

<b>Title: A new enforcement tool to deal with economic crime by commercial organisations: Deferred prosecution agreements</b>  <b>IA No:</b> MOJ143  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b> Attorney General's Office, Serious Fraud Office, Crown Prosecution Service, Home Office	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 10/07/2012		
	<b>Stage:</b> Consultation		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
	<b>Contact for enquiries:</b> Joanne Savage: 102 Petty France SW1H 9AJ Tel. 020 3334 3372		

**Summary: Intervention and Options** **RPC Opinion:** RPC Opinion Status

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£m	£m	£m	No   N/A

**What is the problem under consideration? Why is government intervention necessary?**

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

Prosecutors tackling economic crime<sup>1</sup> (principally the Serious Fraud Office and Crown Prosecution Service, although we do not propose to limit the use of Deferred Prosecution Agreements to these bodies) currently have two key approaches available to them: criminal prosecution or, where this is not appropriate, pursuing a civil recovery order against the commercial organisation. Both involve lengthy investigation while criminal prosecution involves protracted court proceedings to reach a conclusion, the resource and financial costs for prosecutors can be high, and ultimately the number of cases that can be pursued to an outcome is limited.

Government intervention is necessary to ensure that investigators and prosecutors are equipped with the right tools to tackle economic crime. The creation of this new tool, DPAs, requires legislation.

**What are the policy objectives and the intended effects?**

The policy objective is to enable prosecutors to deal with economic crime committed by commercial organisations more effectively and efficiently while ensuring that identifiable victims receive appropriate redress and offenders are appropriately dealt with.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

The following options have been considered:

**Option 0:** Do nothing (base case).


**Option 1:** Create a new tool for the SFO and other prosecuting agencies to use to tackle economic crime committed by commercial organisations: Deferred Prosecution Agreements

Option 1 is the Government's preferred option because it is expected to improve outcomes for victims and increase the efficiency with which economic crime committed by commercial organisations is dealt with. We welcome views on these proposals during the consultation period.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 04/2018

Does implementation go beyond minimum EU requirements?		Yes / No / N/A			
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b>	<b>&lt; 20</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>
	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b>		<b>Non-traded:</b>

**I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.**

Signed by the responsible SELECT SIGNATORY:  Date: 12 July 2012

<sup>1</sup> For the purposes of this paper, serious economic crime includes fraud, bribery, corruption and money-laundering.

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Create a new tool for the SFO and other prosecuting agencies to use to tackle economic crime committed by commercial organisations: Deferred Prosecution Agreements.

**FULL ECONOMIC ASSESSMENT** (Please note that due to the effects of rounding, the components may not add up to the totals presented)

Price Base Year 2010/11	PV Base Year 2010/11	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £40	High: £520	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	£0	Optional
High	Optional	£2m	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

The SFO would incur increased costs for a proportion of cases which become DPAs (as some DPAs would incur higher annual costs than they would have in the base case). These costs could be between £15,000 and £45,000 per year. HMCTS would incur increased costs in relation to cases that currently do not reach court (discontinued investigations/prosecutions) becoming DPAs. The total estimated HMCTS cost could be £2,000-£20,000 per year. The government should see a fall in average annual penalty income for some cases that become DPAs. We have modelled the impact of 3 potential penalty scenarios. The reduction in penalty income could be between £0- £2m (scenario 1) and £0 (scenario 2 and 3) per year.

### Other key non-monetised costs by 'main affected groups'

Commercial organisations would incur various costs, including increased financial penalties, compliance and monitoring requirements, and other conditions associated with DPAs. However, these costs are not scored in this IA, as we do not quantify costs and benefits to individuals or commercial organisations that have committed criminal offences or admitted criminal wrongdoing.

The CPS could face increased costs if DPAs are used to deal with cases where no other action would have been taken. However, due to a lack of data it has not been possible to quantify these costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	£4m	Optional
High	Optional	£60m	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

The SFO would make savings as a result of the introduction of DPAs, as some DPAs are estimated to have lower annual costs than most current prosecution routes. The savings could be between £0.8m and £1.2m per year. HMCTS is estimated to make savings as DPAs require less court time than current prosecution routes. These savings could be between £30,000 and £60,000 per year.

The government would see an increase in penalty income as a result of the introduction of DPAs due to: a) more cases completing; and b) cases where no penalty income is currently gained becoming DPAs. We have modelled the impact of 3 potential penalty scenarios. The increase in penalty income could be £3m- £5m (scenario 1); £10m -£20m (scenario 2) and £30m -£60m (scenario 3) per year.

### Other key non-monetised benefits by 'main affected groups'

Commercial organisations are estimated to incur some benefits. Some commercial organisations could avoid a full conviction due to the introduction of DPAs. This would result in lower financial penalties and wider benefits such as not losing access to the procurement process for some public sector contracts. However as noted above, these benefits have not been scored. There should be benefits to victims and wider society if it is seen that commercial organisations are more effectively penalised for economic crime, and that victims are more effectively reimbursed. It has not been possible to quantify this benefit.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

Volumes: there is a risk that the volumes of cases that become DPAs could be higher or lower than we have estimated.  
 Penalties: there is a lot of uncertainty around the levels of penalties we could expect DPAs to generate  
 Case Lengths: as DPAs are an entirely new tool, there is uncertainty around the amount of court time required. There is a risk that case lengths will be higher or lower than we have estimated.

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	N/A

# Evidence Base (for summary sheets)

## 1 Introduction

### Background

- 1.1 Treating economic crime as seriously as other crime and taking steps to combat it effectively are key commitments in the Coalition Agreement. Economic crime is increasingly sophisticated. As the size of commercial organisations and the reach of their interests grow, so too do the difficulties of identifying criminal activity and of prosecution at national level for what can often be wrong-doing across a number of jurisdictions. It is in the interests of justice and of economic well-being that investigators and prosecutors should be equipped with the right tools to tackle economic crime.
- 1.2 The present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime. The system's deficiencies pose problems for prosecutors, defendants and judges and can have adverse impacts on victims, customers, suppliers and the wider economy. The increasing internationalisation of both the crime and the offending commercial organisation exacerbates the existing problems.
- 1.3 This impact assessment accompanies the consultation paper "A new enforcement tool to deal with economic crime by commercial organisations: Deferred prosecution agreements", in which these proposals are laid out in more detail.

### Problem under consideration

- 1.4 Prosecutors tackling economic crime (principally the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS)) currently have two key approaches available to them; criminal prosecution or, where this is not appropriate, pursuing a civil recovery order against the commercial organisation. Both involve lengthy investigation while criminal prosecution involves protracted court proceedings to reach a conclusion, the resource and financial costs for prosecutors can be high, and ultimately the number of cases that can be pursued to an outcome is limited.
- 1.5 In order to tackle economic crime committed by commercial organisations more effectively and efficiently, new tools are needed that:
  - are effective in tackling economic crime and maintaining confidence in the justice system of England and Wales;
  - have swifter, more efficient and cost effective processes;
  - produce proportionate and effective penalties for wrongdoing;
  - provide flexibility and innovation in outcomes, such as reparation for victims, protection of employees, customers and suppliers, and compliance audits;
  - drive prevention, compliance, self-policing and self-reporting; and
  - enable greater co-operation between international crime agencies.

### Rationale for intervention

- 1.6 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and redistribution reasons (e.g. to reallocate goods and services to the more needy groups in society).

- 1.7 In this case, intervention is justified on both efficiency and equity grounds. Serious economic crime needs to be dealt with more effectively and efficiently while ensuring that identifiable victims receive appropriate redress and offenders are appropriately dealt with.
- 1.8 The SFO and other prosecutors currently have two key tools in tackling economic crime committed by commercial organisations. They can choose to (a) prosecute the commercial organisation or (b) pursue a Civil Recovery Order (CRO) against the commercial organisation. While prosecution can effectively punish commercial organisations using existing criminal penalties, it can also result in a number of detrimental impacts on innocent third parties such as employees of the commercial organisation, customers or even the wider economy if the prosecution ultimately leads to the commercial organisation failing or has a serious adverse impact on its share price. Moreover, obtaining a criminal conviction can be particularly damaging to commercial organisations as it means they could be unable to bid for certain EU and US public procurement tenders. Prosecutions can be extremely lengthy and costly for the state. While civil recovery orders can be effectively used to ensure proceeds of crimes can be recovered, they cannot be used for punishing an offender or for directly compensating victims.
- 1.9 While prosecution or civil recovery orders will remain the most appropriate tools in a number of cases, the Government believes that the SFO and other prosecutors require additional tools that will enable them to tackle economic crime committed by commercial organisations more effectively and efficiently such that they are able to:
1. penalise commercial organisations appropriately and proportionately;
  2. ensure victims of crime receive effective reparation;
  3. protect innocent employees, customers and suppliers; and
  4. ensure commercial organisations put effective monitoring and compliance reforms into place to prevent future offending.
- 1.10 In order to achieve these objectives, the Government believes that prosecutors should be given additional tools to tackle economic crime committed by commercial organisations and that Deferred Prosecution Agreements are an appropriate solution. This new tool should help to ensure that those involved in such crimes are effectively penalised while victims are effectively compensated. It should also produce proportionate penalties; and provide flexibility and innovation in outcomes, such as compensation for victims, protection of employees, customers and suppliers, or compliance audits. Instead of penalties adversely impacting innocent employees in the commercial organisation or their customers due to a criminal conviction, DPAs would ensure that appropriate monitoring and compliance requirements are put in place to help prevent further offending.

## Policy objective

- 1.11 The policy objective is to enable prosecutors to deal with economic crime committed by commercial organisations more effectively and efficiently while ensuring that identifiable victims receive appropriate redress and offenders are appropriately dealt with.

## Description of options considered (including do nothing);

Option 0: make no changes (do nothing). This is the status quo, resulting in no extra costs or benefits. This will form the baseline.

Option 1: Create a tool, deferred prosecution agreements, for prosecutors to use in tackling economic crime committed by commercial organisations.

- 1.12 The Government's preferred option is option 1. We welcome views on these proposals during the consultation period.

## ONE-IN-ONE-OUT (OIOO)

- 1.13 This policy relates to the introduction of a new enforcement mechanism, so does not fall within the scope of the one-in-one-out methodology.

### Affected stakeholder groups, organisations and sectors

- 1.14 The following individuals/sectors are likely to be affected by the proposals:

The Ministry of Justice, the Attorney General's Office, the Serious Fraud Office, the Crown Prosecution Service (CPS), other prosecuting agencies, Her Majesty's Courts and Tribunal Services (HMCTS), the Judiciary, National Offender Management Services (NOMS), Legal Services Commission (LSC), Her Majesty's Revenue and Customs (HMRC), the planned National Crime Agency, the Home Office, the Police, commercial organisations, individuals working in the commercial organisations, victims of economic crime, lawyers, the "monitor"<sup>1</sup> industry, the public.

## 2 Costs and Benefits

- 2.1 The policy development process explored some of the alternatives to criminal prosecution that already exist in England and Wales, and considered whether these might offer useful tools for tackling serious economic crime. It also looked at Non Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) in the US. It is clear that there is an opportunity to develop a model for dealing with serious economic crime that improves reparation for victims whilst offering greater levels of transparency and consistency.
- 2.2 Despite the effectiveness of the US model, the lack of judicial oversight is likely to make it unsuitable for the constitutional arrangements and legal traditions in England and Wales. We have concluded that non-prosecution agreements are not suitable for this jurisdiction due to their markedly lesser degree of transparency, including the absence of judicial oversight.
- 2.3 However, there are opportunities to learn from the US model of DPAs and to develop a bespoke model for England and Wales that provides for better transparency and greater judicial involvement in the process. No other mechanism came to light which would fit within the traditions of the legal system of England and Wales and adequately address the policy problem. We are therefore not consulting on the introduction of any other mechanism and this impact assessment focuses on one preferred policy option – Deferred Prosecution Agreements.
- 2.4 This Impact Assessment attempts to identify both monetised and non-monetised impacts on individuals, groups, commercial organisations and public sector bodies in England and Wales, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These include how the proposal might impact differently on particular groups of society or changes in equity and fairness, either positive or negative.
- 2.5 It has not been possible to monetise all the identified impacts in this Impact Assessment, in part due to a lack of data (for example, data was unavailable in relation to the flow of SFO cases or data on companies legal costs), and in part because the impacts are driven by a number of behavioural responses which are uncertain. Impacts have been quantified where possible. The assumptions that resulted from a lack of data or uncertain behavioural responses are outlined in more detail in paragraphs 2.15 to 2.55.
- 2.6 These proposals are being proposed in a time of limited budgetary flexibility. It is unlikely that the resources available to the criminal justice system will be expanded to implement any aspects of this policy which might increase pressure on resourcing. Instead, the system would need to absorb any additional pressures within existing capacity, and the actual financial costs to the Criminal Justice

---

<sup>1</sup> A potential provision of DPAs is the appointment of an independent "monitor" who is tasked with supervising the company's compliance with the terms of the agreement and reporting to the government the company's progress under, or its breach of, the agreement.

System (CJS) could be significantly lower. This could mean reducing demand in other areas. The costs outlined below are the opportunity costs of other priorities which will not be met as a result of the increased burden associated with the new proposals. Similarly, any savings to the CJS would not necessarily be cashable, and could just mean that more cases are dealt with and/ or the speed with which cases go through the CJS increases.

- 2.7 In terms of scope the cost-benefit analysis aspect of this Impact Assessment covers impacts that fall within England and Wales. This includes all impacts that fall on commercial organisations, consumers, the public and Government, within England and Wales. In considering the impact of the introduction of Deferred Prosecution Agreements it is important to clarify that this cost-benefit analysis does not directly incorporate the costs and benefits which could accrue to overseas commercial organisations, overseas persons, overseas consumers, overseas governments and the overseas public.

### **Option 0: Base case (do nothing)**

- 2.8 If no legislative measures were taken, the SFO and other prosecutors would continue to tackle economic crime committed by commercial organisations through existing tools and existing law – primarily prosecution and CROs.
- 2.9 Because the do nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).
- 2.10 It is believed that we are currently in an unstable equilibrium position and the base case would change over time due to current trends (due to changes in the SFO's priorities, the SFO's case management and the expected impact of the Bribery Act). As a result a future case load for the base case has been modelled. See Annex A for further details on how the SFO's caseload is expected to change.

### **Option 1: Create a new tool for the SFO and other prosecutors – Deferred Prosecution Agreements**

#### **Description**

- 2.11 Under this option, the SFO and other prosecutors would be able to use DPAs as an alternative tool to tackle economic crime committed by commercial organisations. Economic crime in this context includes (but is not limited to) fraud, bribery, corruption and money-laundering type offences. As DPAs would be a voluntary process commercial organisations would need to be willing to engage in the process.
- 2.12 It is hoped that DPAs would be used as a more efficient, flexible and equitable alternative to prosecution or civil recovery in appropriate cases.
- 2.13 The introduction of this new tool is not expected to have an impact on the level of economic crime committed by commercial organisations – primarily it would have an impact on how it is tackled. There is nonetheless potential that if more cases are dealt with more effectively, there would be a cultural change leading to increases in self-reporting, compliance, and monitoring measures. This could lead to a reduction in offending and re-offending, resulting in a fall in economic crime committed by commercial organisations.
- 2.14 We are proposing the introduction of DPAs to the legal system in England and Wales only.

## Key assumptions

- 2.15 In assessing the impacts we assume that DPAs are primarily used by the SFO (which has specific criteria<sup>2</sup> for investigating a case). This Impact Assessment focuses on the SFO cases but acknowledges that the CPS and potentially other prosecutors could also deal with some cases, though this is likely to be a very small number.
- 2.16 We have made a number of assumptions in order to assess the potential impacts of DPAs. There are nonetheless a number of challenges in doing this - the size and complexity of SFO cases means that there is little similarity between cases within the SFO caseload, which makes it difficult to make generalisations and draw assumptions. It is also extremely difficult to predict commercial organisation or prosecution agency behaviour. As a result we have used SFO management knowledge of their current caseload to try to predict which type of cases could be suitable for DPAs in the future. However, the extent to which commercial organisations choose to engage in the process is also difficult to predict, and the final design of the policy will be important in framing commercial organisation incentives.
- 2.17 We have assumed that the policy would be in place either by early 2014 or by early 2015 on the basis that following the completion of the consultation in August 2012, legislation would be introduced in the second or third session of this Parliament and that the necessary work would be done to enable DPAs to be used from early 2014 or 2015.
- 2.18 In order to assess the impacts of introducing DPAs it has been assumed, for simplicity, that they will be used by prosecutors and commercial organisations as soon as they become available. However it is likely that in reality there will be a transitional period as it will take some time for DPAs to be used as an effective tool. For example, in the US<sup>3</sup> in the five years following introduction, only a handful of DPAs and Non Prosecution Agreements were made. We have also assumed that DPAs will be able to be applied retrospectively, i.e. to cases which are already under investigation.
- 2.19 For the purposes of modelling, simplifying assumptions have been made about how the DPA process will work in practice. However, these assumptions could change on the basis of consultation responses.
- 2.20 We estimated current case volumes, lengths and costs and equivalent volumes, lengths and costs for DPAs to gauge the potential costs and benefits of these changes. As cases are so varied it is hard to estimate average costs for the different type of cases. In addition, the SFO does not keep such records. As a result we have had to make a series of assumptions based on SFO management knowledge. A full explanation of all the modelling assumptions can be found in Annex A. Key assumptions are outlined below:

### *Volumes of DPAs (SFO)*

- 2.21 Please note that even though the volume of corporate cases that the SFO deals with annually is small, overall case costs can be high. Due to a lack of data on the flow of SFO cases, we have only looked at the stock of SFO cases in the future base case (option 0) and how this is expected to change under DPA's (option 1). We assume that the stock of cases remains constant for modelling purposes (a total caseload of 88, and a commercial organisation caseload of 32) and effectively we compare the steady state in the base case (option 0) with the steady state under policy option 1.
- 2.22 We have modelled two scenarios. We have made assumptions around: (a) the minimum percentage of cases where it would remain in the public interest to prosecute the commercial organisation (b) the maximum percentage of cases that would be dealt with by a civil recovery order. In addition we have made assumptions over the percentage of (c) dormant and (d) discontinued investigations that could potentially become DPAs.
- 2.23 Using this approach, between 7 to 15 cases from different routes<sup>4</sup> would, in the future, become DPAs (see Table 1 below). These volumes of cases refer to changes in the overall stock of cases (which we assume remains constant over time), not the number of cases that are completed annually.

---

<sup>2</sup> [www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence/serious-fraud-office-\[sfo\]-criteria.aspx](http://www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence/serious-fraud-office-[sfo]-criteria.aspx)

<sup>3</sup> Gibson Dunn 2011 Year-End Update on corporate Deferred Prosecution and Non-Prosecution agreements. Please note that the report does not separate out DPA volumes from NPAs.

<sup>4</sup> Alternative routes considered are: a contested trial, discontinued prosecution, late guilty plea, early guilty plea, discontinued investigation, dormant investigation, and civil recovery order

**Table 1: Predicted volume of cases that become DPAs**

Case Route	Volume of cases that become DPAs	
	Scenario 1	Scenario 2
Contested trial	2	3
Discontinued prosecution	0	1
Late guilty plea	2	3
Early guilty plea	1	1
Discontinued investigation	3	4
Dormant investigation	0	0
Civil Recovery Order	0	3
<i>Total volume of cases that become DPAs<sup>5</sup></i>	7	15

**SFO case lengths**

2.24 Assumptions on the length of cases are based on all SFO cases against commercial organisations. Cases have been broken down into different stages (investigation, discuss terms, trial preparation, trial, reporting / monitoring) and the length of these stages estimated. Where no data was available assumptions have been based on proxies and SFO intelligence. For DPAs it has been assumed that the investigation and 'discuss terms' stages will take the same amount of time, as the existing co-operative criminal route, early guilty pleas. The reporting/ monitoring length for DPAs is based on the CRO reporting/ monitoring length. As a result the following case lengths have been assumed including potential reporting/ monitoring requirements placed on commercial organisations.

**Table 2: SFO case lengths**

Case Route	Total case length (years)	Case length minus reporting / monitoring (years)
Contested trial	9.2	6.2
Discontinued prosecution	5.1	5.1
Late guilty plea	7.9	4.9
Early guilty plea	5.8	2.8
Discontinued investigation	2.1	2.1
Dormant investigation	2.2	2.2
Civil Recovery Order	4.7	2.7
Deferred Prosecution Agreement	4.8	2.8

<sup>5</sup> Please note that due to rounding errors the components may not add up to the total



## SFO Case costs

2.25 In order to gauge case costs to the SFO, we have looked at SFO staff costs and other non staff case costs. SFO staff costs were calculated by developing staff allocation profiles for each stage of the case and using salary data for the appropriate level of staff member. It has been assumed that the investigation stage of a case is broken down into two halves. For cases where the commercial organisation is not cooperating from the start, the second half of the investigation is assumed to be staffed at a higher level than the first half, as activity ramps up. For the cases where the commercial organisation is assumed to be co-operating (early guilty plea, civil recovery order and DPAs) the second part of the investigation is assumed to be less resource intensive as an “internal investigation” conducted by the commercial organisation is assumed to involve the organisation providing much of the evidence. Then using the above case length assumptions for the corresponding stages, we were able to calculate estimates for SFO staff case costs.

2.26 For non-staff case costs, which includes direct case expenditure, such as Counsel, external accountants and other non permanent staff, travel and communication costs such as translation, estimates were obtained by looking at concluded cases against commercial organisations. Where there were no data available, non staff case costs from a sample of recently concluded cases against individuals were used as proxies.

**Table 3: SFO case costs**

Case Route	Total SFO case cost £m
Contested trial	2.5
Discontinued prosecution	2.1
Late guilty plea	1.6
Early guilty plea	0.7
Discontinued investigation	0.5
Dormant investigation	0.6
Civil Recovery Order	0.6
Deferred Prosecution Agreement	0.6

## Court time (HMCTS) assumptions

2.27 We have estimated the following court costs based on assumptions over how long different types of cases take, on average, in court. For DPAs we have modelled two scenarios, a short and a long case, as it is expected that some cases would only involve two hearings, while other cases could involve more court time as the judge requires the prosecutor and commercial organisation to revisit parts of their potential agreement. The detail of the DPA process is explained in more detail in chapter 4 of the accompanying consultation paper.

**Table 4: HMCTS case costs**

Case Type	HMCTS cost (£'000s)
Contested trial	193
Discontinued prosecution	1
Late guilty plea	13
Early guilty plea	7
Civil Recovery Order	1
DPA (short case)	4
DPA (longer case)	9

## *Penalties<sup>6</sup>*

### Evidence Base

- 2.28 A crucial factor in assessing the impact of the introduction of DPAs is the level of financial penalties that DPAs will generate. As DPAs are an entirely new tool, it is difficult to estimate what these levels might be.
- 2.29 However, we do have some evidence on current financial penalties for commercial organisation offending in England and Wales, as well as on DPA penalty levels in the US, which we will use to inform our assumptions in modelling a range of potential penalty levels. This evidence is outlined below:

### *Current Financial Penalties for offending by commercial organisations in England and Wales*

- 2.30 There are various agencies in England and Wales which deal with economic crime committed by commercial organisations. These include the Serious Fraud Office (SFO), the Financial Services Authority (FSA) and the Office of Fair Trading (OFT). The SFO deals mainly with fraud and bribery cases, while the OFT deals with criminal anti-trust and cartel offences. The FSA regulates the financial industry and imposes financial penalties on commercial organisations which breach regulations.
- 2.31 The SFO has successfully prosecuted only a handful of commercial organisation cases over the years<sup>7</sup>. In the cases that have resulted in convictions, the following financial penalties were imposed: 2 late guilty plea cases with an average penalty of £4.5m; and 2 early guilty plea cases with an average penalty of £2.8m. The SFO has also imposed 5 Civil Recovery Orders (CROs), with an average payment of £6.2m
- 2.32 The FSA imposed financial penalties on commercial organisations on 53 occasions during 2010 and 2011. The average penalty was £2.5m. The average penalty imposed on the 20 'major' commercial organisations was £5.9m.
- 2.33 The OFT imposed penalties on 21 commercial organisations for competition offences<sup>8</sup> during 2010 and 2011. The average penalty imposed was £13m. If discounts given for leniency and early resolution are added back to the final penalties given, the average penalty imposed would have been £17m.

### *US DPA Penalties*

- 2.34 The US Department of Justice (DoJ) has used DPAs and Non-Prosecution Agreements (NPAs) as a tool to tackle economic crime for the last decade.
- 2.35 In the period 2009-2011 the DoJ agreed 46 DPAs. The average financial penalty imposed was \$95m. This is approximately £60m at an exchange rate of 1.6.
- 2.36 It is hoped that the introduction of DPAs would help the authorities in England and Wales generate a significant increase in penalty income, compared to the current levels outlined above. The US penalty levels give an indication of the potential of DPAs to generate large amounts of penalty income. However, it is not realistic to expect penalty levels in England and Wales to approach US penalty levels following the introduction of DPAs. Some of the reasons for this are outlined below:
- i. the US has different laws on corporate criminal liability which are easier to satisfy;
  - ii. the US DoJ has a stronger track record of prosecution than the SFO. A more credible threat of prosecution could allow the US authorities to agree higher financial penalties during the DPA process;

---

<sup>6</sup> For the purposes of the impact assessment "penalties" include the financial penalty element and any payments made under a civil recovery order. The above amounts do not include payments made under a confiscation order, those to victims, or costs paid to the SFO.

<sup>7</sup> As at September 2011.

<sup>8</sup> Under the Competition Act 1998 and Article 101 of the EC Treaty.

- iii. current levels of fines upon conviction of commercial organisations are generally much higher in the US than in England and Wales;
- iv. for multi-jurisdictional cases, the government may only obtain a share of the overall penalty.

2.37 If penalty levels were to reach the levels seen in the US, we estimate that this could result in a net increase in penalty income of around £120m per year. However, we do not think this is a realistic estimate for the reasons outlined above. This estimate is included here for illustrative purposes only.

## Penalty Scenarios

2.38 Due to uncertainty about the potential magnitude of penalty income, the impact assessment will model three scenarios to give a wide range of estimated outcomes.

2.39 When comparing between option 0 (base case) and option 1 (DPAs), it is assumed that the different level of penalties in the three scenarios apply whether DPAs are introduced or not.

2.40 The different penalties assumed in the three scenarios are depicted in the following table. They are then explained in more detail below.

**Table 5: Average penalties for each scenario**

Scenario	Contested Trial Average Penalty	DPA Average Penalty	Civil Recovery Order Average Payment
1	£5m	£3m	£6m
2	£17m	£11m	£6m
3	£45m	£30m	£6m

2.41 For the purposes of the impact assessment we have assumed that DPA penalties will be discounted by 33% compared to contested trial penalty levels. The consultation will invite views on the appropriate level of discount, so this assumption could be revised following the consultation.

2.42 In calculating the overall impact of the introduction of DPAs on the level of penalty income, we have annualised the penalty income for each case route by dividing the average penalty (Table 4) by the average length of case (Table 2). This allows us to take into account case length and compare how much penalty income is generated per year under policy option 0 ('do nothing') and policy option 1 (create DPAs).

2.43 The total impact is also dependant on the volume of cases that become DPAs. The two volume scenarios discussed above (paragraph 2.22) assume different numbers of cases become DPAs (Table 1), which results in variation in the impact on penalty income. In addition, due to a lack of data, we have assumed that 50% of contested trials would result in a successful prosecution and hence 50% of these cases would generate penalty income. All other penalty income generating routes<sup>9</sup> are assumed to generate penalty income in 100% of cases.

### Scenario 1

2.44 This scenario is based on penalties data for completed SFO cases involving commercial organisations, so gives a good indication of current average penalty levels.

2.45 However, as there have not been many concluded cases involving commercial organisation, these averages are based on a small number of cases (9 cases; 2 late guilty pleas, 2 early guilty pleas

<sup>9</sup> Late guilty plea, Early guilty plea, Civil Recovery Order and Deferred Prosecution Agreements

and 5 CROs), so should be treated with some caution. Nonetheless, this still provides us with our best estimate as it is based on actual penalties given to date.

2.46 The average for late guilty plea cases (£4.5m) has been scaled up to £5m for a contested trial, based on average discount for a late guilty plea of 10%.

2.47 The assumed 33% DPA discount has then been applied to give an average DPA penalty of £3m.

## Scenario 2

2.48 This scenario is based on penalties imposed for competition offences<sup>10</sup> by the OFT in 2010 and 2011. We have used OFT cases as a proxy for the sorts of cases that could be suitable for DPAs and to gauge the capacity of firms to absorb this level of penalty. We assume that the average OFT penalties (with discounts for early resolution and leniency added back on) would represent the average penalty for contested trials. This scenario assumes that the increase in penalties for all prosecution routes would occur regardless of whether DPAs were introduced (i.e. the base case).

2.49 The average penalty imposed by the OFT (prior to discounts being applied) was £17m. Applying the 33% discount that is assumed for DPAs this would result in an average DPA penalty of £11m.

## Scenario 3

2.50 For the reasons outlined above, we do not feel that it is realistic to expect DPA penalty levels in England and Wales to approach the levels seen in the US (average of approximately £60m for DPAs in 2009-11).

2.51 In order to estimate a potential 'high' case scenario we have assumed that DPA penalties in England and Wales will be, at best, around 50% of the levels seen in the US. This reflects the caveats outlined in paragraph 2.36.

2.52 This results in an average DPA penalty of £30m. Applying the 33% DPA discount gives an average for contested trials of £45m. This scenario assumes that the increase in penalties for all prosecution routes would occur regardless of whether DPAs were introduced (i.e. the base case).

2.53 Please note that the figures for court-imposed penalties (for prosecution routes) in this scenario are based on 'in principle' assumptions about the level of DPA penalties (as opposed to being derived from current penalty levels in the courts). As a result they are notional only, and are significantly higher than the actual level of penalties currently being imposed by courts. There is therefore a risk that these court-imposed penalty levels will not be achieved.

## CPS

2.54 Discussions with the CPS have helped inform our assessment of the potential impact of DPAs on their caseload. Key factors that were taken into consideration were as follows:

- the CPS does not currently prosecute many commercial organisations for economic crimes and often its focus is more on individuals or senior management involved in the offences. Since April 2010, the Central Fraud Group had prosecuted 4 cases against commercial organisations;
- the majority of commercial organisation cases in the CPS's current caseload were in respect of illegitimate commercial organisations. Often the commercial organisations have been set up for the very purpose of facilitating criminal activity and being a vehicle for fraud. These types of cases would therefore not be suitable for DPAs. Examples of these types of cases include Ponzi scheme frauds<sup>11</sup>, boiler room frauds<sup>12</sup> and land banking<sup>13</sup>. These commercial organisations are generally set up as a vehicle for crime;

<sup>10</sup> Under the Competition Act 1998 and Article 101 of the EC Treaty.

<sup>11</sup> Ponzi schemes promise high financial returns or dividends not available through traditional investments. Instead of investing the funds of victims, however, the fraudster pays "dividends" to initial investors using the funds of subsequent investors. The scheme generally falls apart when the operator flees with all of the proceeds or when a sufficient number of new investors cannot be found to allow the continued payment of "dividends."

<sup>12</sup> A crime where investors are cold-called by bogus stockbrokers and persuaded to either buy worthless or non-existent shares, or to buy genuine shares at vastly inflated prices.

- other commercial organisation cases tended to involve commercial organisations which were genuinely innocent of any wrongdoing and were themselves a victim of fraud/ crime perpetrated by one/ some of their employees. These types of cases would, again, not be suitable for DPAs; and
- another proportion of cases would involve circumstances where prosecution would be the only suitable route. DPAs would not be a viable option in these cases.

2.55 The only expected change in the CPS's future caseload was in relation to the Bribery Act 2010. At present the CPS are yet to prosecute any commercial organisation in respect of the Bribery Act. However, more commercial organisations could be held liable for failing to prevent bribery and as a result the CPS could have some cases in its future caseload that are suitable for DPAs. The CPS expect that there would be few of these cases and, given the uncertainty surrounding the impact of the Bribery Act, it was assumed that there could be a few CPS cases a year that would be considered to be suitable for DPAs. However, for the purposes of this IA we have not quantified any impacts on the CPS.

## Costs of Option 1

### One-off costs

2.56 In order for a DPA process to be created, legislation would be required. There would therefore be one-off costs to Government of establishing new primary legislation, but it has not been possible to quantify this impact.

2.57 There would be some one-off costs for all affected parties associated with familiarisation with the new DPA process.

2.58 The Government would bear any awareness and familiarisation costs associated with the enforcement authorities, including the SFO, other prosecuting authorities and courts, gaining an understanding of the new law. There would be initial one-off awareness, familiarisation and issuing guidance costs stemming from the introduction of the new DPA process. In particular:

- there would be a cost associated with amending the Code of Practice for Prosecutors so that it sufficiently takes DPAs into account;
- there could also be additional costs in relation to creating procedural rules and operational guidance to assist the parties;
- the cost of designing and then publishing penalty guidelines for DPAs for the Sentencing Council;
- one-off costs associated with judicial training; and
- one-off costs associated with setting up the DPA court process.

2.59 These costs have not been quantified, but are expected to be small.

2.60 In addition business would also bear similar one-off awareness and familiarisation costs.

---

<sup>13</sup> Land banking fraud is a property type fraud and is becoming increasingly prevalent. This is where investors are led to believe they are investing in land that will significantly increase in value. The factors supporting this belief would be for instance plots of land in areas with high house prices, a declared government intention for increased housing or the plot is close to land that has been allocated for development.

## Ongoing costs

### **Government**

- 2.61 The Government would bear some costs associated with tracking and evaluating the effectiveness of DPA policy.
- 2.62 The government is expected to see a fall in average annual penalty income in some cases where CROs become DPAs (as under scenario one, the penalty income generated by a DPA is lower than that of a CRO). The reduction in penalty income is estimated to be between £0- £2m (scenario 1) and £0 (scenario 2 and 3) per year. These figures are based on the annualised penalty revenue per case outlined in the 3 penalty scenarios (calculated using Tables 2 and 5), assumptions around what percentage of cases successfully generate penalty income (paragraph 2.43), and the change in the volume of cases that become DPAs (Table 1). Costs are calculated by comparing the higher penalty income that would have been generated had the cases not become DPAs to the relatively lower penalty income generated by a DPA.

### **Serious Fraud Office (SFO)**

- 2.63 The SFO would bear costs associated with training their staff in relation to the DPA process. They could also incur costs associated with publishing the details of concluded DPAs.
- 2.64 The SFO will incur increased costs associated with the early guilty plea cases and CRO cases that become DPAs as these are assumed to be quicker and cheaper than DPAs. These costs are estimated to be between £15,000 and £45,000 per year. These figures are based on the annualised SFO case costs (calculated using Tables 2 and 3), and the change in the volume of cases that become DPAs (Table 1). Costs are calculated by comparing the lower SFO costs that would have been incurred had the cases not become DPAs to the relatively higher costs of a DPA.
- 2.65 The prosecutor needs to monitor DPAs robustly and review regular reports from monitors or from commercial organisations directly to ensure compliance of commercial organisations and check for breach. This is done on an annual basis by the SFO with current CROs/ prosecution disposals but could be more frequent for DPAs. We have not been able to quantify any additional costs.
- 2.66 The SFO will need to be active enforcers of DPAs. If commercial organisations breach their agreements enforcement action will be required and there could be potential costs involved in extending the duration of DPAs, renegotiating the terms of the DPA, or of prosecuting the original charges. Should the Court find that a DPA has been breached and impose additional sanctions, there would then be the possibility of appeal proceedings. However for the purposes of this impact assessment we assume that no DPAs will be breached and as such no prosecution action will be required. This is based on the fact that a negligible number of cases have been prosecuted in the US following a DPA. We do however believe that the terms of some DPAs would need to be varied. We are consulting on what extent prosecuting authorities will have power, without judicial involvement, to vary the terms and conditions of the DPA between the parties. However we are unable to quantify these impacts.
- 2.67 There could be costs associated with appeals if, following a breach of a DPA, the original prosecution is revived; the commercial organisation is convicted and subsequently appeals. However, as above, we assume that there are no breaches and therefore no prosecutions that could lead to a conviction and a subsequent appeal.

### **Crown Prosecution Service (CPS)**

- 2.68 The CPS would bear costs associated with training their staff in relation to the DPA process. If a Code of Practice for prosecutors is required, this would be a CPS cost. We have assumed that these costs are minimal. They could also incur costs associated with publishing the details of concluded DPAs.
- 2.69 We have not quantified the impact of additional DPA cases on the CPS. It is therefore not clear whether the introduction of DPAs would lead to additional CPS costs.

- 2.70 The CPS would need to monitor its DPAs robustly and review regular reports from monitors or from commercial organisations directly to ensure compliance of commercial organisations and check for breach. This is done on an annual basis by the SFO with current CROs/ prosecution disposals but could be more frequent for DPAs. It has not been possible to quantify this cost.
- 2.71 The CPS would need to be active enforcers of DPAs. If commercial organisations breach their agreements enforcement action will be required and there would be potential costs involved in extending the duration of DPAs, renegotiating the terms of the DPA, or of having to take prosecution action. However for the purposes of this impact assessment we assume that no DPAs will be breached and as such no prosecution action will be required. This is based on the fact that a negligible number of cases have been prosecuted in the US following a DPA. We do, however, believe that the terms of some DPAs would need to be varied due to a change in circumstances for the commercial organisation. However we are unable to quantify these impacts, which are also dependant on the process set up for renegotiation.
- 2.72 There could be costs associated with appeals if, following a breach of a DPA, the original prosecution is revived; the commercial organisation is convicted and then appeals. However, as above, we assume that there are no breaches and therefore no prosecutions that could lead to a conviction and a subsequent appeal.

### ***HM Courts and Tribunals Service (HMCTS)***

- 2.73 There would be some small on-going costs associated with judicial training.
- 2.74 Some cases that currently never reach court (discontinued investigations and discontinued prosecutions) are assumed to become DPAs in the future, with associated HMCTS costs due to the court time required to obtain a DPA. Furthermore, some CROs would become DPAs, which would also impose a cost on HMCTS, as DPAs are estimated to require more court time than CROs. The total HMCTS cost is estimated to be between £2,000 and £20,000 per year. These figures are based on the annualised HMCTS case costs (calculated using Tables 2 and 4), and the change in the volume of cases that become DPAs (Table 1). Costs are calculated by comparing the lower HMCTS costs that would have been incurred had the cases not become DPAs to the relatively higher costs of a DPA.
- 2.75 For modelling purposes we have not assumed that Advocates will be appointed to the court in every case. However, there is a potential cost associated with the appointment of an Advocate to the court to assist the judge with any aspect of the case as the current power to appoint advocates would remain.
- 2.76 If commercial organisations breach their agreements enforcement action will be required and there could be potential costs to HMCTS as a result of the authorities taking prosecution action. However, for the purposes of this impact assessment we assume that no DPAs will be breached and as such no prosecution action will be required. This is based on the fact that a negligible number of cases have been prosecuted in the US following a DPA.
- 2.77 In some cases there could be additional hearings required to amend the terms of a DPA. This would result in additional HMCTS costs. It has not been possible to quantify these costs. However, it is anticipated that hearings to amend terms would be rare, so it is likely that any costs would be minimal.
- 2.78 There would be costs associated with appeals if some commercial organisations are prosecuted following a breach of a DPA. This could result in additional court time with associated HMCTS costs. However, as above, we assume that there are no breaches and as such no prosecution action is required.

### ***Commercial Organisations***

- 2.79 The costs outlined below are those that we anticipate might fall on commercial organisations as a result of the introduction of DPAs. These costs have been included here for information. However, it is important to note that they will not be quantified and scored as part of the assessment of overall

net impact. This is because impact assessments do not quantify costs and benefits to those that have committed crimes or admitted criminal wrongdoing.

- 2.80 Commercial organisations could incur costs when engaging with the prosecutor, which could include producing internal reports on wrong doing. Some commercial organisations could incur additional legal costs. However as noted above these costs have not been scored.
- 2.81 Some commercial organisations would have to pay higher financial penalties, as a result of DPAs, compared to the base case (those commercial organisations who received CROs or where no action was taken in the base case). However, these costs would not be scored, as impact assessments do not quantify costs and benefits to those that have committed crimes or admitted criminal wrongdoing. Strictly, reparation made by an offender to his/her victim or a penalty paid to the government is a transfer of income between two parties which leaves society as a whole no better or worse off overall, excluding the costs of administering and enforcing penalty payments. However, it follows from the social welfare function that the cost of the penalty to the offender carries no weight in the cost-benefit analysis, unlike the benefit to the recipient of any reparation. Similarly, in impact appraisals an offender's gains from crime are not counted, in contrast to the victim's and society's losses.
- 2.82 Commercial organisations could face increased ongoing compliance costs as a result of DPAs. DPAs could require commercial organisations to make improvements in internal controls, compliance programmes or training to detect and prevent future wrongdoing. Commercial organisations could bear additional costs relating to any changes to internal management, information, accounting and auditing procedures which are needed in order to comply with the new DPA process. It is difficult to quantify these potential costs. However as noted above these costs have not been scored.
- 2.83 Commercial organisations could also bear costs in relation to enforcement activity in event of breach, i.e. from cooperating with investigations, from potentially being prosecuted, from paying any resulting penalties and from having any assets seized. However as noted above these costs have not been scored.

### ***“Monitor” industry***

- 2.84 Compliance and monitoring conditions would be placed on some commercial organisations as a part of their DPA, in order to help prevent future offending. If these compliance/monitoring conditions are less severe than those placed on commercial organisations under any existing routes, there could be a reduction in demand for ‘monitoring’ firms, with an associated cost to the monitor industry. It has not been possible to quantify this cost.

## **Benefits of Option 1**

### **Ongoing benefits**

#### **Government**

- 2.85 The government is expected to see an increase in penalty income as a result of the introduction of DPAs. This is due to: a) some cases where no penalty income is currently obtained (discontinued investigations/prosecutions, dormant investigations) becoming DPAs with associated penalty income and; b) more cases completing per year as the DPA process is quicker than full prosecution routes.
- 2.86 The increase in penalty income is estimated to be £3m - £5m (scenario 1); £10m - £20m (scenario 2) and £30m - £60m (scenario 3) per year. These figures are based on the annualised penalty revenue per case outlined in the 3 penalty scenarios (calculated using Tables 2 and 5), assumptions around what percentage of cases successfully generate penalty income (paragraph 2.43), and the change in the volume of cases that become DPAs (Table 1). Benefits are calculated by comparing



the lower penalty income that would have been generated had the cases not become DPAs to the relatively higher penalty income generated by a DPA.

2.87 There could also be an increase in the disgorgement of profits or benefit. However any increase in this could already be accounted for in the modelling of penalty income.

### ***Serious Fraud Office (SFO)***

2.88 It is estimated that DPA cases will be shorter and less expensive than most current prosecution routes. DPAs are estimated to have lower annual average SFO costs than: contested trials, late guilty plea cases, discontinued prosecution, discontinued investigations, and dormant investigations.

2.89 We estimate that the contested trials, discontinued prosecutions, late guilty pleas, and discontinued investigations that become DPAs in the future will result in annual savings of between £0.8m and £1.2m. These figures are based on the annualised SFO case costs (calculated using Tables 2 and 3), and the change in the volume of cases that become DPAs (Table 1). Benefits are calculated by comparing the higher SFO costs that would have been incurred had the cases not become DPAs to the relatively lower costs of a DPA.

### ***Crown Prosecution Service (CPS)***

2.90 It is estimated that DPA cases will be shorter and less expensive than most current prosecution routes. As a result the CPS could see a fall in costs for any cases that would become DPAs. However, it has not been possible to quantify this potential benefit due to a lack of data.

### ***HM Courts and Tribunals Service (HMCTS)***

2.91 It is estimated that DPAs will require less court time than prosecutions. This could result in HMCTS savings for the contested trials, late guilty plea, and early guilty plea cases that become DPAs in the future.

2.92 It is estimated that this could result in savings to HMCTS of between £30,000 and £60,000 per year. These figures are based on the annualised HMCTS case costs (calculated using Tables 2 and 4), and the change in the volume of cases that become DPAs (Table 1). Benefits are calculated by comparing the higher HMCTS costs that would have been incurred had the cases not become DPAs to the relatively lower costs of a DPA.

### ***Commercial Organisations***

2.93 The benefits outlined below are those that we anticipate might be gained by commercial organisations as a result of the introduction of DPAs. These benefits have been included here for information. However, it is important to note that they will not be quantified and scored as part of the assessment of overall net impact. This is because impact assessments do not quantify costs and benefits to those that have committed crimes or admitted criminal wrongdoing.

2.94 Commercial organisations are expected to reap benefits in terms of the reduced legal costs associated with DPAs compared to prosecution. It is expected that the costs of legal advisors would fall under DPAs for these types of cases. However, it is not clear by what magnitude commercial organisations would benefit. We have tried to gain a sense of the magnitude of legal costs that firms incur currently but due to issues of confidentiality it has not been possible to get a good sense of these potential costs. Moreover as noted above these benefits have not been scored.

2.95 Some commercial organisations could benefit through lower financial penalties incurred than would have been the case in the base case following prosecution. This is because it is assumed that DPAs will attract a 33% discount on penalties relative to a contested prosecution outcome. However as noted above these benefits have not been scored.

- 2.96 Commercial organisations would benefit from no longer having to pay for prosecution costs. It has not been possible to quantify this benefit. However as noted above these benefits have not been scored.
- 2.97 In addition, commercial organisations could benefit through better compliance and monitoring programmes being put in place. DPAs could therefore influence necessary business change through the implementation of adequate procedures to improve business process and thereby performance.
- 2.98 Commercial organisations could benefit as a result of engaging in the DPA process where they are no longer debarred from bidding for EU and US public procurement tenders as a result of a criminal conviction. There could also be other benefits to management through better publicity, lower share price impacts to the commercial organisation and a fall in reputational damage. However as noted above these benefits have not been scored.

### ***“Monitor” industry***

- 2.99 Compliance and monitoring conditions could be placed on some commercial organisations as part of a DPA, in order to help prevent future offending. As a result, the commercial organisations themselves could be expected to pay for a commercial organisation monitor. The prosecutor will review regular reports to ensure compliance and check for breach. This is done on an annual basis with current CROs but could be more frequent for DPAs. This could lead to an increase in demand for the services of the ‘monitor’ industry. It has not been possible to quantify the potential benefits to this industry.

### ***Victims of crime***

- 2.100 By introducing a new tool to tackle economic crime committed by commercial organisations, it is hoped that more commercial organisations will engage in the process and accept responsibility for their actions. It is expected that DPAs would include a clause about reimbursement of funds to victims. The size of the reparation to victims would depend upon the size of the offending, but it is expected that more victims will be financially compensated for the wrongdoings of commercial organisations. However it has not been possible to quantify this benefit.

### ***Society***

- 2.101 There would be benefits to wider society if it is seen that more commercial organisations are more effectively dealt with for economic crime, and that victims are more effectively reimbursed.
- 2.102 DPAs should allow commercial organisations to remain in business, when they could have lost contracts or gone out of business following a prosecution. The wider economy could benefit from productive firms continuing to do business. It has not been possible to quantify this benefit.
- 2.103 There could be some intangible reputational benefits. There could be savings from a reduction in economic crime committed by commercial organisations and an improved reputation for the government as a result of tackling it more effectively.
- 2.104 If there is a reduction in economic crime due to the effective use of new tools, this could lead to greater societal benefits. It has not been possible to quantify this potential benefit.

## **Net Impact of Option 1 <sup>14</sup>**

### **Penalty Income**

2.105 The introduction of DPAs is estimated to result in an increase in penalty income/financial payments to government. It is estimated that net penalty income could increase by £3m - £3.3m (penalty scenario 1), £10m - £20m (scenario 2) and £30m - £60m (scenario 3) per year.

### **SFO**

2.106 The introduction of DPAs is estimated to result in net savings to SFO. It is estimated that these savings could be between £0.8m and £1.2m per year.

### **HMCTS**

2.107 The introduction of DPAs is estimated to result in net savings to HMCTS. It is estimated that the savings could be between £0.02m and £0.06m per year.

---

<sup>14</sup> Please note that the net impact of Option 1, may not add up to the sum of the costs and benefits outlined earlier on in the IA as we would need to take into account which costs and benefits are compatible with which scenarios, when calculating net impacts, We have modelled two volume, two HMCTS and three penalty scenarios.

# RISKS

Assumption	Risks
Volume of cases	We have assumed that the overall size of the SFO caseload does not change following the introduction of DPAs. However, DPAs could enable the SFO/CPS to take action against commercial organisations where, currently, no action is taken. This could lead to an increase in volume of cases and additional costs to the SFO and HMCTS.
Caseload	It has been assumed that the caseload (SFO stock of cases) remains constant over time, and we have compared 'steady states' under the baseline and under policy option 1. However if this is not the case, then costs and benefits could be different than assumed.
Future base case	We have assumed that the SFO's caseload will change over time due to changes as a result of the Bribery Act and changes in the SFO's priorities. There is a risk that the SFO's caseload does not change as quickly as assumed and also the caseload composition could not be in line with our modelling assumptions. This could result in higher or lower impacts than assumed in this impact assessment.
Transitional stage	It is likely that it will take some time before DPAs are used as an effective tool. For example in the US it took at least 6 years for a sizeable number of DPAs and NPAs (39) to be agreed after they were first introduced. As a result, assumed costs and benefits would not be as high as assumed in this impact assessment, as we consider a 10 year period from implementation.
Use of DPAs: retrospective/prospective	If DPAs can not be used retrospectively then there is a risk that the costs and benefits assumed would not result until much later than currently assumed.
DPA process – average time for case	The DPA process may not be as quick as we have assumed, especially given judicial involvement in the process could end up being similar to the current prosecution route. As a result there could be additional costs to the CJS that have not been quantified. Alternatively there is a risk that the process could be faster than modelled and as a result there could be potential benefits to the CJS that have not been quantified.
Appeals	We have assumed that no DPAs are breached. However, there is a risk that, if some DPAs are breached and commercial organisations are then prosecuted, there could be some appeals. This could result in additional costs to SFO/HMCTS.
Deterrence effect	The scale of deterrence effects has mixed evidence. However, there is a possibility that the introduction of DPAs could deter individuals and commercial organisations from engaging in serious economic crime. This could either be as a result of being deterred from committing crimes in the first place as it is known that it will be tackled more effectively, or through the compliance measures that are put in place which will discourage commercial organisations from re-offending. As a result there could be savings to commercial organisations and an improved reputation for the government.
HMCTS	If DPAs lead to the SFO/CPS successfully dealing with more serious economic crime cases than modelled, this could result in an increase in costs to HMCTS due to extra court time and court resources required. There is also a risk that the DPA process could take more court time than envisaged. As a result HMCTS costs could be higher than anticipated. There could be an increase in delays in relation to the DPA court process due to timetabling issues. Delays could result as timetabling would depend on the availability of a suitably qualified judge experienced in complex fraud or corruption trials. This could result in additional HMCTS costs.

Assumption	Risks
Individual prosecutions	<p>If evidence is provided by the commercial organisation that is engaging in the DPA process against particular individuals within the firm, this could result in more individuals being held accountable for the offences that they have committed. This could result in wider benefits to society, but there could be associated additional costs to HMCTS, prisons and probation services, and legal aid from additional cases entering the CJS.</p> <p>In contrast, evidence from the US suggests that there could in fact be a fall in individual prosecutions. If this is the case there could be a fall in costs to the CJS, but a reduction in benefits to society.</p>
Legal aid / Legal Services Commission	<p>No impact expected as commercial organisations are not eligible for Legal Aid. However, if the use of DPAs leads to fewer/more individual prosecutions then there could be a fall or increase in LSC costs.</p>
Prisons and probation policy	<p>No impact expected as focus is on commercial organisation cases. However, if the use of DPAs leads to fewer/more individual prosecutions then there could be a fall/increase in costs for the prison and probation services.</p>
CPS/ HMRC	<p>The impact on other prosecutors could be higher or lower than depicted in this impact assessment. Due to a lack of data it has been difficult to quantify these impacts and as a result there is a risk that the impacts could be higher or lower than assumed.</p>
AGO	<p>The Crown Court has power, in suitable cases, to request the Attorney General to appoint an Advocate to the Court, to represent the public interest, who could assist the judge with any aspect of the case. It is expected that such requests would be made only on rare occasions and for this reason has not been quantified for the purposes of this IA. If they were made more frequently, there would be cost implications for the AGO.</p>
Engagement of commercial organisations	<p>There is a risk that fewer commercial organisations than estimated engage in the DPA process This would result in a reduction in savings to SFO/HMCTS. Some of the specific risks are outlined below:</p> <p>Corporate Criminal Liability – the difficulties in proving corporate criminal liability incentivise an adversarial approach to investigations and prosecutions.</p> <p>Level of discount – commercial organisations may not be sufficiently incentivised to engage in the DPA process if the discount offered is considered to be too low (i.e if it is the same as for an early guilty plea)</p> <p>Public proceedings – some commercial organisations could be reluctant to enter into DPAs as they will require participation in public court proceedings</p> <p>Reputational issues – if the reputational risks for a commercial organisation entering into a DPA are perceived as being similar or greater than those associated with a criminal conviction, then commercial organisation engagement with the DPA process could be lower than modelled.</p> <p>Certainty of outcome – commercial organisations could be reluctant to come forward and self report without certainty of outcome.</p>
Commercial organisations' competitiveness	<p>There is a risk that commercial organisations might bear costs stemming from the assumed loss of business at the margin as a result of losing competitiveness by having heavy compliance measures in place. We have no evidence relating to the likely size of these losses, but there are reported examples of where this has occurred in the US.</p> <p>Such losses would occur if, as a result of not winning a contract, commercial organisations were unable to engage in alternative business activity which was equally as profitable. Losses might also be incurred as a result of the costs of failed bidding not being recouped.</p> <p>Though these costs could be incurred, they would not be scored in assessing overall impact if the commercial organisations were involved in criminal conduct.</p>
Credible risk of prosecution	<p>If the risk of prosecution is not a credible one, which would be the case when the volume of prosecutions is low, then there is a risk that commercial organisations will not be willing to engage in the DPA process. In the US, the number of prosecutions has continued to be greater than or at least the same as the number of DPAs and NPAs that are agreed; ensuring the risk of prosecution is credible.</p>

Assumption	Risks
Double jeopardy	<p>As discussed in the consultation document, seeking resolution under US law can be attractive to commercial organisations as, under English law there is a bar to prosecuting someone who has already been convicted or acquitted of the same offence, whereas there is no a similar bar under US law when it comes to prosecuting a person who has already been convicted or acquitted in a foreign jurisdiction. Resolving a case in the US could also be attractive given the wider and more flexible range of enforcement tools.</p> <p>If commercial organisations feel that the introduction of DPAs in England and Wales does not sufficiently address the balance of incentives, there is a risk that, in cases involving both the UK and US jurisdictions, DPAs would not deliver more successful outcomes.</p>
Judicial Review	<p>There is a risk that the prosecutors could be judicially reviewed in relation to DPAs. This could impose additional costs to parties.</p>
Public confidence	<p>The DPA system will need to command public confidence in order to be successful, but there is a risk that it would not. . There is a risk that other parties / pressure groups / public would not feel justice has been done if DPAs are used.</p>

### 3 Wider impacts

3.1 An equalities impact assessment has been published simultaneously with this impact assessment to more fully describe the likely impact of the proposals on groups which share protected characteristics under the Equality Act 2010.

### 4 Summary and Recommendations

- 4.1 The government's preferred option is to implement policy option 1 and create a new tool for the SFO and other prosecuting agencies to use to tackle economic crime: Deferred Prosecution Agreements.
- 4.2 The new process and DPA outcome would be introduced during the second or third session of this Parliament. Royal Assent is expected in spring 2013 or 2014, with implementation to follow in early 2014 or 2015. Once implemented, the Government would keep this area of the law under review. Formal post-legislative scrutiny would take place in 2018 or 2019.

## ANNEX A

### Modelling Option 0: Base case (do nothing)

By law<sup>15</sup> the Serious Fraud Office can investigate only those cases where there is evidence to show that serious or complex fraud and corruption has taken place. The most recently published criteria<sup>16</sup> for the referral of cases of serious or complex fraud to the Serious Fraud Office were agreed with the Attorney General and in consultation with the CPS and the Association of Chief Police Officers. It states that the key criterion for deciding whether the SFO should accept a case is that the suspected fraud is such that the direction of the investigation should be in the hands of those responsible for both the investigation and prosecution. In making that determination certain factors should be taken into account:

- the case gives rise to national publicity and widespread public concern;
- the case requires highly specialised knowledge;
- there is a significant international dimension;
- legal accountancy and investigative skills need to be brought together;
- the case appears complex and the use of the SFO's special powers may be appropriate; and
- the monies at risk or lost are at least £1 million.

At present the SFO has 88 "active cases" (at various stages of the process). In order to try and understand the potential impact of a DPA process, we have classified the SFO cases into 4 key case types:

- A) Cases against individuals only, where no legitimate<sup>17</sup> commercial organisation was involved in the offence e.g. boiler room frauds.
- B) Cases against individuals only, where a legitimate commercial organisation was involved, but no action taken against the commercial organisation due to insufficient evidence or it not being in the public interest.
- C) Cases against both individuals and a legitimate commercial organisation.
- D) Cases against a commercial organisation only, where no action taken against the individuals.

Our analysis has focussed on the following possible routes/ outcomes for commercial organisation cases:

- a) Contested Trial- a case where a commercial organisation is prosecuted, pleads not guilty, and there is a trial in court.
- b) Discontinued Prosecution- a case where a commercial organisation is charged, but the case is dropped before going to trial.
- c) Late guilty plea (prosecution)- a case where a commercial organisation is prosecuted and pleads guilty at the door of the court or after the trial has begun.
- d) Early guilty plea (prosecution)- a case where a commercial organisation is prosecuted and pleads guilty at the first opportunity.
- e) Discontinued Investigation- a case which is dropped during the investigation stage i.e. before a commercial organisation has been charged with any offence.
- f) Dormant Investigation- a case which remains on SFO's books, but the investigation is suspended.
- g) Civil Recovery Orders- an alternative to criminal prosecution, where the proceeds of crime can be recovered through a civil agreement.
- h) Deferred Prosecution Agreements- proposed new tool where commercial organisations voluntarily engage with prosecution, accept their wrongdoing, a penalty and other conditions but are not subject to a criminal conviction.

SFO's current caseload can be broken down into the above categories and routes.

---

<sup>15</sup> Section 1 Criminal Justice Act 1987

<sup>16</sup> See [www.attorneygeneral.gov.uk/Departments/Pages/SFO.aspx](http://www.attorneygeneral.gov.uk/Departments/Pages/SFO.aspx) and [www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence/serious-fraud-office-\[sfo\]-criteria.aspx](http://www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence/serious-fraud-office-[sfo]-criteria.aspx)

<sup>17</sup> 'Legitimate' is used here in relation to a company that is a large and respectable going concern, often a plc or listed. It is used to distinguish these types of company from companies which are set up as a front for criminal activity.

## SFO Future Base Caseload

1. It is believed that we are currently in an unstable equilibrium position and the base case would change over time due to current trends. As a result a future case load for the base case has been modelled. It is believed that **the newer cases in the SFO's caseload are more likely to be indicative of the SFO's future caseload.** Since 2008/09, when a new approach to investigations and prosecutions was introduced, there has been a significant change in the SFO's case mix. At present the current SFO caseload of 88 cases is comprised of 47 older cases that were started prior to 1/4/2008 and 41 cases that were started following the change in approach after 1/4/2008. For modelling purposes it is assumed that any future SFO caseload is more likely to reflect the composition of cases started after 2008/09 as the caseload is expected to change over time. In order to assess the types of cases that could be potential candidates for DPAs we have tried to model the SFO's expected future case load removing the effect of the 47 legacy cases.

The key reasons for expected changes in the SFO's caseload are:

- Since 2008/09 the SFO has increased the proportion of commercial organisation cases it takes on. It is more willing to ensure commercial organisations takes responsibility and are punished for their wrongdoings as a result of the new approach.
- Since 2008/09 the SFO has adopted a more robust case acceptance and case management process to ensure that cases taken on will be viable (i.e. are not likely to be discontinued); to focus and reduce the length of the investigation; and has discontinued some cases where no discernable progress was being or was likely to be made.
- Since 2008/09 the SFO has increased the overall proportion of multi jurisdiction cases relative to single jurisdiction cases that it takes on.
- Since 2008/09 the SFO has increased the overall proportion of bribery cases relative to fraud cases that it takes on. Changes as a result of the Bribery Act 2010 which creates criminal liability for a commercial organisation that fails to prevent bribery will also impact the overall proportion of bribery cases in the SFO's caseload.
- The SFO has also started using the Proceeds of Crime Act 2002 to settle cases through the civil courts using Civil Recovery Orders and as a result the routes that cases now follow should reflect these advances.

Using the 41 cases that were started after 1/4/2008 are split between different routes and intelligence from SFO case managers we have allocated any unknown cases into routes that they are most likely to follow.

**2. The overall volume of cases that the SFO could take on is assumed to remain constant at 88 cases.** By looking at only the 41 cases that were started after 1/4/2008, it is clear that the SFO would be under utilising its full capacity and would be able to handle more than 41 cases in its stock in total. Following discussions with SFO senior management we decided that a fair reflection of the size of the SFO's future caseload would be to assume that it maintains its current volume of cases. In order to model this we have uplifted the 41 cases that were started after 1/4/2012 to 88 cases.

**3. The new future SFO caseload was sense-checked to reflect practical considerations and constraints.** In particular:

- (i) **The use of civil recovery orders (CROs).** The use CROs has increased over time. However there are indications that the use of CROs cannot continue to grow indefinitely. In 2011 there was already a significant level of criticism and unease with the SFO's use of standalone CROs from stakeholder groups<sup>18</sup> including the judiciary and pressure groups. As a result the SFO feel that there is likely to be an upper limit on the number of CROs that will ever be used by the SFO. **For modelling purposes, after discussions with SFO senior management, we assume that the maximum proportion of commercial organisation cases that could be taken down the civil route is 20%.** It is unlikely that SFO will agree CROs with commercial organisations who engage late in the process so the civil recovery route has only been considered in cases where early engagement is expected.

---

<sup>18</sup> Pressure Group Transparency International produced a report in December 2011, entitled "UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases". In this their criticism of CRO usage includes (1) the lack transparency, particularly as to the principles as to when prosecutors decide to use them (2) the criminal conduct is poorly labelled and (3) the minimal involvement of the judiciary in CROs.



**Public interest and prosecutions.** Similarly, it is likely that there will be a minimum number of cases that will always be prosecuted as the seriousness of the offending or circumstances of the case will mean that civil sanctions would never be appropriate.

**As a result of this, for modelling purposes, following discussions with the SFO senior management we have assumed it is likely that at least 20% commercial organisation cases will always be prosecuted because the offending is so serious or the circumstances require it.**

Using the above assumptions, the future base case load was modelled. For modelling purposes, it is assumed that the future base case is the SFO's caseload in steady state.