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Corporate Crime and Corruption Committee response to Ministry of Justice consultation on Deferred Prosecution Agreements.

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of The Ministry of Justice Consultation Paper CP9/2012 on Deferred Prosecution Agreements (DPAs). has been prepared by the CLLS Corporate Crime and Corruption Committee.

We have followed the template of response suggested in the Consultation Paper and answered the following questions which were raised in the Paper.

There are inevitably differences of opinion between members of the committee on specific questions. Therefore, in some instances the response may not necessarily reflect the views of all the members.

Q.1 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?

We agree that there is certainly a need for improvement in dealing with economic crime in England and Wales. The consultation notes that the performance of the SFO in bringing successful prosecutions against commercial organisations has been unsatisfactory.

As a potential middle ground between a lengthy and costly criminal prosecution with no guarantee of success and a discontinued investigation, DPAs certainly have a role to play in increasing the number of successful investigations. They alone will not though provide the complete answer; the SFO itself is under resourced and its budget has been reduced. For a prosecuting authority to function appropriately it must be properly funded.

Q.2 Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?

A careful balance ought to be maintained between the Government's stated desire in paragraph 12 of the consultation to treat white collar and economic crime as seriously as other crime, and the reality in practice that there can be few other types of crime where a DPA would be seen to satisfy the justice of the case.

It is easy to foresee a danger that introducing DPAs for white collar and economic crime would certainly lead to perceptions that such crime is not treated as seriously as other crime which may undermine public confidence in the criminal justice system.

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

As proposed currently, the prosecutor must decide whether it is in the "interests of justice" to offer a DPA or to prosecute. As acknowledged in the Ministers' foreword to the Consultation, there may be cases in which there is a substantive public interest in bringing a criminal prosecution to trial rather than entering into a DPA.

We would add therefore an additional factor along the lines of:

"there is no other compelling reason for the prosecution to be continued."

Where a company has had a previous DPA, account should be taken of their record of compliance with it when considering whether a DPA may be appropriate for a subsequent matter which arises.

Q.4 Do you think it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?

Thought and clear guidance is needed on the interaction between the Code for Crown Prosecutors and the proposed Code of Practice in a case of economic crime. To commence a prosecution currently, the prosecutor needs to be satisfied there is both a "realistic prospect of conviction" against the defendant and that it is in the public interest to bring the case to Court.

We note that the Consultation proposes a "separate approach" (para 92, p.24) for the purposes of pursuing a DPA. Elsewhere, in the executive summary it says the prosecutor "would lay, but not immediately proceed with criminal charges…" (para 15, p.6).

It is though impossible to separate the decision to enter a DPA from the decision to prosecute; a decision to enter a DPA can only come about from a decision not to prosecute and similarly a decision to prosecute can only come through a decision not to offer a DPA (where both tests of the Code are satisfied).

In short, would the Code for Crown Prosecutors have to be satisfied in order for the prosecution to offer a DPA as an alternative, more desirable means of prosecuting the case? Or in the alternative, does the Government see the DPA to be an acceptable option where the Code for Crown Prosecutors is not satisfied (on either evidential or public interest limb), but some action would be desirable?

Though this may seem a narrow technical point, it goes to the heart of the philosophy behind the proposals and their practical use. If the latter of the above two options were the intention, we could expect a significant increase in actions being taken through DPAs where currently a prosecution is not a viable option. In the list of proposed factors in the Code of Practice, there is no reference to the prospect of conviction or an explicit public interest test in offering a DPA; therefore as currently drafted it would allow the Prosecutor to offer a DPA where there was no realistic prospect of conviction and it was not in the public interest to prosecute.

Clarity as to how Prosecutors should apply the two Codes when faced with a potential economic prosecution would help to resolve this apparent ambiguity.

Secondly, where a company has self-reported for an offence, this ought to be a factor in considering whether or not a DPA may be appropriate. At present this is alluded to in the "action taken…by the commercial organisation and the level of commitment to resolving the issues" (para 94, p.25). This ought to be a more explicit factor to incentivise self-reporting.

In addition serious consideration needs to be given to the issue of privilege. In the United States there has been widespread debate on how requests for waivers of privilege have become commonplace, or waivers volunteered in an effort to demonstrate full and open cooperation with an internal investigation. If the use of DPAs were to widen here, as it has in the United States, a danger may arise that it may become expedient for prosecutors to expect a waiver of privilege as a sign of cooperation.

Q.5 Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?

Yes. It is difficult to conceive of an appropriate alternative body.

Q.6 What do you think would be most useful in a guideline for DPAs?

Of the two forms put forward in the consultation, we feel the narrative form would be most useful. It would leave a certain degree of flexibility for the judge in determining the sentence whilst granting an indication as to the range of penalties a company is likely to face in the event of prosecution.

Q.7 Do you agree that the preliminary hearing should take place in private?

The issue of whether the first hearing ought to be held in public or private was the subject of a range of views amongst Committee members.

The view of the large majority was that the protection to the defendant afforded by a private hearing is of paramount importance. The Committee acknowledged that there has been some criticism of the UK by the OECD for a lack of transparency in some of its more recent settlements of overseas corruption cases, and indeed that resolution in private of the sort of matters which may be the subject of a DPA would not be conducive to the interests of justice, but this does not require the first hearing to be held in public.

For corporate defendants it is of vital importance, not only for the company, but also for its shareholders and its current employees - all of whom may well be innocent of any alleged wrongdoing - that the potential adverse consequences associated with any publicity, however limited, should be minimised in the period up to trial and/or final resolution by way of DPA or otherwise. This is particularly so when there is no guarantee that the judge would agree that the DPA was the appropriate course of action. Publication of a judge's decision to state that a DPA is not suitable in a particular case, particularly in a high profile matter, would be difficult to exclude from jurors' consideration in any subsequent trial and the reasons for the judgment may prove highly prejudicial to the defendant, even though those reasons may be based on an incomplete understanding of the facts. Such concerns may deter corporate defendants from considering the DPA process as a viable option which may minimise the proposed system's effectiveness. Further, it may even deter self-reporting which is something that the Committee believes should be encouraged.

Q.8 Do you agree that the first test for a judge to apply to a preliminary hearing is whether a DPS is 'in the interests of justice'?

There needs to be some guidelines or indications about what constituted the 'interests of justice' in the context of deciding whether to proceed with a prosecution or agree a DPA would be most welcome. In addition, should the judge have regard to the case against the company and the likelihood of a successful prosecution when deciding whether or not to sanction a DPA?

Q.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'?

In addition to these words, there ought to be a reference, as in the United States, to 'adequate', 'sufficient' or 'appropriate to reflect the totality of the offending behaviour' to ensure that the judge is conscious of the need for the agreement to reflect the nature of the behaviour.

Q.10 Do you agree with the proposed contents of a DPA as outlined?

Yes. Though please see Q.4 regarding the dangers of a request for waiver of legal privilege becoming a routine as a way for companies having to demonstrate their cooperation as has happened in the United States.

In addition, there becomes a danger of the DPA being a vehicle for directors to avoid their own personal liability by leaving the commercial organisation to take the DPA while junior employees would be unprotected to face subsequent individual prosecutions. Consideration needs to be given as to the scenario where a DPA may be expedient, but where the director/s who is/are to negotiate it may be themselves the most deserving of prosecution and punishment. We could expect that if DPAs were to be introduced, the number of individual prosecutions for company directors and CEOs would decrease, whilst junior employees may be exposed. There is substantial commentary suggesting this has been the pattern in the United States since DPAs have become more common.

One potential way of avoiding this problem would be to state explicitly that a DPA could not in any way guarantee that individuals within the firm involved would not face criminal prosecution. The other solution, radically different, would be to grant

immunity to all employees against prosecution if a DPA is granted. We do not anticipate the latter approach being acceptable to the interests of justice where the extent and potential of individuals' criminal liability may be unknown at the time the DPA is offered.

Q.11 Do you agree 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?

This would follow the general principle on sentencing and an early indication of a guilty plea. However, DPAs may be considered less flexible and lenient in some ways than recent cases concluded by the SFO against Mabey & Johnson and BAE, for example, where the disgorgement ordered against those companies was significantly less than the revenues from the contracts in question.

The maximum discount suggested by DPAs may be insufficient to persuade corporates to self-report wrongdoing that they consider unlikely to see the light of day otherwise. Currently the SFO is able to offer Civil Recovery Orders to companies which require no transparency on behalf of the company involved other than the terms of the Order itself, whereas the DPA regime is more demanding in this respect.

One possible approach would be to have a discretionary approach to the maximum sentence, or a higher maximum reduction to 50%. This would only be appropriate where reflecting the conduct of the defendant company in self-reporting and then fully cooperating with the DPA process.

The significant incentive of a DPA is that it allows the company to avoid a criminal conviction. This itself should not be disregarded when it comes to calculating the scale of the financial penalty in a DPA.

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

Yes and please see our comments to question 7.

Q.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?

Unless there is an existing clause that gives the prosecutor the ability to vary the terms unilaterally as per Q.14 in the event of non-compliance, then any other variances would have to be proposed before the Court.

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

This seems to be the most practical approach; removing the need for court hearings, having previously agreed penalties for non-compliance which would be straightforward to introduce in the event of non-compliance. It ought also be a condition that the activation of such clauses be made clear to the Court administratively. Any other proposed variances would have to be put before the Court.

Q.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?

We think this would represent too wide a departure from the original agreement, would be open to potential abuse and would also dilute one of the primary commercial attractions of the DPA; that of the certainty of the penalty. This route would leave open the possibility of more extensive litigation should the parties fail to agree amendments in what is perceived to be an unreasonable fashion. An example of this would be the judicial review of a prosecutor's failure to consider making an amendment, in breach of the terms of the original DPA. In order to lend credibility and engender public confidence in this new process, it would assist if there were not regular departures from the initial terms of the DPA as agreed and originally announced in Court.

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

We agree with the provision in the consultation.

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

Yes, and we agree that it should not be the decision of the prosecutor.

Q.18 Do you agree that the above proposals regarding admissibility are appropriate?

Yes, although in a high profile matter the admissions made by a company in a DPA may inevitably make their way into the juror's mind during any subsequent prosecution of individuals in any event. It may be safer to allow this to be admitted, but with the judge giving a clear direction as to the possible reasons the commercial organisation entered into the DPA; that it may not represent the complete picture, and that the company had an interest in self-preservation and protecting its own reputation and commercial interests.

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

We think the approach as outlined in the consultation is the correct one.

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

Yes, broadly, but it may be a factor in considering whether the prosecution acted in the public interest in pursuing a prosecution when an easier DPA may be more suitable.

Q.21 Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?

It would undoubtedly assist in the implementation of the new system were it to be applied to conduct which happened before the passing of the legislation, and would become practically available sooner to more cases.

This has the potential for being unfair on other defendants. Take, for example, two identical but separate cases of fraud taking place at the same time, say in 2008. One of these was discovered and an investigation commenced resulting in the charge of the company with planned trial etc. The second case was not discovered and investigated until 2011 and is still awaiting charge. Presumably for the second case, a DPA would be available whereas for the first it would not.

It would certainly be grossly unfair for companies whose actions were investigated following an existing operation were then to be offered a DPA when other companies who happened to have been discovered earlier had been prosecuted. On balance then, given the significance of this planned reform, it would be more preferable and consistent with long standing principles of the rule of law to avoid retroactive use of these provisions.

Q.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?

DPAs should also be used as an addition to, not a substitute to criminal prosecutions. The SFO and the government still need to have as its fundamental priority bringing to justice those accused of economic crime.

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

No.

Q.24 Do you have any comments in relation to our impact assessment?

The statement in paragraph 2.20 that the SFO does not keep records of how much different types of case tend to cost or indeed average costs is surprising.

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

No.

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

The proposals are likely to mean directors, partners and CEOs of smaller enterprises are much more susceptible to individual prosecution than those in larger companies

whose conduct may be no less reprehensible and with a greater negative impact on society, but where for reasons of expedience a DPA may seem more attractive than a criminal prosecution.

The new system is likely therefore to favour larger, multinational companies and their directors and employees rather than smaller, UK based businesses.

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

No.

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

Careful consideration needs to be given to ensure that the DPA does not become a vehicle for a 'quick win'; prosecuting the Company and facilitating individual prosecutions against junior employees whilst allowing culpable senior staff to escape prosecution.

City of London Law Society Corporate Crime and Corruption Committee

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THE CITY OF LONDON LAW SOCIETY
CORPORATE CRIME & CORRUPTION COMMITTEE

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