question (46 out of 59) generally agreed with the proposal that the first test for a judge to apply at a preliminary hearing should be whether a DPA is likely to be 'in the interests of justice'. Three respondents felt that the test was too vague and that further guidance ought to be published on its meaning through the inclusion of a clear statement of the purpose of DPAs within the Code of Practice.

82. Ten respondents (17%) did not agree that a test of whether the DPA was in the interests of justice ought to be applied, three felt the proposed test to be too broad. Three others expressed concern that the test may create uncertainty by inviting the judge to substitute their judgement for that of the parties to the Agreement, and emphasised that it should be for the prosecutor to decide what is in the public interest with the judge restricted to a traditional 'judicial review' role.

83. Two responses proposed alternatives to the interests of justice test, the first suggesting other considerations that could be included, the second suggesting that it should be replaced by a wider "public interest" test.

84. The Government has noted the comments by respondents calling for further guidance as to how the interests of justice test would operate in practice. However, this is a broad concept which judges are used to applying and we do not believe that additional guidance on the application of this established legal principle is required.

Judicial tests: 'fair, reasonable and proportionate'

85. The responses to this question agreed (85%) with the proposal that the judge should apply a second test at a preliminary hearing as to whether the emerging conditions of a DPA are 'fair, reasonable and proportionate'. Four of the fifty eight responses called for guidelines on this test to ensure that the criteria for assessment were clear. Seven respondents (12%) opposed the application of this test, on the grounds that the terms appeared to be insufficiently precise.

86. One response expressed concern as to how the different elements of this test would be applied, particularly in relation to cross-jurisdictional issues.

87. One response rejected outright the application of any tests, proposing instead that the judge should be restricted to a purely supervisory role, assessing the procedural fairness rather than the content of the DPA to provide the prosecutor with greater flexibility in negotiations. However, another response suggested that this test was a crucial safeguard to reduce the risk of DPAs being rejected at the later hearing for reasons that could have been aired at the initial hearing, helping to reduce any potential uncertainty for commercial organisations.

88. Having considered the comments by respondents, The Government continues to be of the view that the role of the judge at this stage should be to consider whether, based on the evidence and information provided, the proposed terms are "fair, reasonable and proportionate". As with the "interests of justice" test, we do not propose to produce additional guidance on the application of this test as it is based on established legal principles that the courts are used to applying.

At the preliminary hearing, we will require that initial indications be given by the judge both as to whether a DPA would be "in the interests of justice" and as to whether the proposed conditions are "fair, reasonable and proportionate".

Contents of a DPA

89. We proposed that 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 proposed 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.
    - A **time period** for the duration of the Agreement of between one and three years.

90. The terms and conditions of a DPA would be specific to individual cases and to the issues 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;
    - an obligation to use all reasonable efforts to **make available to the prosecutor all relevant non-privileged information and material** such as the factual findings of an internal investigation and **interviews given as part of an investigation,** and to **provide access to witnesses** in relation to investigations against individual wrongdoers;
    - an obligation to **replace implicated individuals, or to pull out from the market in which the wrongdoing is admitted**;
    - an obligation to put in place **anti-corruption or anti-fraud policies, procedures or training** where none exist. The organisation would be required to **certify** that these had been successfully instituted and regularly reviewed and modified, and could be requested to provide **periodic reports** detailing the review of the policies, procedures and training, and the level of compliance. In more serious cases, an **independent monitor** may be appointed.

91. Taking into account the relevant facts, previous discussions and the views of the prosecutor, the financial penalty and other terms would be a matter for the judge to approve.

We asked

Question 10: Do you agree with the proposed possible contents of a DPA as outlined?

92. There was strong support for the proposed possible contents of a DPA, with 82% (fifty) of the sixty one responses to this question agreeing that the suggested terms were appropriate. A further seven respondents (11%) had no definitive view on whether they agreed with the proposed contents.

93. Four respondents (7%) did not agree with the proposed contents as outlined. One response raised particular concerns regarding the proposal for an organisation to provide ‘access to witnesses,’ which they saw as prejudicial to any individual who might be tried subsequently for a connected offence. The other three respondents were of the opinion that the conditions appeared unduly punitive and were unlikely to be attractive to businesses for this reason.

94. A number of respondents provided detailed comments on specific terms.

- **Statement of facts**: Four responses voiced concerns about this requirement, considering that the statement would equate to an admission of guilt, making a DPA an unattractive option for companies. However, two other responses specifically emphasised the importance of having both a statement of facts and clear reasons why the DPA has been considered appropriate set out in the Agreement.
- **Internal investigations**: Five respondents raised concerns about the protection of individuals during these investigations. One response emphasised that providing assistance with investigations should be a requirement for any organisation entering into a DPA.
- **Compliance**: Three responses agreed with the use of monitoring in appropriate cases, with a further response emphasising the need for any compliance programme to focus on ensuring that the commercial organisation complies with its legal obligations. One response raised concerns about the risks for companies having to recognise that they do not have in place proper anti-corruption and anti-fraud policies as this could be used in potential civil actions against them.
- **Financial penalty**: Three respondents commented on the reduction principle. This issue is considered in more detail in the Government's response to Question 11 on the penalty reduction principle.
- **Disgorgement payment**: Two respondents were of the view that the calculation should also take account of any amounts already "disgorged" by way of payment of compensation to victims. A further response sought clarity as to the basis used to calculate the benefit to the organisation when considering disgorgement payments.
- **Reparation**: One response advised that any reparation should take into account any prior, pending or future civil settlements with victims. A further response suggested that companies should not play a role in managing the process for paying reparations.
- **Costs**: Three responses suggested that costs should be included in the possible contents of a DPA.
- **Confiscation**: Two responses questioned how an Order of Confiscation would apply in a DPA context as they would generally only be available following a conviction.

95. We have considered the comments from respondents and welcome their support for the proposed terms of a DPA. We believe that it is essential for DPAs to be capable of being tailored to the particular facts of an individual case. To ensure that there is sufficient flexibility to allow both parties to agree a DPA which meets the requirements of the specific case, we do not intend to set out an exhaustive list of terms and conditions on the face of the legislation. However we will set out example terms to which parties and the courts may have reference. Judicial

scrutiny will provide the check and balance on the terms and conditions in each case.

96. However, the Government remains of the view that all DPAs must include a statement of facts attached to the Agreement to ensure openness and transparency. The statement will have been agreed by the commercial organisation before inclusion in the DPA and an admission of guilt will not be required. Further, whilst we do not propose to set a maximum or minimum limit for the duration of the DPA as this would depend on the individual circumstances of the case, each Agreement must specify an expiry date upon which the DPA will cease to have effect (if it has not already been terminated following breach or the finding of new evidence). We consider that this expiry date must be set so that both parties have clarity regarding the duration of the deferral period.

- We will require all DPAs to include a statement of facts and an expiry date upon which the Agreement will cease to have effect.
- Legislation will not prescribe an exhaustive list of terms and conditions which all DPAs must feature, but will set out example terms which a DPA may include.

Reduction in financial penalty

97. We proposed that there where an organisation co-operates in proceeding to a DPA, the financial penalty term of the Agreement should be able to be reduced. We considered that this would incentivise commercial organisations to co-operate with investigators, and would reflect the time and resources saved by the criminal justice system in not bringing the case to trial.

98. We also proposed that the maximum reduction in the financial penalty imposed as part of a DPA should be set at one third of the likely fine that would have been imposed on conviction in a contested case. This figure reflects the recommended maximum in the scale for reduction of sentence for a guilty plea indicated at the first available opportunity, and therefore achieves parity between ordinary criminal proceedings where a timely plea is entered and organisations entering into a DPA.

We asked

Question 11: 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?

99. There was overwhelming support from respondents for a reduction principle relating to the financial penalty element of a DPA, with 94% of the fifty-seven responses to this question agreeing that it would

incentivise commercial organisations to self-report wrongdoing and co-operate with prosecutors.

100. Three responses suggested that a reduction principle, or a financial penalty system, may not be appropriate in DPA cases. One response noted that, in the US, DPAs are often used as a revenue raising exercise rather that a sanction against corporate misdemeanour, and expressed concern that adopting a penalty system may lead to the same outcome in the UK. A further response noted that to some extent a DPA, as an alternative to prosecution, is itself credit for co-operation and ought to provide a sufficient incentive.

101. One response suggested that any reduction should not be restricted to the financial penalty element and that, in order to provide an incentive, it would be more appropriate to apply mitigation across a general scale.

102. We also received a range of views on the appropriate level of reduction of the penalty amount. 57% of respondents disagreed with the proposed maximum reduction of one third. However, there was no consensus over an alternative level, with respondents suggesting that both an increase (eighteen) and a decrease (four) in the proposed maximum level of reduction may be appropriate. A further ten respondents proposed that the level of reduction should be calculated on a case by case basis or left to the judge to apply a sliding scale according to mitigating and aggravating circumstances.

103. Having considered the responses to this question, the Government remains of the view that a reduction principle, relating only to the financial penalty element of a DPA would incentivise organisations to co-operate with investigators and prosecutors in working towards the conclusion of a DPA, and would reflect the benefits of an organisation voluntarily entering into a disposal that would save the cost and time to the state of a bringing the case to trial.

104. It is important to be clear that the reduction is not the only incentive for an organisation to enter into a DPA – the most significant incentive and benefit to an organisation is the avoidance of a prosecution and potential criminal conviction. Any reduction could only be applied to the financial penalty term, but the level of an organisation's co-operation could also be reflected in other aspects of a DPA, for example through flexibility in relation to whether or not there should be monitoring and its duration.

105. We have noted the concerns raised by respondents that the maximum penalty level of one third may not prove to be sufficiently attractive in practice. The Government remains of the view that a maximum reduction of up to one third would provide a clear and transparent basis for negotiations about the financial penalty and ensure that the penalty was proportionate to the seriousness of the alleged misconduct. The proposed maximum penalty reduction will mirror the principle of a recommended maximum in the scale for a reduction of sentence for a guilty plea indicated at the first reasonable opportunity.

We will:

- Allow for a reduction in the financial penalty element of a DPA.
- Provide for any reduction to mirror the reduction available for a guilty plea at the first reasonable opportunity were the organisation to have been prosecuted. This would be calculated by reference to relevant sentencing guidelines.

Judicial approval of final Agreement

106. In our consultation, we suggested that the final approval stage should 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. The judge would then be invited to approve the DPA in open court, at which the Agreement could be publicly outlined and explained, thereby ensuring openness and transparency. The timing of the final hearing might be arranged to coincide or fit with other relevant disposals proceedings which may be overseas. Once signed, the Agreement and statement of facts would be binding on the commercial organisation and would be admissible in subsequent proceedings.

107. At the same time as the formal approval of the Agreement in open court, the formal laying of the charge or indictment would take place. 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 of the DPA.

108. 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 or future related prosecutions or investigations.

109. If a draft DPA is not approved at the 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.

110. 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, 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.

We asked

Question 12: Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?

111. An overwhelming majority of respondents to this question (93%) supported the proposal in the consultation paper that the final stage of the DPA process should take place in open court. A number of responses noted that it would be essential for consistency and the maintenance of public trust that DPAs be scrutinised and approved by a Crown Court judge, in public, before they are made.

112. Three respondents suggested that, whilst the Agreement should be made public, all discussions and hearings should remain in private and between the parties involved, due to the risk of undermining either the market in which the organisation operates or of damaging reputation of the organisation should the content of these discussions be made public. A further response suggested that greater clarity was necessary regarding the extent to which the terms of the DPA and the statement of facts would be made public.

113. One response suggested that, whether the hearing was public or private, safeguards were needed to preserve legal professional privilege between companies and their legal representatives.

114. The Government remains of the view that it would be appropriate for the final approval stage of the DPA process to take place in open court. It is essential for transparency, consistency and for maintaining public trust in the DPA process that DPAs be scrutinised and properly approved by a Crown Court judge in a public forum.

115. We consider that the final approval stage should 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. This may include updating the judge on the progress of associated prosecutions or international hearings and implications for the timing of the final hearing in open court.

116. Charges will be laid in the Crown Court without the need for any prior involvement of a magistrates' court by virtue of a modified procedure for preferring a voluntary bill of indictment to which the court could consent only where it has already approved the DPA and the DPA has subsequently been made.

117. In order to ensure full public transparency throughout the process, we also consider that, upon approval of the DPA by the court, the prosecutor should be obliged to publish the final Agreement and details of rulings made at the final hearing and any previous hearings, including the reasons given. At the end of the DPA process, the prosecutor should similarly be obliged to publish details of how the terms and conditions of the Agreement have been complied with by the organisation. In the event of any breach, variation or termination of the Agreement, the prosecutor

will also have to publish details of the facts and the approach that has been taken by the prosecutor and the court. All these publication requirements would be subject to any necessary protections in respect of ongoing or future related proceedings.

We will:

- Require the final agreement to be approved by a judge, in open court.
- Set out a mechanism to lay an indictment without the need to go back to a magistrates' court.
- Oblige the prosecutor to publish (subject to any necessary protections in respect of ongoing or future related proceedings):
    1. The final Agreement and court rulings upon approval of the Agreement;
    2. Details of how the terms and conditions of the DPA have been complied with by the organisation at the end of the DPA process;
    3. Details of the facts and approach taken the event of any breach, variation or of termination of the Agreement

Variation of a DPA

118. We proposed that provision be made to deal with circumstances where a commercial organisation fails to comply, either fully or in part, with any aspect of a DPA. As a DPA is a form of 'agreement', we proposed a range of options for considering and dealing with non-compliance. The consultation invited views on what tools and options should be available to deal with this situation.

119. Where a DPA can no longer be complied with or within the stated time frames, it was proposed that there should be mechanisms available to provide for reconsideration of the DPAs terms. The consultation document invited views on three different options for dealing with a change of circumstances and a possible amendment of terms.

    - Applying to a judge to consider a variation of the DPA.
    - Permitting prosecutors to vary the terms without recourse to the court.
    - Permitting parties to reconsider the terms of the DPA, potentially including the ability to make mutually agreed amendments.

120. Although these mechanisms were initially proposed to deal with instances where the commercial organisation experiences a change in circumstances, we recognised that there is a potential for these mechanisms to go further and to apply in cases of non-compliance or breach.

Question 13 – 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?

Question 14 – Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?

Question 15 – 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?

121. There was general agreement amongst the responses to these questions (69%) that the court should determine whether a variation to a DPA should be permitted. A majority of respondents, 72%, also felt that it should be possible for parties to amend the DPA within the limits defined by the DPA. There was only marginal support (36%) for the proposal that prosecutors should be able to vary the terms of the DPA. There was no consensus over the appropriate extent of any prosecutorial power to vary an Agreement.

122. Nineteen responses (32% of the overall total for these questions) suggested that parties should initially be able to propose agreed amendments, but that it should be the responsibility of the court to approve any variation. They proposed that any provision to enable the parties to vary the terms of a DPA should be clearly defined, to avoid organisations and prosecutors attempting to make substantial changes to the terms of a DPA after it had been approved in court.

123. Fourteen respondents (25%) noted that if parties were to be given the ability to amend, or propose amendments, to a DPA, then any disagreement over the proposed amendment ought to be referred to a judge for determination. One response recommended that this process ought to be set out in the DPA Code of Practice.

124. A number of responses expressed reticence at the potential to give parties any ability to vary the material aspect of the DPA without seeking the approval of the court, due to the importance of the imposed provisions and the sums of money involved.

125. We received one response which questioned whether any variation should ever be acceptable, drawing parallels with the treatment of individuals in ordinary criminal cases, where no review of the level of a fine would take place if, for example, the defendant became unemployed.

126. Having considered the responses, the Government is of the opinion that variation of any term in the DPA should be permissible only in exceptional circumstances. These should be limited to those situations where not varying the DPA is more likely than not to lead to breach of the DPA, and the circumstances giving rise to the potential breach could not have been foreseen at the time that the DPA was agreed. It should not be possible to vary the DPA without the approval of the court, to ensure that the public interest and public confidence is protected. The court's power will be

limited to either approving or refusing to approve the proposed variation. Where it refuses to approve the variation the original Agreement will stand.

127. When considering any variation to the Agreement the parties should determine whether and if so how the DPA might be amended to ensure compliance with its terms. The prosecutor should then put proposed variation before the court to determine whether the proposals are in the interests of justice and that any new or varied terms are fair, reasonable and proportionate. Where the parties cannot reach agreement as to how the terms of an Agreement ought to be varied, then the original terms of the DPA would stand. If the commercial organisation is not able to fulfil these terms, the prosecutor would need to consider whether to initiate formal breach proceedings.

We will:

- Ensure that any variation must be approved by the court who will apply the same judicial scrutiny tests as during the pre-Agreement stages.

Formal breach proceedings

128. It is not anticipated that there will be many instances where an organisation will be unable to uphold its obligations under a DPA that cannot reasonably be resolved through variation. However, to ensure that this eventuality was covered, the consultation invited views as to whether there ought to be a formal process for dealing with breach.

129. We proposed that it should be for the judge to determine, on referral from the prosecutor, whether a breach has occurred and the extent of such a breach. It was anticipated that the determination of a breach would require a factual finding proved to the criminal standard (i.e. beyond reasonable doubt), but would not amount to a conviction or a criminal offence. Following such a finding the potential consequences would include:

    - A financial penalty
    - Additional or varied conditions;
    - Extension of the period of the DPA; or
    - Termination of the DPA.

130. We proposed that it should be open to the prosecutor to determine whether or not a breach is of such a nature as to require the case to be brought back to court, or to seek to have the Agreement terminated and the suspension on the indictment lifted.

131. Any breach proceedings would focus on the failure of the commercial organisation to abide by the terms of the DPA, rather than on the original

offending. Any additional penalty imposed by a judge would be based on the level of default, not on the original offending.

132. In developing our proposals we considered, and discounted, characterising the breach of a DPA as a criminal offence in itself. However, although a breach would not constitute a criminal offence, it would be for the prosecutor to decide whether to revive the substantive prosecution of the commercial organisation in respect of the underlying offence.

We asked:

Question 16: Do you agree that there should be provision for formal breach proceedings and that it should operate as described?

133. The comments received in response to this question overwhelmingly supported our proposals, with 97% of the fifty eight respondents agreeing that formal breach proceedings should be set out as part of the DPA process. One response was neutral on whether there should be proceedings for breach. Only one response did not agree that there should be freestanding breach proceedings on the basis that a DPA is not a Court Order.

134. We received a range of comments on the proposed process by which breach proceedings should operate. 94% (fifty out of fifty-three) of responses agreed that it should operate as described in the consultation paper. Of the remainder, one response suggested an amendment to the process to distinguish between different levels of breach, one response emphasised that it should be for the judge to determine whether a breach has occurred, and one response suggested that, rather than enter into formal breach proceedings, and the substantive prosecution should be revived.

135. Seven respondents commented on the appropriate standard of proof for determination of a breach. Opinion on this issue was split, with three responses suggesting it should be to the criminal standard, and four considering it ought to be determined on the balance of probabilities.

136. Nine responses commented on whether a breach of a DPA ought to amount to a criminal offence, with seven of those agreeing that it should fall short of being viewed as criminal. One respondent expressed concern that an organisation may not take the DPA seriously if they know they are unlikely to be subject to criminal prosecution. The Government remains of the opinion that a breach should not amount to a criminal offence, and that the threat of prosecution should remain linked to the initial wrongdoing on which the DPA is based.

137. We welcome the support from respondents for our proposals, and their agreement that there should be formal breach proceedings in place for DPAs. The Government remains of the opinion that the prosecutor should have discretion to apply to the court to terminate a DPA on the basis of any breach of its terms.

138. However, without prejudice to this overarching discretion, we consider that the DPA itself should be able to specify the consequences for a minor breach of certain of its terms. These consequences would be applied by the prosecutor without the need to have the matter determined by the court. The number of these terms will be small, and limited to objective matters (for example a specified financial penalty for late compliance with any of the terms) in respect of which a DPA would be capable of specifying a consequence with absolute certainty.

139. The consequences for dealing with a breach of this type will have been expressly approved by a judge at the time the original DPA was made who will ensure that there is proper judicial scrutiny of these arrangements. To ensure full transparency, we will require the prosecutor to publish the fact that any instance of breach has taken place and the nature of the action taken.

140. For all alleged breaches of a DPA (even those provided for in the terms of the DPA), the prosecutor should have the ability to refer the alleged breach to the court for a determination of whether the Agreement has in fact been breached. Having considered the comments received from respondents, the Government considers that the civil standard of proof should apply when determining breach, as the issue is more closely comparable to a civil dispute where a contractual obligation has been breached rather than a finding of criminal liability. The sole question for the court should be whether, and to what extent, the DPA has been breached, with no consideration of the underlying alleged offence. Such consideration would be both irrelevant and potentially prejudicial to the fairness of any future prosecution. Any factual determination by the court in relation to breach would be binding on the parties to the DPA.

141. The court would also be able to lift the suspension on the indictment where the DPA has been terminated. This would be a separate decision from the decision to terminate and may take place at the same time or within a reasonable period in future if the prosecution needed more time to prepare the case for trial. The Government is clear that it should remain for the discretion of the prosecutor to be able to apply to have the suspension lifted.

142. We do not propose that a judge would be able to impose any sanction additional to those set out in the original Agreement in the event of a breach, as this would sit uneasily with the independent scrutiny role of the judge, and would go against the ethos of the DPA process which depends on voluntary cooperation between parties.

We will:

- Give the prosecutor discretion to refer any alleged breach to the court for determination.
- Allow for a DPA to set out the consequences for a minor breach of certain of its terms, which can be administered by the prosecutor without the need to go before a judge.
- Set out in legislation the options available to the court following the determination of a breach.
- Set out the process for breach in the DPA Code of Practice for Prosecutors

Judicial discretion to terminate a DPA

143. In some circumstances, it will be necessary to terminate a DPA and recommence the substantive prosecution. In our consultation, we proposed that where a decision has been made to prosecute following breach or non-compliance, a prosecutor could ask a judge to terminate an Agreement. A termination could also be sought where a decision to enter into a DPA by the prosecutor had been successfully challenged by a third party in the Administrative Court and the prosecutor's decision had been quashed. We suggested that if formal breach proceedings were brought, discretion might lie with the judge to insist that the Agreement be terminated.

144. It is important to be clear that it should be open to the prosecutor to determine whether or not a breach is of such a nature as to require the case to be brought back to court or to seek to have the Agreement terminated and the suspension on the indictment lifted.

145. Following termination of a DPA, it would be for the prosecutor to assess whether to revive the substantive prosecution in line with the Code for Crown Prosecutors. If the substantive prosecution is revived and the commercial organisation is subsequently convicted of the substantive offence, the judge would need to consider when sentencing 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 asked:

Question 17 – Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?

146. We received fifty-four responses to this question, of which 81% of responses agreed that the judge should have discretion, following a breach, to insist that a DPA be terminated. A number of respondents emphasised that the discretion should be tightly circumscribed, but that there should not be an obligation to insist on termination.

147. Five responses disagreed with this proposal, who felt that the decision to terminate a DPA was too closely linked to the decision to revive the substantial prosecution, which should rest with the prosecutor, and therefore permitting the judge to terminate a DPA would blur the boundaries between the role of the prosecutor and the role of the judge.

148. We received four responses which commented on the proposed approach to dealing with a breach, but which did not make clear whether they agreed or disagreed in principle with our proposal. Two respondents stressed the need to preserve the distinction between judge and prosecutor, and that the termination of a DPA by a judge should only arise on the request of one, or both, of the parties. However, a further response emphasised the need for mechanisms to be put in place to ensure judges are made aware of any potential breach. The fourth response suggested that the judge should only insist on termination in exceptional circumstances.

149. We received one response which argued that any provisions on breach were unnecessary as DPAs should not be introduced in any event.

150. We consider that it should be left to the prosecutor's discretion to decide whether or not a breach is of such a nature as to require the case to be brought back to court, and in the event that the court determines that a term of the DPA has been breached, to seek to have the Agreement terminated.

151. Having considered the responses to the consultation, the Government remains of the opinion that, where it is in the interests of justice to do so, the court should be able to terminate the DPA on its own motion.

We will:

- Empower the court to terminate a DPA on its own motion following breach, where it is in the interests of justice to do so, and following a referral by the prosecutor of an alleged breach to the court for determination.

Admissions

152. The information gathered or produced during negotiations between the prosecutor and commercial organisation during the DPA process is likely to be useful in any subsequent criminal prosecution of a commercial organisation, an individual, or in civil proceedings brought by parties who have suffered loss. In our consultation, we set out separate proposed approaches for dealing with this information and the status of that information in subsequent criminal and civil proceedings. As approved DPAs will be publicly available, our general position was that any limitations on the uses to which the facts or the substance of an Agreement can be put should be kept to a minimum. We made it clear that the DPA would not amount to a criminal conviction even where a

concluded DPA includes admissions which may tend to suggest an offence has been committed.

153. In regards to criminal proceedings, where a DPA has been concluded, we proposed that any information should in principle be admissible against the commercial organisation. In criminal proceedings against individuals, we proposed that any information provided by the commercial organisation during the DPA process could be used against the individual, but any admissions made by the commercial could not be used as conclusive findings of fact against an individual accused.

154. We proposed that prosecutors should treat documents created by the commercial organisation in the course of DPA discussions as if obtained under compulsion, and would not be able to use these in relation to the prosecution of a commercial organisation or individual unless an exception applied, namely:

- where the organisation makes a statement during the prosecution of the underlying offence in respect of which the DPA was concluded or adduces evidence inconsistent with a statement made in the course of DPA discussions;
- in the prosecution of an offence other than the wrongdoing which is the subject of the DPA;
- as a basis on which to make enquiries or in the gathering of further evidence to be used in proceedings against the commercial organisation or any individual.

155. In regards to civil proceedings, we recognised that admissions could be relevant to alleged civil liability, and that both the fact of, and the terms of a signed DPA should in principle be admissible in civil proceedings as hearsay evidence, with the court determining the weight to be attached to such evidence in the usual way. We suggested that as DPAs ought to be treated as seriously as a criminal conviction, the agreed facts should be subject to a rebuttable presumption of truth.

We asked:

Question 18: Do you agree that the above proposals regarding admissibility are appropriate?

156. There was a range of opinions on whether the proposed approach to admissibility is appropriate. Half of the 59 respondents to this question agreed with the proposals, although a number made suggestions as to where they could be improved. Three responses emphasised that in any future criminal proceedings it should be for the judge to direct the jury as to the possible reasons for entering into a DPA, and that they would need to explain that the facts in the DPA may not represent the complete picture.

157. Four responses (7%) supported our proposals on admissibility insofar as they applied to civil cases, but disagreed with the approach in relation to criminal proceedings. Two respondents proposed that any evidence provided in the course of discussions over DPAs should not be admissible unless obtainable through compulsory evidence gathering powers.

158. We received seven responses (12%) which commented on the proposals but which were neutral on whether or not they agreed with them. One response suggested that further clarity on the appropriate approach was necessary, whilst another suggested that the common law principle against self-incrimination ought to be adopted.

159. A third of responses disagreed with the proposals set out in the consultation, on three broad grounds. Five respondents suggested that the normal rules of criminal evidence should apply, with one response preferring the use of admissibility provisions on compulsory evidence gathering powers. Seven responses expressed concern that there did not appear to be any limitation on the use of evidence in other circumstances, including in relation to other jurisdictions. Two responses emphasised the need for more detailed provisions on the appropriate status of admissions where an individual is being prosecuted. A further response was of the opinion that there were insufficient safeguards to prevent a prosecutor from commencing a DPA, obtaining the necessary evidence, then terminating the process and continuing with a full prosecution.

160. Four of the responses to this question (7%) commented on the impact of the proposed approach to disclosure on individuals, and suggested that certain safeguards, or limited immunity provisions, would be needed. One response suggested that any notes of interviews with individual employees in the course of investigating wrongdoing should be confidential.

161. It is important to be clear that where a DPA has been entered into, subject to any necessary restrictions to avoid prejudicing future prosecutions, it will be a matter of public record that negotiations will have been entered into. The Government therefore remains of the opinion that the limitations on the use to which the facts or substance of an Agreement can be put should be kept to a minimum, both in relation to subsequent criminal prosecutions and for any civil proceedings brought by third parties. Having considered the comments provided in response to this question, we believe that the proposed approach to the admissibility of evidence in future proceedings' following the creation of a DPA is the correct one.

162. However, following the closure of the consultation and in light of the responses we have received, we recognise that the admissibility of evidence in future proceedings should depend on whether or not a DPA is concluded. We therefore intend to cater for cases where a DPA is concluded and those where it is not.

Subsequent criminal proceedings where a DPA is concluded

163. Where a DPA has been concluded, material provided in the course of DPA negotiations (as opposed to admissions made during those negotiations), should be admissible in the subsequent criminal prosecution of both the commercial organisation and of an individual.

164. With regards to admissions made during DPA negotiations (including the statement of facts), this material can be used in criminal proceedings against a commercial organisation (for example following breach of the DPA), as conclusive evidence of the fact admitted. On the other hand, should criminal proceedings subsequently be taken against an individual, admissions made during DPA negotiations should not be capable of being relied upon during those proceedings. It would be unfair to rely upon this information in the criminal prosecution of an individual as such information could not be treated as an admission by the individual. However, the information in the statement of facts will be useful in any prosecution and we consider that the existing regime on admissibility of hearsay evidence will be sufficient to allow prosecutors to use such evidence in criminal proceedings where relevant.

165. It is important to be clear that entering into a DPA will not remove other grounds on which to refuse disclosure such as legal professional privilege, and existing law and practice on this matter will continue to apply. The Government does not intend to make it a condition of the DPA that the commercial organisation should waive privilege. The principle that an accused's right to refuse to disclose information subject to legal professional privilege will continue to apply in its current form.

Subsequent civil proceedings where a DPA is concluded

166. Having carefully considered the responses received to the consultation on this issue, the Government remains of the opinion that the fact that a DPA has been entered into, the DPA itself and the statement of facts should be capable of being treated as hearsay evidence in civil proceedings. It would therefore be up to the court to determine the appropriate weight to give such evidence in the usual way. However, claimants should not be given access to other information and material obtained during the DPA process other than in accordance with the existing legal framework.

Criminal proceedings where a DPA is not concluded

167. As the DPA has not been concluded, there will be no agreed and approved statement of facts. Therefore we believe (subject to what we say in the next paragraph) that a prosecutor should not be able to rely either on the fact that it conducted DPA negotiations with the commercial organisation, or on any draft DPA created during the negotiations in any future criminal proceedings against the organisation. However, prosecutors should not be prevented from relying on evidence obtained from enquiries pursued as a result of anything said in any unsigned statement of facts/draft DPA. This approach would not prevent pre-existing material provided by the commercial organisation during the

DPA process from being admissible in proceedings for any offence (subject to existing rules on admissibility).

168. We envisage, however, that a narrow range of material (including a draft DPA and statement of facts) created in the course of unsuccessful DPA negotiations should be capable of being used against the organisation in any subsequent criminal prosecution. This would only be admissible to the extent that it is inconsistent with a statement made by the organisation in those proceedings or where the organisation is being prosecuted for the provision of false or misleading information.

Civil proceedings where a DPA is not concluded

169. In civil proceedings, where no DPA is concluded, the confidentiality of the DPA process will mean that any civil claimants are unlikely to know that the prosecutor and commercial organisation have held discussions. Therefore it is unlikely that a third party would be aware that there may be any material in respect of which it might seek disclosure. But in the event that it does become aware of the existence of such material, it should not have access to it unless there are other legal obligations requiring the prosecutor to disclose it (e.g. a court order).

170. In civil proceedings, where no DPA is concluded, the confidentiality of the DPA process will mean that claimants are unlikely to know that the prosecutor and commercial organisation have held discussions. Therefore third parties should not have access to material provided by the commercial organisation where no DPA is concluded unless there are legal obligations requiring the prosecutor to disclose.

We will:

- Make provision on the admissibility, in criminal proceedings, of material related to the DPA process.

Disclosure

171. We proposed that common law principles regarding disclosure of evidence by the prosecutor to the defence should be applied to the DPA process, reflecting the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud. The common law rules require a prosecutor to consider what disclosure justice and fairness require.

172. In our consultation, we explained that statutory disclosure obligations on the prosecutor only arise following the formal institution of criminal proceedings, so would not apply during the DPA process.

We asked:

Question 19: What are your views on the appropriate approach to disclosure in the context of DPAs?

173. We received fifty two responses to this question. There was general agreement amongst 63% of respondents that, as proposed, the common law principles regarding disclosure of evidence to the defence should be applied to the DPA process.

174. Of those that responded to this question, 11 (21%) disagreed with the proposed approach to disclosure. These respondents proposed a range of alternative approaches to disclosure, including:

- Adopting the same regime as applies in ordinary criminal proceedings
- Developing a bespoke disclosure regime for DPAs
- Mirroring the procedure for pre-charge plea discussions as set out in the Attorney General's Guidelines
- A restricted test confining the obligation on the prosecutor to disclosing obviously undermining material (rather than the standard disclosure test which obliges the prosecutor to disclose any material which might reasonably be considered capable of undermining the case for the prosecution)

175. One response suggested that there should be no need for disclosure where the organisation has self-reported, as they would know the facts against them, thereby relieving the prosecutor of the burden of disclosure, whilst a number of responses suggested that the prosecutor should be under a statutory obligation to disclose any unused or undermining evidence prior to a DPA being entered into. However, four responses noted that any disclosure obligations should not place an undue burden on either party and that the proposed disclosure regime appeared to be the fairest approach.

176. Having considered the responses to the consultation and the clear support for the proposed approach, the Government continues to be of the opinion that disclosure obligations reflecting those at common law should apply throughout the DPA process. The prosecutor should, therefore, consider whether the interests of justice and fairness require disclosure of any material. In particular, the prosecutor should ensure that the organisation is not misled as to the strength of the prosecution case so that the organisation can make a fair assessment as to whether entering into a DPA is in its interests.

177. It is important to recognise that where negotiations have not resulted in a DPA, or where a DPA has been breached, a criminal prosecution of the commercial organisation may be commenced. Further, whether or not a DPA is concluded, related individuals may face prosecution in their own right. The Government believes that the existing disclosure obligations at common law and under the Criminal Procedure and Investigations Act

1996 are adequate to deal with the material generated by the DPA procedure in such cases and does not consider that there is a need to make further special provision.

178. In some circumstances, this may result in a prosecutor being obliged to disclose material handed over to it during DPA negotiations to other defendants if it is relevant to their cases. We recognise that this may act as a disincentive to commercial organisations contemplating whether to enter into a DPA, but we do not propose to modify any existing obligations in this respect.

We will:

- Ensure that appropriate provision is made to establish a just and fair disclosure regime to DPAs that reflects the existing regime under common law and the Criminal Procedure and Investigations Act 1996.

Susceptibility to Judicial Review

179. The exercise of the Crown Court's jurisdiction in respect of "matters relating to trials on indictment" cannot be the subject of judicial review proceedings. We believe that the role of the court in relation to a DPA should be covered by the same prohibition, for the same reasons as for the prohibition that applies to a decision of the Crown Court to approve a DPA, and in light of the collaborative nature of the DPA process. We did not propose that there should be a right of appeal in relation to the outcome of a preliminary hearing.

180. However, a decision on whether or not to prosecute would remain susceptible to judicial review if that decision is founded on unlawful policy, results from a failure to act in accordance with a prosecutor's own settled policy, or is perverse. We do not propose to alter the existing law as to when a prosecutor's decision (including a decision as to whether to prosecute or instead enter into a DPA) may be challenged.

We asked

Question 20: Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?

181. A strong majority (82%) of the fifty responses to this question agreed with our proposals that the decision to approve a DPA should not be subject to judicial review. One response suggested that this arrangement ought to be set out in the DPA Code of Practice for Prosecutors.

182. Seven responses (14%) disagreed with our proposals. Of those that provided an explanation for their position, five responses expressed concern that this approach would still leave some elements of the DPA

183. Having considered the responses to this question, the Government remains of the view that DPAs should be covered by the same prohibition concerning matters relating to trials on indictment and be subject to the relevant consequential protections that would apply, in order to avoid opportunistic challenges that risk de-railing the DPA process. However, a prosecutor's decision would, as at present, remain capable of being challenged.

- We consider that the existing prohibition on judicial review in relation to the jurisdiction of the Crown Court concerning matters relating to trials on indictment should extend to DPAs.

Retrospective application of DPAs

184. In order for the benefits of DPAs to be realised as soon as possible, we proposed that DPAs should be available in relation to conduct which took place before the commencement of any legislation introducing them, including in relation to any investigations or proceedings commenced before the introduction of the scheme.

We asked

Question 21: Do you agree that deferred prosecution agreements should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

185. There was strong support for this proposal. 89% of respondents agreed that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them.

186. We received four responses (7%) noting that there may be practical difficulties in applying DPAs to historic wrongdoing, and that organisations which had been prosecuted before the availability of the DPA may perceive this approach to be unfair. However, it is important to be clear that there can be no guarantee that the DPA process would have been appropriate for any particular case prosecuted before the commencement of DPA provisions, nor that an organisation would have wanted to enter into the voluntary DPA process.

187. Three further responses (5%) voiced concerns that as DPAs are to some extent punitive in nature, it may be possible to argue that it is retrospective punishment and therefore unlawful. However, we are clear that DPAs would not create any additional criminal liability, but rather provide a new mechanism as an alternative to prosecution for dealing

with existing criminal liability. As parties would voluntarily enter into a DPA, the application of this tool should not be dependent on the date of its legislative commencement.

188. Having considered the responses to this issue we consider DPAs should be available for past conduct in order to realise their benefits as soon as possible and by making provision in this respect there would be no unfairness. However, their availability for past conduct will be limited only to cases where criminal proceedings have not yet commenced.

We will:

- Ensure that DPAs are available for conduct that took place before the commencement of legislation providing for them where no proceedings have yet commenced against the organisation.

Process for DPAs

189. We sought comments on the overall process for DPAs outlined in the Government's consultation paper, in addition to the above questions which covered elements of the process in greater detail, and invited suggestions on how it may be improved whilst supporting the overall objective of tackling corporate economic crime in a transparent and consistent manner.

We asked

Question 22: 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?

190. We received thirty six specific responses to this question, in addition to the specific comments provided on each aspect of the proposals in response to Questions 2 to 21. Fifteen respondents (42%) agreed with the process for DPAs at least in part, although one respondent called for further consultation.

191. A further sixteen responses (43%) did not provide an opinion on whether or not they agreed with the proposed process, but did comment on how the proposals may be amended or improved. The suggestions included a number of possible amendments to the proposed process, a call for a clear framework for judges, prosecutors and commercial organisations, and further consideration of the process in regards to individuals.

192. Three respondents took this opportunity to make clear their support for the strong involvement of the judiciary in the process, with one respondent applauding the way that the United States approach to DPAs had been modified in the consultation to reflect the different constitutional

arrangements in England and Wales. One response welcomed the involvement of the judiciary, and recognised that a full merits-based review would create uncertainty for commercial organisations considering whether to agree to enter into a DPA.

193. Two respondents suggested that further guidance should be provided on when it might be appropriate to enter into a DPA, in particular the regard that ought to be had to plea deals in other jurisdictions.

194. We received six responses which disagreed with the proposed process for DPAs as outlined in the consultation document. There was no common reason for this opposition, and each respondent put forward a different justification. One response suggested that there would be insufficient incentives to enter into negotiations, whilst another expressed concern over the lack of opportunities for individuals to participate in the DPA process. A further response was of the opinion that the proposed process for DPAs may turn out to be as equally lengthy and resource consuming as a full prosecution.

195. We welcome the positive and instructive comments from respondents to this question, and have given careful consideration to how the proposals may be refined in light of the suggestions. There were a number of common themes that emerged from the responses to this question. These are all dealt with in further detail elsewhere in the Government's response to the consultation, and include:

- The proposed possible contents of a DPA. This issue is considered in the Government's response to Question 10.
- The role of the judge in entering into a DPA. This issue is considered in further detail in the Government's response to Questions 7–9 and to Question 12.
- The guidance available to commercial organisations on DPAs. This issue is considered in further detail in the Government's response to Questions 3, 4 and 6. The Government expects that further engagement will take place on this issue.
- The status of any admissions made during the course of negotiating a DPA. This issue is considered in the Government's response to Question 18.

The Government remains of the opinion that the proposed process for DPAs will enable prosecutors to tackle corporate economic crime in a transparent and consistent manner

We will:

- Ensure that the process for DPAs is clear, practical and supported by clear guidance which ensures organisations, prosecutors and the public have a clear understanding as to how they operate.

Further comments

196. We sought general comments on DPAs to cover any issues that were not specifically addressed in the consultation documents.

We asked

Question 23: Do you have any further comments in relation to the subject of this consultation?

197. We received thirty-five responses to this question raising a wide range of issues, including:

- International issues (8 responses – 23%).
- Alternatives to a DPA (6 responses – 17%).
- The potential to extend the scope of the proposals and specifically to provide for regulators to enter into DPAs (6 responses – 17%).
- The potential for companies entering into a DPA to be disbarred from public procurement tenders (4 responses – 11%)

International issues

198. Eight responses (23%) to this question commented on the wider international element of the introduction of DPAs, in particular the relationship with, and the use of DPAs in, the United States. All of these respondents emphasised the need for greater international co-operation over any attempts to tackle corporate economic crime. Respondents were, in particular, eager to ensure that sufficient consideration was given to the issue of double jeopardy.

199. The Government has fully considered the international context surrounding the use of DPAs in England and Wales, both in the United States and more widely. It is important to ensure that there are as few barriers to multi-jurisdictional cooperation as possible. We consider that the introduction of DPAs will provide prosecutors in England and Wales with a flexible tool that can be used to tackle multi-jurisdictional cases and conduct negotiations with overseas prosecutors more effectively, particularly given the need for a timely resolution in such instances.

Alternatives to a DPA

200. Six responses (17%) suggested that further consideration ought to be given to the possibility of adopting Non Prosecution Agreements (NPAs), which were expressly ruled out in the consultation, as a tool for dealing with corporate economic crime. However two respondents emphatically endorsed the Government's approach regarding NPAs and agreed that they would not be appropriate as a tool in England and Wales.

201. Two respondents emphasised the benefits of Civil Recovery Orders (CROs) and noted that there would continue to be circumstances where these would be the appropriate tool. However, another respondent

specifically noted that DPAs offer a better solution to the challenge of tackling corporate economic crime than CROs.

202. The Government recognises that CROs will continue to be an appropriate option in some cases where a criminal enforcement sanction is not pursued or available. However in the majority of cases of economic crime we do not consider that civil recovery provides a tough enough response to wrongdoing or justice for victims of the unlawful conduct.

Scope

203. This issue considered in further detail in the Government's response to Question 2 above.

Debarment

204. Four respondents (11%) raised concerns over the potential for DPAs to result in debarment from public procurement tenders. It is important to be clear that as a DPA is not a criminal conviction, DPAs will not trigger mandatory debarment under the EU public procurement regime.

205. However, DPAs may be a potential factor in deciding whether or not to exclude an organisation from public procurement tenders on a discretionary basis, as the activities covered by a DPA may well be sufficient grounds for exclusion on a case by case basis. As DPAs are a tough response to wrongdoing by organisations that would otherwise face prosecution and a potential criminal record, the Government remains of the opinion that, if an organisation's wrongdoing is considered to be sufficiently serious to result in discretionary debarment, then the organisation in question should suffer the full consequences of that wrongdoing.

Impact Assessment

206. We published an Impact Assessment alongside our consultation paper, setting out the expected costs and benefits of DPAs, and invited comments in relation to its contents.

We asked the following questions:

Question 24: Do you have any comments in relation to our Impact Assessment?

Question 25: Could you provide any evidence or sources of information that will help to understand and assess those impacts further?

207. Ten responses, 13% of the total, commented specifically on the questions on the content of the Impact Assessment (IA).

208. We received three responses which suggested that the funding of prosecuting agencies ought to be taken into account in assessing the likely success of DPAs as this would impact upon the number of DPAs they may be able to enter into. They expressed concern that the key objective behind the proposed introduction of DPAs is cost saving rather than uncovering greater levels of fraud through self reporting and more criminal trials of the individuals responsible. We recognise that the volume of cases that the prosecuting agencies are able to deal with may be affected by the resources available to them and the volume of cases they could take on could be higher or lower than is currently assumed in the Impact Assessment. We will ensure that this is made clear in our post-consultation Impact Assessment.

209. Two responses suggested that commercial organisations were more likely to self-report, and that this would lead to an increase in the stock of cases that the SFO and CPS could deal with. We have considered this issue in our Impact Assessment. While we have made the assumption that the overall size of the SFO caseload does not change following the introduction of DPAs for modelling purposes, we have modelled a change in the composition of the caseload. The future base case recognises that commercial organisations are more likely to self-report in the future and the caseload of commercial organisations will rise. Self reporting was also one of the factors considered when modelling the scenarios for the volume of cases that become DPAs. We recognise that a rise in self reporting beyond what is assumed in the Impact Assessment may lead to an increase in the volume of cases. We will ensure that this is made clear in our post-consultation Impact Assessment.

210. One response expressed surprise that DPAs should offer any benefits at all to companies through the avoidance of criminal conviction, lower financial penalties and a reduction in the risk of discretionary debarment from public procurement tenders. It is important to recognise that, whilst

under a DPA an organisation would avoid a conviction, it would be subject to stringent and tough terms and conditions, with the real risk of prosecution hanging over it until there has been compliance. At the same time, there needs to be a sufficient incentive for organisations to come forward and self-report wrongdoing. This is set out in the Impact Assessment to help illustrate how DPAs both penalise organisations for their wrongdoing, and take account of where organisations genuinely want to change their ways. However, where the circumstances of a particular case suggest that a DPA may not be appropriate, for example where the alleged wrongdoing is very serious, or the public interest would otherwise require it, a criminal prosecution would remain the most appropriate course of action.

211. A further response suggested that no account has been taken of the number of SFO cases flowing from the offence under section 7 the Bribery Act 2010. The Impact Assessment does incorporate the impact of the Bribery Act into the calculations for the SFO's caseload under the future base case.

212. Only one response disagreed with the overall content of the Impact Assessment, on the basis that the policy itself was not sufficiently clear to enable accurate calculations to be made. However, another response recognised that, as DPAs would be an entirely new prosecutorial tool for use in England and Wales, the Impact Assessment presented a reasonable assessment of the information available.

213. Three responses suggested further information that may help to assess the impacts of DPAs in response to Question 25, including a number of articles and a suggestion that further consideration of the US model may be helpful. We carefully reviewed some of this information when drafting our Impact Assessment for the consultation and gave particular consideration to the approach to DPAs in the US when developing our proposals. While the additional information on these matters provided during consultation has been helpful, it has not changed our assessment of the impact of our proposals.

214. We received a suggestion that a review of the impact of DPAs should take place 3 years after the legislation became effective. We intend to undertake formal post-legislative scrutiny 3–5 years after Royal Assent of the necessary legislative provisions, in line with the Government's standard approach to post-legislative scrutiny.[2]

[2] '*Post-Legislative Scrutiny – the Government's Approach'* (Cm 7320) March 2008

Equality Impact Assessment

215. We sought comments on the equality impacts of the proposals in the consultation document and any information that could be provided to improve our evidence base.

We asked:

Question 26: What do you consider to be the positive or negative equality impacts of the proposals?

Question 27: Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

Question 28: Do you have any suggestions on how potential adverse equality impacts could be mitigated?

216. Thirteen respondents, or 8% of the total, addressed these questions. The majority of respondents who answered these questions suggested that DPAs will only be used against larger commercial organisations and that smaller companies will still face prosecution.

217. It is important to be clear when considering positive or negative equality impacts, that the size of a commercial organisation is not a protected characteristic under the Equality Act 2010. In any event, under our proposals, prosecutors may enter into a DPA with any organisation that is capable of committing one of the relevant offences and there will be no restriction depending on an organisation's size.

218. Three respondents to the consultation (4%) noted that, as the makeup of boardrooms remained predominantly white and male, the proposals may have a disproportionate impact on people with these characteristics. However, as DPAs are only available for corporate bodies and not for individuals, persons with these particular characteristics will not be directly affected by the introduction of this tool. Any decision to prosecute individuals who are employed by an organisation subject to a DPA is an entirely separate decision for a prosecutor from the decision to enter into a DPA with that organisation. Prosecuting agencies would be obliged to satisfy the requirements of the Code for Crown Prosecutors before commencing a prosecution against an individual.

219. A further three respondents suggested that, as our proposals would only apply to commercial organisations, they are not subject to the Equality Act 2010 and an Equality Impact Assessment is not necessary.

220. The four responses provided to Question 27 did not provide any information which changes our assumptions as to the impact of the proposals on equality issues.

221. Very few responses were received in answer to Question 28 with regards to mitigating potential adverse equality impacts. Two responses suggested that further consideration needed to be given to all potential equality issues. Two further responses suggested that a formal review of the effectiveness of DPAs after the first 12 months of their operation would be helpful in identifying potential adverse equality issues. We believe that this suggestion is addressed by our commitment to the formal post-legislative scrutiny that would take place 3–5 years after Royal Assent

222. On the basis of the responses received, and having considered potential equality issues in the development of our proposals on DPAs, we do not believe that there is any further evidence to suggest that there may be a disproportionate impact on people with protected characteristics as a result of the creation of DPAs.

We do not consider that a full Equality Impact Assessment is necessary.

Next Steps

223. We are grateful for the responses we have received to this consultation, which form a vital part of developing and refining the Government's proposals for DPAs. We appreciate the time and expertise involved in putting together the responses to what is a complex and technical new area of law.

224. 86% of respondents agreed that DPAs have the potential to improve the way that economic crime is dealt with in England and Wales. A number of respondents to this consultation also proposed other possible approaches to tackling economic crime. We welcome these suggestions and whilst they could not be explored in further detail in this response given the remit of the consultation, they will help to inform future thinking on ways to tackle economic crime.

225. Having considered the responses to this consultation, the Government remains committed to the introduction of DPAs as a new enforcement tool to deal with economic crime committed by organisations. It is the Government's intention to include an amendment to the Crime and Courts Bill currently before Parliament in order to make the necessary legislative provisions for introducing DPAs in England and Wales.

226. This consultation looked closely at the possible models for DPAs and sought views on how they might be effective in tackling economic crime as well as offering transparency and consistency to prosecutors, organisations and the public. We will now seek to take forward our proposals by putting in place primary legislation to bring them into effect, We will also provide for guidance to be produced to ensure that DPAs work effectively in practice.

- The Director of Public Prosecutions and the Director of the Serious Fraud Office will be required to develop and publish a DPA Code of Practice for Prosecutors, setting out the factors to which prosecutors ought to have regards when considering whether to offer into a DPA.
- The Sentencing Council will be producing sentencing guidelines on offences likely to be encompassed by DPAs which will provide transparency and certainty for the parties and court, particularly in the calculation of the level of the financial penalty term of a DPA.
- Criminal Procedure Rules will be developed to enable the DPA process to operate effectively and efficiently.

227. DPAs will help to bring more organisations that commit wrongdoing to justice and will support the Government's wider approach to tackling economic crime. However, more still needs to be done and the Government remains committed to continuing to develop new and effective ways to combat fraud and other white collar crime.

Annex A – List of Respondents

The respondents to the consultation who gave their details included individual members of the judiciary, legal practitioners, organisations, representative bodies, academics, members of the House of Lords and members of the public.

HHJ Alistair McCreath

Angus MacCulloch, University of Lancaster Law School

Arnold & Porter (UK) LLP

Association of British Insurers

Association of the British Pharmaceutical Industry

Association of Chartered Certified Accountants (ACCA)

Association of General Counsel and Company Secretaries of the FTSE 100 (GC100)

Balfour Beatty

Berwin Leighton Paisner LLP

BOND UK Anti-Corruption Group

Brian Woodgate

Professor Chris Lewis, Southampton University

CIFAS

City of London Law Society, Corruption and Corporate Crime Committee

Clifford Chance LLP

CMS Cameron McKenna LLP

Colin Nicholls QC, Tim Daniel, and Professor John Hatchard (joint response)

Council of HM Circuit Judges

Criminal Bar Association and Law Reform Committee of General Council of the Bar of England and Wales

Crown Prosecution Service

Dechert LLP

Diane Beck

DLA Piper UK LLP

Felicity Gerry

Field Fisher Waterhouse LLP

Financial Services Authority

Fraud Advisory Panel
Freshfields Bruckhaus Deringer LLP
FTI Consulting
HH Geoffrey Rivlin QC
Graham Martin Philips
Herbert Smith LLP
International Chamber of Commerce UK
Jean James
Jones Day LLP
Justices' Clerks Society
K & L Gates LLP
KPMG LLP
Law Society
Lloyd's
London Criminal Courts Solicitor's Association
Sentencing Council
Lord Morris of Aberavon
Lyndon Harris
Maclay Murray & Spens LLP
Marie Perry
Professor Michael Levi, Cardiff University
Assistant Professor Mike Koehler, Southern Illinois University School of Law
HHJ Neil Clark
Network Rail Infrastructure Limited
Nicola Padfield, Cambridge University
North East Trading Standards Association
Norton Rose LLP
Peters and Peters Solicitors LLP
Pinsent Masons LLP
Police Federation of England and Wales
President of the Queen's Bench Division and Fulford J (joint response)
PricewaterhouseCoopers LLP
Prudential PLC
QEB Hollis Whiteman Chambers

Richard Tromans, Legal Strategy Consultant

Risk Advisory Group

Royal Bank of Scotland Group

Russell Jones & Walker LLP

SAB Miller

Serious Fraud Office

Simmons & Simmons LLP

Sir Richard Buxton

Thales UK

Transparency International

UK Anti-Corruption Forum

Willkie Farr & Gallagher (UK) LLP

Wilmer Hale LLP

Zurich UK

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ISBN 978-0-10-184632-5