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Dear Sirs

Re: Deferred Prosecution Agreements: Consultation on Draft Code of Practice

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 above has been prepared by the CLLS Corporate Crime and Corruption Committee.

Yours sincerely

Michael Caplan QC

Chair

City of London Law Society

Deferred Prosecution Agreements: Consultation on Draft code of Practice

In its response to the feedback on the Ministry of Justice's Deferred Prosecution Agreement ("DPAs") consultation, the Government recognised that the current system for dealing with economic crime poses problems for prosecutors, defendants and judges. The introduction of DPAs is intended to address such problems by providing a practical mechanism by which criminal investigations into corporate organisations may be efficiently and effectively concluded.

The Government has suggested that the DPA regime should be characterised by and should contribute to transparency and consistency of outcome. In order for these objectives to be attained, the DPA process must be sufficiently clear to encourage companies to come forward and self report and the parties to the DPA should be able to work from common principles when entering into the DPA process.

The Deferred Prosecution Agreement Code of Practice ("the Code of Practice") as currently drafted does not provide sufficient levels of clarity in relation to a number of key concepts and demonstrates a lack of appreciation of the commercial realities that inform internal investigations and questions of self reporting. It provides prosecutors with significant levels of discretion in relation to the circumstances in which it may be appropriate to enter into DPAs, but provides relatively few indications of the situations in which corporate organisations may legitimately expect investigations to be capable of resolution by way of DPAs.

The Code of Practice also omits to mention other issues which will be crucial importance to corporate organisations and their advisers when deciding whether it will be appropriate to enter into discussions with a view to concluding an investigation by way of a DPA.

As such, it provides less certainty than existing guidance published by regulatory authorities in relation to settlement mechanisms analogous to DPAs. If left as currently drafted, the Code of Practice is likely to quickly become moribund when prosecutors acquire powers to enter into DPAs as it is likely to be overtaken by fact sensitive decisions taken in individual cases.

In particular the lack of any recognition of LPP is a glaring omission from the code. This is all the more surprising given that the OFT has specifically recognised the importance of LPP in broadly comparable circumstances following two lengthy consultation processes.

Question 1: Do you agree with the test for entering into a DPA set out in paragraph 2?
We broadly agree with the test as set out in paragraph 2. As is clear from the formulation of the test, only those cases where there is, or is likely to be, sufficient evidence to provide a realistic prospect of conviction will be suitable for resolution by way of DPAs The formulation of the test recognises that, in cases of evidential sufficiency, the public interest does not always require a prosecution. Civil recovery under Part 5 of the Proceeds of Crime Act 2002 ("POCA") remains available to prosecutors in those cases where there is doubt as to evidential

sufficiency. Therefore, taking the Code of Practice together with the guidance issued to prosecuting authorities by the Attorney General on the use of civil recovery powers under Part 5 of POCA, there is, in practice, a potential hierarchy of outcomes:

(1) Criminal investigation & prosecution;
(2) the offer of a DPA; and
(3) the making of a Civil Recovery Order.

Some members felt the language used in the Code of Practice as currently drafted is insufficiently clear in this regard and leaves significant room for ambiguity in relation to which mechanism will be used in which circumstances.

We agree with the point made in the Code of Practice that there is no right to be invited to enter into a DPA. However, the language of the Code of Practice also does not, in our view, properly recognise the full extent of the public interest in a DPA for those cases where a corporate self reports matters not otherwise known to the prosecuting authorities. We consider that the Code of Practice would be more useful and would provide greater transparency and consistency by explicitly setting out factors for and against agreeing a DPA rather than listing additional factors for and against prosecution.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA, as set out at paragraphs 11-13?

Many of the factors are relatively uncontroversial. However, taken as a whole, we do not agree with the approach set out here. Rather than providing clear guidance as to the factors a prosecutor may take into account when deciding whether to enter into a DPA, paragraphs 11 to 13 of the Code of Practice as currently drafted essentially simply restate the existing approach to prosecution decision making in the context of corporate crime.

This does not appear consistent with, for example, paragraph 92 of the government's response to the feedback on the consultation paper in relation to DPAs, where it observed that:

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

Where the code does add further substance to the existing guidance it does so in an

unrealistic and highly subjective manner. For example, factors such as "*failure to report properly and fully the extent of wrongdoing*" and "*an adverse impact on the economic reputation of England and Wales*" are not defined and are open to variable interpretation.

At paragraph 49 of the Government's response to the feedback on the consultation paper in relation to DPAs, it recognised that the Code should

"*assist Prosecutors in the task of considering whether to prosecute or to offer a DPA, and to ensure that the DPA process is transparent and offers* ***greater certainty*** *to commercial organisations and the public.*" (emphasis added).

Our overall view is that the draft code is excessively conservative and that it does not provide such certainty as currently drafted. Rather than seeking to incentivise self reporting by corporate organisations, paragraph 12 of the Code of Practice describes in negative terms the factors that a Prosecutor will consider in attaching weight to a self report. We also do not consider that it conveys a willingness on the part of prosecutors to balance the obvious need to ensure that appropriate cases are prosecuted with the requirement for clear and realistic guidance to enable corporate organisations and their advisers to make judgments as to whether they may legitimately expect prosecutors to enter into discussions with a view to DPAs.

We also do not consider that it adequately recognises the complexities ordinarily involved in cases where DPAs may be appropriate and makes excessive demands of corporate organisations. For example, paragraph 11(b)(ii) of the Code of Practice as currently drafted suggests that anything short of a corporate organisation actively giving evidence against current or former employees will not amount to "*proactive compliance*". We regard this as an oversimplification which may have the effect of ruling out cases which otherwise fall within the policy objectives of the legislation under which DPAs will be introduced.

At paragraph 52 of its response to the consultation on the introduction of DPAs, the Government dealt with the relative weight attributable to the public interest factors in a DPA context and suggested that this ought to be addressed in the Code of Practice. We note that the Code of Practice does not do so.

Given the breadth of the discretion afforded to prosecutors by way of the revised evidential test, it is incumbent upon them to clearly state the overall weight that attaches to the public interest in corporates investigating and policing their own conduct through a self report.

In particular, we consider that the Code of Practice should explicitly recognise that a self report of information that was not otherwise known to prosecutor is a public interest factor of considerable weight..

We consider that paragraph 12 (i) requires further elaboration.. At present it appears to be a bare assertion that a self-reporting corporate organisation should produce all material in the possession in order to qualify for a DPA, irrespective of whether that material attracts or is capable of attracting legal professional privilege.

At paragraph 50 the government response to the DPA consultation it proposed that the code should contain a number of elements, including a provision for the protection of Legal Professional Privilege. This provision in the DPA code is conspicuous by its absence. The absence is all the more surprising given the express protection afforded to applicants in the context of the OFT's recently published guidance on leniency and no action letters in cartel cases.

The OFT gives non statutory guidance in this respect and therefore it is surprising that the statutory equivalent in the DPA setting is less helpful.

As a matter of principle it is a perverse that an applicant seeking immunity from criminal prosecution should have available greater guidance and protection than one who considers a self report for the purpose of a DPA.

It is perfectly possible for a criminal trial to take place in the absence of material that attracts LPP but would otherwise be potentially relevant to the issues in the case. A number of SFO and CPS cases have had this point determined at first instance and there is clear authority on this point in the House of Lords.

Paragraph 12(ii) is unrealistic. It is doubtful whether SFO or Police investigations achieve the standard identified here. There are numerous "errors" of the sort described here in most criminal investigations. In a great many cases witnesses and suspects are already aware of an investigation before the police or SFO have contacted them. Indeed there are many cases where lines of enquiry do not appear immediately apparent and require extensive pre and post charge investigation.

Question 3: Do you agree with the approach to disclosure at paragraphs 30-35?

We agree with the approach to disclosure outlined in the Code of Practice as drafted.

Question 4: Would it assist if examples of potential terms additional to those addressed at paragraphs 40-42 are included in the Code?

We do not consider that any additional terms are required.

Question 5: Do you agree with the approach to the use of a monitor at paragraphs 43-51?
We agree with the approach to the use of a monitor as set out at paragraphs 43 to 51.

Question 6: Do you agree that the examples of the policies and procedures at paragraph 52 that the monitor may be tasked to identify are in place is sufficiently comprehensive?
We agree. However, care should be taken to ensure that this is not taken to be a more general prosecution statement of what amounts to "adequate procedures" for the purposes of section 7 of the Bribery Act 2010.
Question 7: Is the approach to determining an appropriate level of a financial penalty term in paragraphs 53 to 57 clear?
Yes. It is an approximation of the process outlined in the AG's guidelines on plea negotiations in cases of serious and complex fraud.
Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice? Please refer to the relevant section of the draft Code when responding.
There is scope for additional information on how the UK Prosecutors will approach concurrent jurisdiction cases (whether they involve negotiations at a US/UK level or under the auspices of Eurojust).