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Deferred Prosecution Agreements Code of Practice

The Directors' response to the public consultation

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FOREWORD

Following Royal Assent to the Crime and Courts Act ("the Act") on 25 April 2013 there is now provision at section 45 and Schedule 17 for Deferred Prosecution Agreements ("DPAs") to be used by prosecutors.

A DPA is an agreement between an organisation (P) and a prosecutor which, if approved by a court, entails a charge for a criminal offence being preferred against P but proceedings being automatically suspended. By entering a DPA, P agrees to comply with the requirements imposed upon P by the agreement. These can include paying a financial penalty, paying compensation, co-operating with future prosecutions of individuals, and implementation of a corporate compliance programme.

The suspension of proceedings cannot be lifted unless P fails to comply with the terms of the DPA and the DPA is terminated by the court. The offences for which a DPA may be used are listed in Part 2 of Schedule 17 of the Act and broadly relate to fraud, bribery and other economic crime. They do not apply to the prosecution of individuals.

A DPA may be appropriate where the public interest is not best served by mounting a prosecution. Entering into a DPA will be a transparent public event and the process will be supervised and determined by a judge.

Paragraph 6 of Schedule 17 to the Act states that the Director of the Serious Fraud Office ("DSFO") and Director of Public Prosecutions ("DPP") must jointly issue a Code for prosecutors giving guidance on: the principles to be applied in determining whether a DPA is likely to be appropriate in a given case; and the disclosure of information by a prosecutor to the organisation ("P") during the DPA process. In June 2013, the DSFO and DPP published, for consultation, a draft Code of Practice for Prosecutors explaining how they intend to use the new DPAs. The consultation closed on 20 September 2013.

The Directors wish to thank the thirty two individuals and organisations who reviewed the draft DPA Code and provided helpful and insightful observations.

What follows is a summary of the consultation submissions and the Directors' response to those submissions. We have produced a revised, final version of the DPA Code which is published alongside this response.

DPAs will be available to prosecutors from 24 February 2014.

David Green CB QC
Director of the Serious Fraud Office

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Question 1: Do you agree with the test for entering a DPA?

THE LOWER EVIDENTIAL TEST.

1. Fifteen respondents registered objections to limb 1.2 i b) of the test.
2. The main thrust of the objections was that the evidential standard was simply too low, and this was not acceptable, bearing in mind its intended use as a criminal sanction. There were concerns that the test was so easily satisfied as to have very little substance. A prosecutor would be entering into DPA negotiations on a “hunch” that there had been wrongdoing. Concern was expressed that the lower test in 1.2 i. b) could be used as a means of saving time and money, whilst not investigating suspected criminality to a level necessary to determine whether a prosecution was justified.
3. One of the principal purposes of DPAs is to bring a resolution to cases of corporate criminality more quickly. This is expressly stated in the Commons debate of the Public Bill Committee on the Crime and Courts Bill 2013 on 5 February 2013: “[t]hey [DPAs] are being adopted because it is currently very difficult to prosecute for that sort of crime and even when a case can be brought forward, it takes a very long time and costs an awful lot of money to do so... [t]heir use might allow for swifter resolution and importantly they might bolster the aim of changing behaviour”. The Ministry of Justice in its response of 23 October 2012 to the consultation on DPAs stated, “the length and cost of a full-scale investigation and prosecution can give rise to uncertainty and reputational damage...by having the option of using DPAs alongside existing criminal and civil approaches, prosecutors will be able to bring more cases to justice, and secure outcomes, including restitution for victims, more quickly and efficiently.”
4. One of the purposes of DPAs, as set out in the Ministry of Justice’s response to the consultation, is to foster a culture of openness and cooperation between organisations and the authorities. Paragraph 31 of the Ministry of Justice response states, “There is currently little incentive for organisations who have committed wrongdoing to come forward and engage with prosecutors...” Further paragraph 32 states, “Ultimately we consider that DPAs could further contribute to the current trend of an increase in self-reporting by organisations.” Stimulating official investigations into corporations is therefore at the heart of the DPA regime.
5. If a prosecutor had to be satisfied that the evidence against an organisation was sufficient to meet the Full Code Test without the alternative of the ‘lower’ evidential test before considering whether a DPA was in the public interest, a key purpose of DPAs, as was the express intention of parliament, would become redundant. In order to achieve one of parliament’s key intentions in legislating for the introduction of DPAs a ‘lower’ evidential test is necessary.

“One of the principal purposes of DPAs is to bring a resolution to cases of corporate criminality more quickly.”

Question 1: Do you agree with the test for entering a DPA?

6. Satisfaction of the Full Code Test, particularly in view of the well documented difficulties in proving corporate liability, would in most circumstances require a complete and full scale investigation, sometimes spanning many jurisdictions, which inevitably is time consuming and expensive. It is not intended for there to have been such an investigation before a DPA is entered into.
7. There are safeguards built into the DPA process to ensure that organisations will only enter into a DPA if they are criminally liable:
 - a. It is likely that DPAs will often be negotiated by the prosecution with Ps who have self-referred findings of criminal conduct subsequent to an internal investigation. Fundamental to a DPA is the cooperation and agreement between the prosecutor and P. Where P concludes it has not been involved in criminal misconduct P should refuse to enter into DPA negotiations or a DPA.
 - b. DPAs do not absolve the prosecutor of his/her duty to ensure that matters are properly and appropriately investigated. A DPA cannot be entered into without the certification by a court that it is in the interests of justice and the terms are fair, reasonable and proportionate. The DPA Code also requires the court to be informed of the evidential test applicable.
8. We have made an amendment to paragraph 1.2.i.b. requiring the reasonable suspicion to be based upon some admissible evidence. It is envisaged that source documents such as emails that may underlie a report will be sufficient to fulfil this criterion provided such documents are on their face admissible and there is no reason to suspect their forensic integrity.

A LOW EVIDENTIAL TEST AND FUTURE PROSECUTION

9. Some respondents envisaged a situation where a company was charged, a DPA was entered into and the DPA was for some reason terminated but a prosecution could not proceed because the Full Code Test was not met. Such occurrences, it was suggested, could undermine DPAs on a principled level. Thus, 1.2 i. b) implies circumstances where a DPA could be agreed but where there is no real threat of prosecution.
10. The DPA Code requires the prosecutor to inform the court of the evidential test satisfied on seeking approval of a DPA. This ensures the court is aware of the parties' assessment of the strength of the evidence. It will later be capable of being taken into account in respect of any delay between termination of a DPA and an application to lift the suspension of an indictment. Therefore there is a real threat of prosecution because the prosecutor will have the opportunity to investigate more fully in order to ensure that the evidential stage of the Full Code test is met.
11. However, the conduct which is the subject of the DPA will often be more fully investigated in connection with the conduct of the individuals who incriminate P. For example, it may be that an organisation will enter into a DPA and its (former) employees will be investigated and, if justified, prosecuted for their part. In that case the Full Code test will need to be satisfied.

THE DPA AS AN INDUCEMENT

12. There was concern that companies might be induced to enter for commercial reasons into a DPA even where they are not guilty of a crime, i.e. in order to avoid the financial and reputational risks of on-going criminal proceedings.

Question 1: Do you agree with the test for entering a DPA?

13. P would have in advance sufficient information to play an informed part in negotiations and will not have been misled as to the strength of the prosecution case. In many cases P will be the source of the majority of the evidence as P will often have conducted an internal investigation of its own and reported its findings to the prosecutor. P should be expected to make reasonable, not irrational, decisions, whether or not to enter into a DPA.

THE "IDENTIFICATION PRINCIPLE" WILL BE CIRCUMVENTED

14. As the law on corporate criminal liability currently stands, the prosecution is required to prove a criminal intent which can be attributed to one or more individuals who represent the "controlling mind and will" of the organisation in question. Numerous respondents made the point that the lower evidential test of 1.2 i.b) would allow the prosecution to circumvent this principle and should not be used as a tool to make up for legislative deficiencies.

15. It was also suggested that s.7 of the Bribery Act 2010 provides an exception to the identification principle and until Parliament amends the law on corporate criminal liability DPAs should be confined to Bribery Act offences.

16. The 'lower' evidential test does not remove the need for every element of an offence, including establishing corporate liability, to be proved. The lower test requires the prosecutor to have a reasonably held belief that sufficient evidence to meet the evidential stage of the Full Code Test, i.e. to be able to prove corporate liability, would be available with further investigation over a reasonable period of time. If P thinks that the Full Code Test is not capable of being met with further investigation then it may refuse to enter the DPA process.

17. The Crime and Courts Act 2013 (hereinafter "the Act"), schedule 17, paragraphs 15 – 31 expressly set out the offences in relation to which DPAs may be entered into. They include offences other than Bribery.

WHEN IS IT APPROPRIATE TO USE THE LOWER EVIDENTIAL TEST?

18. One respondent thought there should be greater clarification as to the extent to which the prosecutor should be required to attempt to satisfy paragraph 1.2 i. a) before moving onto 1.2 i. b).

19. We have amended the DPA Code to provide guidance on this point at paragraph 1.3.

PROBLEMS WITH TERMINOLOGY

20. It was suggested that the test over-uses the word "reasonable" and provides no guidance as to how this word should be interpreted, resulting in a lack of clarity.

21. A "reasonable period of time" is highly fact specific. We have given guidance at paragraph 1.4 of the DPA Code.

WHEN TO ENTER DPA NEGOTIATIONS

22. It was suggested that it is unclear whether the charging test is for entering into the DPA or for entering into negotiations for the DPA. One respondent suggested that it would make sense for the prosecutor to have in mind the two stage test of paragraph 1.2 when deciding whether to invite an organisation to enter into DPA negotiations and this should be expressly dealt with in the DPA Code. They further suggested that organisations are more likely to self-report if they have express confirmation of the "gateways" towards being extended an invitation.

Question 1: Do you agree with the test for entering a DPA?

23. The DPA Code now makes clear that the test at paragraph 1.2 is the test to be applied for entering into a DPA following negotiations. We have also clarified at paragraph 2.2 that DPA negotiations may begin on the basis of a reasonable suspicion based upon some admissible evidence that P has committed an offence and the prosecutor believes that the full extent of the alleged offending has been identified and the public interest is likely to be met by a DPA.

THE INTERESTS OF JUSTICE

24. It was suggested that the DPA Code does not identify how a Court is to determine that entering into a DPA is “in the interests of justice” and that the DPA Code should make provision for the Judge to be provided with all minutes of DPA negotiation meetings, in order to determine whether the DPA is in the interests of justice, and is fair, just, and reasonable.

25. The DPA Code is a Code for prosecutors issued by the Director of the SFO and DPP. The Directors cannot issue guidance for the courts. The public interest criteria at paragraph 2.8 are all matters which will assist a prosecutor to determine what the interests of justice are. Paragraph 9.4 and 10.3 of the DPA Code further provide that the prosecutor’s application for a DPA must explain why the agreement is in the interests of justice and the terms are fair, reasonable, and proportionate.

26. The Criminal Procedure Rules specify what material the court should be provided with and as such the DPA Code reflects those rules.

FULL RANGE OF DISPOSALS NOT SET OUT CLEARLY

27. It was suggested that the DPA Code does not make it sufficiently explicit that there is a hierarchy of outcomes whenever a prosecutor becomes involved with an organisation, namely:

criminal prosecution; DPA; civil recovery; no further action. Factors specifically in favour of DPAs should be more clearly delineated, and the DPA Code should recognise the possibility that neither a prosecution nor a DPA may be in the public interest.

28. Paragraphs 2.5 - 2.9 set out in detail the non-exhaustive factors to consider whether a prosecution is in the public interest. Paragraph 1.6 explicitly mentions Civil Recovery Orders and says that these should be considered where neither limb of the evidential test can be met.

INVITATION TO NEGOTIATE

29. It was suggested that to give organisations the incentive to enter into DPAs and to foster a pro-compliance culture, invitations to enter DPA negotiations should be extended to all companies. By contrast, another response agrees that there should be no right to be invited to enter into DPA negotiations. A further suggestion was that DPAs should only be offered in exceptional circumstances.

30. It would clearly be inappropriate to offer DPAs to all companies, especially where there has been serious wrongdoing, inadequate compliance procedures and a failure to self-report. There will be cases where the public interest decision not to offer a DPA but to prosecute is quite clear.

31. The DPA Code already provides through the examples of public interest criteria that DPAs are to be used in only limited circumstances. However we do not agree that DPAs should only be offered in exceptional circumstances. The public interest criteria are designed to incentivise self-reporting and effective compliance controls.

Question 1: Do you agree with the test for entering a DPA?

MISCELLANEOUS

32. Reservations were expressed that the prosecutor will be asking the offender to investigate and confirm the extent of the offending. An opinion was given that DPAs do not provide sufficient punishment because only the organisation and not the wrongdoing individuals are punished.
33. The prosecution or law enforcement agency will also conduct their own investigations and will test the veracity of information provided by organisations. The entering into a DPA does not prevent a prosecution of individuals for the same matters. The conduct of individuals will ordinarily be investigated.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

34. The factors for and against prosecution were for reasons of consistency adopted from the Corporate Prosecution Guidance. Some praised the consistency of this, others were concerned that re-stating the Corporate Prosecution Guidance does not help clarify how organisations can expect to be dealt with by way of DPA. One respondent said that there were unnecessary small differences.
35. **In light of the responses changes have been made to the factors. In order to maintain consistency it is expected that the Corporate Prosecution Guidance will be amended to reflect these changes.**
36. Further guidance was sought by one respondent on how prosecutors will consider pre-existing charging guidance.
37. **In reaching a decision whether to enter a DPA the DPA Code reminds prosecutors to have regard to the Code for Crown Prosecutors and Joint Prosecution Guidance on both corporate prosecutions and the Bribery Act. Neither of these documents is inconsistent with the DPA Code of Practice.**
38. Two respondents advocated making DPAs the default option for organisational economic crime rather than prosecution, unless public interest factors tend against this.
39. **This would contradict the Code for Crown Prosecutors, which states that a prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution.**
40. The absence of any mention of legal professional privilege was mentioned by thirteen respondents.
41. **The DPA Code has been supplemented to address this concern at paragraph 3.3 which makes explicit that the Act does not, and this DPA Code cannot, alter the law on legal professional privilege.**

“Approval of a DPA includes satisfying an interest of justice test.”

RELATIVE IMPORTANCE OF FACTORS

42. Three respondents asked for the DPA Code to state the relative weight attached to the different public interest factors. One said that as it stands the DPA Code treats self-reporting as just one of numerous factors that a prosecutor will take into account, whereas it should give clear guidance as to how it will affect the likelihood of a DPA outcome, in order to incentivise companies to self-report. Another noted that the DPA Code does not provide detailed guidance on when self-reporting will lead to DPAs and when it will lead to other available disposals, e.g. civil recovery.
43. **The exercise of the prosecutorial charging decision is always case specific. Paragraph 2.6 of the DPA Code reflects the Code for Crown Prosecutors: which factors are considered relevant and the weight to be given to each are matters for the prosecutor. Emphasis has however been given to paragraph 2.8.2 i.**
44. Two respondents wanted disclosure by the prosecution of the factors it had taken into consideration in concluding that a DPA would be appropriate.
45. **Approval of a DPA includes satisfying an interest of justice test. In practical terms the prosecutor will rely on its public interest considerations to satisfy the court of this test. In doing so P will be aware at an early stage of negotiations what the prosecutor’s preliminary rationale is. Further if the DPA is approved, reasons for entering a DPA must be given in open court and will ordinarily be published.**

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

2.8.1 i.

46. One respondent suggested care should be taken in attaching too much weight to past regulatory enforcement, since the standard of proof for regulatory enforcement is lower than the criminal standard required for a prosecutor.
47. **We disagree. Regulatory or civil enforcement reflects wrongdoing by a company, regardless of the standard of proof.**
48. One respondent suggested that the word “flagrant” was both provocative and vague, and should be replaced by “serious”.
49. Another suggested that in addition to the conduct of a company, prosecutors should consider the record of its individual directors or majority shareholders.
50. **The DPA Code has been amended to reflect substantial agreement although we believe that ‘repeated’ and ‘serious’ should be alternative rather than cumulative.**

2.8.1 iii.

51. One respondent suggests that the DPA Code should make it clear the DPAs can apply to offences under s. 7 Bribery Act 2010.
52. **The s.7 Bribery Act 2010 is an offence listed in Part 2 of Schedule 17 to the Act, as an offence in relation to which a DPA may be entered into.**
53. One respondent said that since it is not a legal requirement for companies to have corporate compliance programmes, the DPA Code should not assume that one has always been in place.
54. **Certain offences may be committed either by an organisation or individuals employed by it either directly or indirectly as a consequence of inadequate compliance procedures being in place. The Directors wish to positively encourage the adoption of compliance programmes that reduce the likelihood of the commission of economic crime.**

55. A number of respondents suggested a difficulty in prosecutors assessing the effectiveness of corporate compliance programmes. One of these respondents suggested changing this factor to read, “the offence was committed at a time when the company had an ineffective corporate compliance programme and it has not been able to demonstrate a significant improvement in its compliance programme since that time.”
56. **The DPA Code has been amended to reflect agreement with the latter observation. We disagree that the prosecution cannot assess the adequacy of compliance programmes. The prosecution has developed experience of working with corporate monitors and where appropriate will bring in external resource to assess compliance programmes.**

2.8.1 v.

57. Six respondents note that there is no general duty to report crime, but this provision suggests that there is. The prevailing view is that reporting should be rewarded, rather than non-reporting punished. One respondent suggested that the phrase “failure to report wrongdoing” could be replaced with wording such as “the company has a history of concealing violations” or “the company has a history of obstructing investigations into the company’s misconduct”, so that companies are penalised for affirmative wrongdoing rather than simply failure to report.
58. **The DPA Code remains unchanged in this regard. The prosecutor is interested in P’s response to the present conduct. Its historic conduct if successfully concealed will not be known to the prosecutor. If unsuccessfully concealed and resulting in action being taken against P the historic conduct will be taken account of at 2.8.1 i.**
59. A number of respondents sought clarification of the concept of “reasonable time”. It was noted that there is an inconsistency between both reporting early and spending sufficient time investigating so that it is possible to report fully.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

60. The wording is changed from 'report' to 'notify.' It is agreed that 'report' may imply a full investigation has been undertaken at the time of first contact with a prosecution. What is a reasonable amount of time will be fact specific and some guidance has been provided at paragraph 2.9.
61. Some respondents questioned the provision that, "the prosecutor will also need to consider whether it is appropriate to charge the company officers responsible for the failures / breaches" with one stating "it is unclear why a passing reference to such an important issue should be included in guidance as to whether a DPA is or is not appropriate for the corporate entity."
62. **The DPA Code has been amended. The need to investigate individuals is addressed elsewhere in the DPA Code. The statement in respect of individual liability was not a public interest criterion and as such did not sit comfortably here.**
- 2.8.1 vi.**
63. Several respondents noted the inconsistency between reporting "properly and fully" and reporting early.
64. One respondent suggested replacing the wording with "withholding of relevant facts established in the course of the company's own investigations".
65. Another suggested reporting wrongdoing "known to the team conducting the investigation / making the self-report at the time the self-report was made".
66. A further respondent proposed "wrongdoing as known at the time of reporting".
67. **Paragraph 2.8.1 vi. has been amended to address this. In doing so we have used language consistent with that used in the Act and Criminal Procedure Rule 12.**
- Former 11 a. vii. and viii.**
68. Seven respondents said that the criterion of adverse economic impact was vague, ambiguous, and very difficult for a prosecutor to measure.
69. Three respondents suggested that the prosecutor should take into consideration other kinds of harm and not just economic harm.
70. **The DPA Code has been amended at paragraph 2.8.1 vii to amalgamate these two former paragraphs into a new criterion which focusses on harm consistent with the Sentencing Council's guidelines on Fraud, Bribery and Money Laundering.**
- 2.8.2 i.**
71. The unqualified obligation to make witnesses available was considered inappropriate, due to the numerous reasonable and legitimate reasons an organisation could have for not being able to do this (e.g. domestic employment law reasons).
72. **The DPA Code has been amended to reflect agreement that it is not always practicable. Instead witnesses should be identified and their accounts made available along with the documents put to them.**
73. A number of respondents suggested that it would be too early at this stage for organisations to envisage paying compensation to victims. Compensation claims can involve complex issues of causation, remoteness, and value, and can only be resolved by judicial or arbitral proceedings.
74. **We agree that the payment of compensation may involve complex considerations. The DPA Code has been amended to reflect that it will not always be appropriate or possible to pay compensation.**
75. One respondent said that former paragraph 11. b. i. is too wide in its scope with its requirement for "information about the operation of the company in its entirety".

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

76. The DPA Code has been amended at paragraph 2.8.2 i. to reflect agreement

77. One respondent suggested that the use of an employer's coercive powers to compel employees to attend an interview is not appropriate.

78. The DPA Code has been amended at paragraph 2.8.2 i. to clarify what will normally be expected in assessing whether P has been cooperative.

2.8.2 ii.

79. One respondent suggested that this factor should also refer to contact being made with overseas regulators, where appropriate.

80. The DPA Code has been amended to reflect agreement.

81. One respondent suggested good behaviour and history should be factors in sentencing rather than in the decision whether or not to prosecute.

82. Antecedent history is an established and perfectly proper charging consideration.

2.8.2 iii.

83. Two respondents criticised the word "effective", saying that it would be very difficult to assess in practice. One said the word "genuinely" does not add anything in this context.

84. We have removed the word "genuinely". We believe that "effective" is a proper and objective standard to measure a compliance programme. However, we recognise the difficulty in assessing a compliance programme in existence at the time of offending as effective and so the wording has been changed.

2.8.2 v.

85. One respondent suggested the term "different body" requires clarification. Another suggested that a change in the company's corporate management team could be referred to as a factor distinguishing the company in its current form from the one which committed the offences. One suggested that the DPA Code should include as a relevant factor that the wrongdoing occurred at a time when P did not control the employees in question.

86. Five respondents criticised the phrase, "all of the culpable individuals have left or been dismissed". Two respondents suggested "appropriate disciplinary action" ought to be sufficient. One respondent suggested "either all of the culpable individuals have left or been dismissed or their conduct in connection with the offending has been the subject of appropriate disciplinary consideration". Another suggested, "dismissal where appropriate".

87. In relation to the phrase "make a repetition of the offending impossible", seven respondents criticised the term "impossible". It was thought that this was too high a test. One suggested amending it to, "reduce the risk of reoffending to an acceptable level". Three suggested simply changing "impossible" to "unlikely". One suggested, "minimising the risk of a repetition of offending". Another suggested, "avoid so far as reasonably possible the risk of any repetition of the offending".

88. The DPA Code has been amended to reflect substantial agreement.

2.8.2 vi.

89. One respondent suggested that the adverse effects of prosecution in the organisation's own country should be taken into consideration, not just the adverse effects in different countries.

90. Agreed.

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

91. One respondent proposed that “the law of another jurisdiction including European law” be substituted for “the law of another jurisdiction, including but not limited to the law of the European Union”.
92. **Agreed.**
93. Four respondents agreed that the Directive 2004/18/EC should not be taken into consideration. By contrast, three others thought that it should be.
94. **We have drawn to the prosecutor’s attention the existence of the directive. In considering the public interest we are of the opinion that the prosecutor may take into account ‘disproportionate consequences.’ We recognise that the Directive is intended to be draconian, have a deterrent effect and that P ought to have been aware of its provisions.**
95. Three respondents noted that a company entering into a DPA would be subject to the discretionary debarment regime, and suggest that the DPA Code require prosecutors to consider this.
96. Three respondents submitted that the DPA Code should include consideration of the collateral effects of a prosecution of an organisation upon the public or on the organisation’s employees, pension holders and shareholders, as permissible under the US Principles of Federal Prosecution of Business Organizations.
97. **The DPA Code has been amended to reflect agreement in respect of collateral consequences and make clear the possibility of discretionary debarment.**
98. One respondent also suggested that the additional following factors, also derived from the US Principles of Federal Prosecution of Business Organizations, should be addressed in the DPA Code:
- the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance;
 - the adequacy of civil or regulatory enforcement actions.
99. **Ordinarily the prosecutor will prosecute individuals in addition to taking enforcement action against the organisation, rather than as an alternative.**
100. **The DPA Code already addresses civil recovery orders. The appropriateness of other civil or regulatory enforcement is already considered by the prosecutor at a case acceptance stage in consultation with the appropriate regulatory agency concerned.**
- ### SELF-REPORTING
101. One respondent suggested that the obligation on the company not to withhold material should be limited to an obligation not to withhold material knowingly.
102. **We are not creating an obligation in paragraph 2.9.1 but providing guidance to the prosecutor to assist in assessing the level of cooperation being offered.**
103. Others noted that employees must cooperate with internal investigations to keep their jobs, and says that prosecutors should not require companies to hand over incriminating statements from these employees. Four respondents expressed concern about the rights of individual employees during the course of internal investigations. One said that the DPA Code should make clear that it is not intended to make internal investigators provide inadequate disclosure to individuals prior to interviewing them.
104. **The admissibility of interviews obtained as part of an internal investigation can be adequately determined at any future trial on an individual basis.**
105. A number of concerns were expressed about the role of the prosecutor in the internal investigations.
106. One respondent submitted that the DPA Code does not give guidance as to when an

Question 2: Do you agree with the suggested factors a prosecutor may take into account when deciding whether to enter into a DPA?

organisation should self-report. Some suggested involving the prosecutor too early, including before any internal investigation had occurred, could lead to a waste of time and resources both for the prosecutor and for the organisation. It may also discourage organisations from self-reporting, because, having conducted an internal investigation, they would not want to report late, lest their lateness resulted in prosecution. Some suggested an inconsistency between both involving the prosecutor early and providing thorough information. One suggested that it would be useful for the organisation to be able to inform the prosecutor at an early stage that a potential offence was under investigation, and agree a timescale to report a final determination.

107. There was concern that the investigative standard imposed upon organisations was unrealistically high. Some thought that the DPA Code does not take into account the intrinsic difficulties of internal investigations and the impossibility of predicting the future consequences of steps necessary for the investigation.

108. **The manner in which any internal investigation is conducted needs to be assessed on an individual basis. The difficulties of investigating organisational crime are appreciated and it is for that reason that we believe early engagement with the prosecutor is beneficial.**

109. The DPA Code permits prosecutors to weigh favourably early notification and discussion with the prosecutor. A failure to give early notification and discussion does not however exclude an organisation from consideration for a DPA. But if an internal investigation has prejudiced criminal proceedings, this may result in an unfavourable assessment.

“ The manner in which any internal investigation is conducted needs to be assessed on an individual basis. The difficulties of investigating organisational crime are appreciated and it is for that reason that we believe early engagement with the prosecutor is beneficial. ”

110. Six respondents said that there ought to be an element of intent added into this provision, i.e. an element of wilfulness, recklessness, knowledge, or intention in conducting investigations prejudicially. One respondent suggest this alternative formulation: “the prosecutor will critically assess the manner of any internal investigation to determine whether it was intentionally conducted in such a way as to make the destruction and/or fabrication of evidence highly likely. Deliberate acts of omission or commission, including deliberate delays in the conduct of internal investigations which led to such adverse consequences will militate against the use of DPAs.” Another similarly suggested that the final sentence should be changed to: “Very serious errors, or recklessness, in the conduct of internal investigations which leads to such adverse consequences will militate against the use of DPAs.”

111. Amendments have been made to paragraph 2.9 to reflect agreement in part but we do not consider it appropriate to include a requirement of a mental element, such as intent to undermine an investigation. Paragraph 2.9.3 is concerned with adverse consequences of an internal investigation and not the cause of the adverse consequences. We have not therefore introduced an amendment that requires the adverse consequence to be the result of very serious error.

Question 3: Do you agree with the approach to disclosure?

112. Nearly a third of responses (ten) were in agreement with the approach to disclosure. The comments and observations of those in agreement as well as the basis for the dissenting respondents are as follows:

DISCLOSURE REQUIREMENTS FOR PROSECUTOR

113. Seven respondents expressed concern about the lack of disclosure regime in the early negotiations stage. Eight respondents observed, in several different ways, that the prosecutor's disclosure obligations are too limited.

114. Some respondents were strongly of the opinion that the DPA Code should expressly oblige the prosecutor to disclose information that might reasonably be considered capable of undermining the prosecution case or assisting the defence case, and that the spirit of the CPIA obligations should be embraced right from the outset of negotiations. One respondent suggested that the "Terms and Conditions" letter should require the prosecutor to act in accordance with CPIA obligations.

115. Paragraph 5.2 makes it clear that a DPA is an agreement and it would therefore be inappropriate to have a disclosure regime in place during negotiations that is the equivalent of the CPIA regime. That regime is tailored to adversarial proceedings. Paragraph 5.2 further outlines the Prosecutor's duty of disclosure during the negotiation stage which is the common law duty. The duty to disclose material in relation to DPAs is no different from the duty that exists in relation to any other criminal investigation or proceedings prior to duties arising under the CPIA. Paragraph 14 of the Attorney General's Guidelines on Disclosure 2013 outlines that duty. The DPA Code is consistent with that guidance.

" The duty to disclose material in relation to DPAs is no different to the duty that exists in relation to any other criminal investigation or proceedings prior to duties arising under the CPIA."

116. It is suggested that whilst it was to be assumed that common law disclosure applies to the early stages consideration should be given to spelling this out so everyone is aware.

117. The Prosecutor's disclosure obligations outlined in paragraph 5.2 are in effect the common law duties of disclosure illustrated with application to the particular circumstances of DPA negotiations. We think it is unnecessary to state explicitly that common law disclosure applies.

118. It was suggested that the duty not to mislead already exists and so adds nothing. There was strong concern about the word "alive", which was not considered by some to go far enough and was not considered to be a proper legal test.

119. Paragraph 5.2 offers guidance to prosecutors on fulfilling disclosure duties where the purpose of disclosure is to ensure that negotiations are fair and that P is not misled as to the strength of the prosecution case.

120. "Alive to" are the words used in the test considered appropriate to common law/pre CPIA disclosure by the court in R v DPP ex parte Lee [1999] 2 All ER 737. Its meaning is clear and it is appropriate to use in the DPA Code.

Question 3: Do you agree with the approach to disclosure?

121. It was thought that organisations need greater comfort that the prosecutor will pursue reasonable lines of inquiry, and three respondents thought the lack of sanctions if the prosecutor did not fulfil its obligations was a concern.
122. Paragraph 5.4 states explicitly that the investigator's duty to pursue all reasonable lines of enquiry still applies. Paragraphs 5.5 to 5.6 have been added to the DPA Code which reflects Criminal Procedure Rule 12.2 (3). This creates an obligation upon the prosecutor to make a declaration to the court that it has complied with its disclosure obligation.
123. A further observation was that disclosure should be supervised by the court and that the prosecutor should create schedules and hand them to P.
124. Any supervision of disclosure by the court is beyond the remit of the DPA Code and would need to be in the form of Statute or Rules. The Criminal Procedure Rules have made provision for the prosecutor to make a written declaration to the court. The provision of schedules of material would create a burden equivalent to that imposed by the CPIA Codes during proceedings and, as stated, it is envisaged that the disclosure regime should be less onerous than the statutory regime appropriate for adversarial proceedings.
125. One respondent suggested amending the paragraph to read, "the prosecutor must ensure that the suspect is not misled as to the strength of the prosecution case" and "disclosure shall be made of information that might undermine the factual basis of conclusions drawn". Another commented upon the apparent inconsistent use of 'shall', 'ought' and 'must'.
126. **The first suggested wording is adopted and an amendment has been made at paragraph 5.2. Although the prosecutor must not mislead P as to the strength of the prosecution case there may conceivably be circumstances in which it would be appropriate to seek to withhold disclosure of 'information that might undermine the factual basis of conclusions drawn' on PII grounds. The word 'ought' is therefore retained rather than the suggested wording 'shall'.**

GENERAL OBSERVATIONS

127. One respondent suggested that the term "in principle" should be deleted from what was paragraph 34 as it implies that there are circumstances where this level of disclosure is not required.
128. **Agreed and the DPA Code is amended accordingly at paragraph 5.2.**
129. Several respondents suggest that the phrase "sufficient information" to play an informed part in negotiations" is too vague, and requires clarification.
130. **This phrase puts the Prosecutor's disclosure obligations into the context of a negotiation as distinct from adversarial proceedings. The phrase is sufficiently clear and easy to understand.**
131. It was suggested that in old paragraph 34 the phrase "disclosure ought to be made of information that might undermine the factual basis of conclusions drawn by P from material disclosed by P" be substituted for, "the prosecutor has a duty to disclose exculpatory material to P". Also that it is unclear how this would apply where (a) prosecution disclosure could place a witness's life in jeopardy; or (b) where the prosecutor has reason to believe that a witness statement exculpating the company is untruthful.

Question 3: Do you agree with the approach to disclosure?

132. This phrase is used as an example of where disclosure ought to be made when applying the disclosure obligations outlined earlier in the paragraph to the particular circumstances of a DPA. Adopting the wording suggested would create a new disclosure test so the suggestion has been rejected.

DISCLOSURE REQUESTS

133. Six respondents made the point that where reasonable and specific disclosure requests are made by an organisation to the company, they should be granted rather than merely "given consideration".

134. The duty on the prosecutor is to first consider whether the disclosure request is reasonable and specific, then whether there are any public interest grounds for not disclosing. To make it mandatory to grant all reasonable requests for disclosure would exceed the current legal requirement.

135. Some respondents suggested that where the prosecutor refused to give information, it should give its reasons for refusal.

136. The prosecutor will assess on a case by case basis whether reasons for non-disclosure can and should be given. We think it is unnecessary to state this in the DPA Code.

THIRD PARTY DISCLOSURE

137. Four respondents expressed concern about information disclosed to a prosecutor reaching third parties. These third parties could be civil claimants, international counterparts in mutual legal assistance requests, or other companies involved in a DPA process. It was suggested that as in the US, prosecutors should agree not to disclose information, or at least to inform the defendant organisation before doing so.

138. Disclosure and use of information by the prosecutor is dealt with by the Act. Before disclosing information to a third party the prosecutor must meet the requirements of statutory gateways such as s.3(5) CJA 1987. There are safeguards inherent in such provisions. It is not necessary to repeat in the DPA Code the well-known and clear legal obligations already in existence.

REASONABLE LINES OF ENQUIRY

139. Three respondents suggested that where the defendant organisation makes a reasonable and specific request to the prosecutor, the prosecutor should use its power to compel third parties to provide information.

140. As in any other investigation the prosecutor or investigator would be duty bound to pursue all reasonable lines of enquiry to obtain information. Compulsory powers could be exercised if justified, reasonable and proportionate. Where P identifies the existence of such information to the prosecutor or investigator it would have to be treated as any other line of enquiry and we think that this does not need to be expressed explicitly in the DPA Code.

Question 4: Would it assist if examples of potential terms additional to those addressed are included in the DPA Code?

141. Sixteen respondents answered “no” to this question. Reasons given for answering “no” were as follows:

- no examples of terms are given in guidance for ASBOs or SCPOs;
- the terms will be heavily fact-dependent and too many terms could detract from the bespoke nature of a given DPA;
- the terms are not exhaustive so it is not necessary to include any more before any practical examples exist to show how DPAs work in practice

142. A number of respondents said the DPA Code should make it clearer which terms are optional and which are mandatory, and it should make clear that the list of possible terms is not exhaustive. There was also concern that “suggested” terms might become “default” terms.

143. One respondent characterised this section of the DPA Code as inappropriate as it amounted to prosecutors unilaterally proposing terms in addition to those set out in paragraph 5(3) of schedule 17.

144. The same respondent suggested that there is a rebuttable presumption that all the terms in paragraph 5(3) of schedule 17 will be included in a DPA, and this undermines the company’s bargaining position – any further presumptions would further undermine the company’s bargaining position. The respondent opposed any additional terms “as a matter of principle.”

145. The DPA Code is a code for prosecutors. This section of the DPA Code aims to assist a prosecutor to identify the appropriate terms for consideration in any given case. DPAs are about negotiated settlement and absent agreement between the parties there will not be a DPA. We have amended the DPA Code to distinguish those terms which are mandatory under the Act from those which will normally be included. We have also suggested other possible terms which may be included where appropriate.

“ DPAs are about negotiated settlement and absent agreement between the parties there will not be a DPA.”

146. Paragraph 5(3) of the Act says: “The requirements that a DPA may impose on P include, but are not limited to, the following requirements...” There is no such presumption that all the terms at paragraph 5 (3) will be included and the DPA Code does not suggest otherwise.

147. We are of the view that some terms will ordinarily be present, such as financial penalties. Others should always be present such as the warranty of accuracy and completeness. Before any term may be imposed a court must be satisfied it is “fair, reasonable and proportionate.” As such there will not be “default” terms.

148. The following were suggested as possible additional or amended terms:

- 42(iv) (now 7.7 i.) could make it clear that in the absence of new facts, the organisation will not be charged with alternative offences. Two respondents suggested “offences” should be replaced with “conduct”. We disagree with the use of the word “conduct.” An indictment does particularise offences. It is our view that it is unnecessary for the prosecutor to agree not to prosecute P for a different offence arising out of the same facts that are the subject of the DPA. There are adequate protections in public law or any trial process to correct any injustice or unfairness if a prosecutor brought charges improperly.

Question 4: Would it assist if examples of potential terms additional to those addressed are included in the DPA Code?

- ii. The warranty in paragraph 42(v) (now 7.7 ii.) should have the term “best of belief” added to it. **The term has been amended consistent with Criminal Procedure Rule 12. A request that P’s legal advisers make the same warranty has also been added.**
- iii. 42(vi) (now 7.7 iii.) should be extended so as to cover any new indictments preferred against individuals as a result of the investigations, rather than just covering the indictment to which the DPA relates.
- iv. 42 (xiii) (now 7.8 iii and footnote 7.) - where there is prosecution of individuals then there should be a continuing duty of cooperation with the prosecution by the organisation in respect of its disclosure obligations. **We agree that co-operation should be extended to any trial of individuals in respect of the provision of material as evidence or for disclosure. Footnote 7 clarifies this.**
- v. Five respondents expressed concern about the concept of “cooperation with sector wide investigations”. There is concern that such investigations are potentially very costly and intrusive, and that such an open-ended obligation would be a disincentive for organisations to enter into DPA. Some noted that this term does not accord with the comparable term from paragraph 5(3)(f) of schedule 17 of the Act, namely, “to cooperate in any investigation related to the alleged offence”. One respondent suggested that the DPA Code should make clear that such terms are optional and not default. Another respondent expressed the opposite viewpoint, and submitted that organisations should both cooperate with sector-wide investigations and be required to assist any prosecution of individuals. **The terms of any DPA will be unique to the circumstances of the case. Neither the Act nor this DPA Code prescribe the terms of any such DPA. Where appropriate the assistance with sector wide investigations may be a term of a DPA and would be a factor the court may take into account in assessing any financial penalty.**
- vi. It was submitted that it would be helpful to know whether DPAs might prohibit the companies from engaging in certain activities or impose specific financial reporting obligations on them, and if so, the nature of such terms and the circumstances in which they might be imposed. **This is agreed, and paragraph 42 xiii has been replaced with a new paragraph 7.9. However, the application of such terms would be on an individual basis, so we have not listed circumstances in which they may be imposed.**
- vii. 42 (viii-ix) (now 7.9ii.) - One respondent said that seven days is not a reasonable time for the payment of a penalty which may amount to millions or tens of millions of pounds. They suggest thirty days as more reasonable. **Seven days will be the ordinary requirement. Any longer term may be negotiated. Consequent on its participation in the DPA negotiations, the organisation will be fully aware of and will have agreed what it will likely be required to pay. Furthermore, approval will be sought from the court on the time period to pay.**
- viii. One respondent submitted that it would not be fair, reasonable, or proportionate if a late payment could terminate a DPA, and they say that the timing of payments should not be a term of the DPA. **Seven days will be the ordinary requirement. Any longer term may be negotiated. Consequent on its participation in the DPA negotiations, the organisation will be fully aware of and will have agreed what it will likely be required to pay. Furthermore, approval will be sought from the court on the time period to pay.**

Question 4: Would it assist if examples of potential terms additional to those addressed are included in the DPA Code?

- ix. One respondent submitted that it would not be fair, reasonable, or proportionate if a late payment could terminate a DPA, and they say that the timing of payments should not be a term of the DPA.
- The test of “fair, reasonable and proportionate” relates to a term of the DPA. It is not a test used to decide whether a breach has occurred. Payment of a financial penalty and the time by which such a payment will be required will be a fundamental term of a DPA to be agreed. If payment is not made in the amount or by the date ordered a breach will occur. Breach procedures laid down by the Act will be then be triggered. We have suggested a term that builds in flexibility which, permitting with prior court approval interest to be paid on late payments without breach proceedings being instigated. Naturally such a term will be time limited and not be open ended.

OTHER OBSERVATIONS

149. One respondent commented that if it is to be a common term that the organisation will normally have to pay the costs of the investigation and negotiation, then the issue of how the investigation costs are to be assessed and quantified needs to be addressed.
150. We are of the view that costs are best decided on a case by case basis with the organisation concerned and resolved as with the other terms by agreement.
151. Guidance on the likely duration of DPAs, and the factors which would be likely to make a DPA shorter or longer, was requested.
152. Agreed and amendment made – see footnote to paragraph 7.2.

“ The terms of any DPA will be unique to the circumstances of the case. Neither the Act nor this DPA Code prescribe the terms of any such DPA. ”

153. One respondent asked for a reference in the DPA that its terms are not a final adjudication on any matter set forth therein, so that the organisation does not admit any civil liability.
154. A DPA is intended to be a final adjudication extinguishing criminal liability in England and Wales. We do not think that a term within the DPA can determine how a civil or foreign jurisdiction assesses the nature of a DPA.

Question 5: Do you agree with the approach to the use of a monitor?

155. Ten respondents agreed with the approach to the use of monitors as presented.

WHEN MONITORS WILL BE APPROPRIATE

156. Six respondents suggested that the DPA Code seems to assume that a monitor will always be required, despite the fact that they are an onerous and costly sanction, and will not always be appropriate. They submitted the DPA Code should state expressly that monitors will not always be appropriate, and it should also provide specific guidance as to when a monitor will be used.

157. **There is no such assumption. We have reworked paragraph 7.11 in order to emphasise this.**

158. Two respondents suggested adoption wholly or in part of the Morford Memorandum.

159. **In drafting this section of the DPA Code we gave consideration to that guidance and believe that the DPA Code addresses the issues dealt with therein.**

160. One respondent suggested the following six factors as useful for determining when a monitor is appropriate, as drawn from a Resource Guide published by the US Department of Justice and SEC to the US Foreign Corrupt Practices Act:

- i. the seriousness of the offence;
- ii. the duration of the misconduct;
- iii. the pervasiveness of the misconduct;
- iv. the nature and size of the company;
- v. the quality of the company's compliance programme at the time of the misconduct;
- vi. subsequent remedial efforts by the company.

161. **These six factors are all considerations that the prosecutor will already take in to account when deciding whether a DPA may be appropriate. In the circumstances of a favourable assessment of these factors a**

monitor will rarely be necessary. It is for this reason that a circumspect approach is advised at paragraph 7.11.

ROLE OF MONITOR

162. Three respondents suggested that the DPA Code's description of the monitor's role at paragraph 7.12 is unclear. One of these suggested: "A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct."

163. **We are of the view that paragraph 7.12 is sufficiently clear and the proposed amendment does not add to what has already been provided.**

164. One respondent suggested that the monitor should be independent and should not report to P or to the court in order that it may report freely. They further submit that the monitor should not provide advice to P.

165. **A responsibility of the monitor is to advise P of necessary compliance improvements as well as to report on P's compliance with the terms of the DPA. As such the monitor will need to report to P. The court, which may be engaged by the prosecutor to adjudicate on P's non-compliance, will need to have access to the monitor's findings.**

166. Six respondents expressed reservations about the monitor being granted access to all aspects of the business, considering this to be disproportionate, expensive and unfocused. The general view amongst these six respondents is that it would be preferable for the monitor to have access to all relevant aspects of the business.

Question 5: Do you agree with the approach to the use of a monitor?

167. **We agree. The DPA Code has been amended at paragraph 7.14 by inserting a relevance requirement.**
168. One respondent suggested that the issue of P's privilege in respect of investigating compliance issues that arise during the monitorship be specifically addressed.
169. **The Act does not undermine the existing law on legal privilege and as such a term of a DPA cannot do so. Therefore we do not believe this needs addressing.**

APPOINTMENT

170. One respondent noted that the DPA Code creates a presumption that the prosecutor will accept the organisation's preferred monitor, and they say that it is unhelpful for this presumption to exist. They suggest abolishing the presumption but creating a requirement for the prosecutor to take the preferred choice into account and to give reasons when declining the organisation's preferred monitor.
171. **We do not think the approach is sufficiently different from the DPA Code as drafted to warrant a change.**
172. One respondent said that it was unclear why the judge should have the power of veto over the proposed monitor but recognised that the judge may veto any part of the agreement. By contrast, another submitted that only the judge should be able to veto the monitor, but if the prosecution object to the proposed monitor then they should be able to make representations to the judge.
173. **The ultimate decision as with any term will rest with the judge who must be satisfied that it meets the statutory test.**
174. Some respondents were anxious for the terms of reference and form of reporting to be set out in clear guidelines, to prevent disagreements occurring later.
175. **The DPA Code requires the terms of the monitorship to be agreed. The terms will be fact specific and both parties will bring their respective experience to bear along with that of the proposed monitor in settling the terms.**
176. Two respondents suggested that a default monitorship period of one to two years should be indicated in the DPA Code.
177. **We are disinclined to be prescriptive about the length of a monitorship. The period will be fact specific.**
178. One respondent submitted that extensions should be subject to the jurisdiction of the court.
179. **The DPA Code suggests drafting the DPA to allow flexibility in the engagement of the monitor permitting extensions or reductions by agreement. If the court disfavours this approach the mechanisms afforded by the Act for variation are very limited.**
180. Two respondents suggested the need for a mechanism to deal with disputes regarding the conduct of the monitorship including applying to court to resolve by declaration any dispute.
181. **The jurisdiction of the court over DPAs has already been determined. The DPA Code cannot provide for procedural mechanisms. Whether existing mechanisms will allow for resolution of disagreements remains to be seen.**

COSTS

182. One respondent suggested that the DPA Code should provide that the costs of the monitor are subject to reasonableness and proportionality tests, and subject to review by the courts.

Question 5: Do you agree with the approach to the use of a monitor?

183. An amendment has been made to paragraph 7.13 to reflect the fact that costs of the monitor may impact on whether a term of monitoring will meet the statutory test.

184. Four respondents express concern about the mechanisms surrounding the costs of the monitorship process. They note that there is no mechanism in the DPA Code for reviewing any disputed costs, and if escalating costs of monitors could be dealt with as variations of the DPA, then this should be stated expressly.

185. We have amended paragraph 7.13 in order to draw the prosecutor's attention to the issue of costs which may be relevant to the term meeting the statutory test. The onus on negotiating costs with the monitor is however on P who should consider capped or fixed fee arrangements.

186. One respondent wanted the DPA Code to refer to the potential costs of a monitor, and they suggest adding the following at the end of the paragraph: "including provisions or limits as to costs. The monitor's report should include a breakdown of his costs, and on what matters costs were incurred."

187. We agree and the paragraph 7.18 has been amended.

COMPLIANCE PROCEDURES

188. Three respondents submitted that there is no positive obligation on companies to operate anti-bribery procedures (though companies without such procedures in place risk incurring liability under s. 7 Bribery Act 2010), and ask that the DPA Code make this clear. They question the use of monitors to oblige organisations to put in place procedures they have no obligation to adopt.

189. One purpose of a DPA is to prevent future occurrence of misconduct. A monitor may have an important role in securing this outcome. A DPA is a negotiated resolution supervised by a court that avoids an ordinary prosecution. The appointment of a monitor will only occur where there is agreement between the parties and the court is satisfied that the appointment meets the statutory test.

"A DPA is a negotiated resolution supervised by a court that avoids an ordinary prosecution. The appointment of a monitor will only occur where there is agreement between the parties and the court is satisfied that the appointment meets the statutory test."

Question 6: Do you agree that the examples of the policies and procedures ... that the monitor may be tasked to identify are in place is sufficiently comprehensive?

190. Twelve respondents were broadly in agreement.
191. Six respondents observe that these policies are focused on anti-corruption compliance programmes, but since DPAs are to apply to economic offences more generally, there is no reason why this should be the case.
192. Three respondents queried the value of having a list. Since each DPA will require a case-specific solution to it there is a danger of the list developing into a check-list which will be applied inflexibly. Any list will quickly become outdated. One respondent submitted it was unnecessary to set out such policies in any great detail.
193. Three respondents submitted that the policies and procedures should be determined on a case by case basis and should be proportionate to the size of the business involved.
194. Three respondents suggested that the inclusion of these examples is confusing and that for anti-corruption programmes, reference can simply be made to the Ministry of Justice Guidance. One respondent suggested referring to externally published compliance frameworks (e.g. OECD Good Practice Guide on Internal Controls, Ethics and Compliance, the BS 10500 Anti-Bribery System Standard).
195. **We think examples will be useful for a prosecutor and we have added further examples given by respondents. We have also noted that regard should be had to contemporary external guidance on compliance programmes. The DPA Code makes clear the importance of a case by case approach. We have however strengthened the emphasis in this respect.**

196. Two respondents said that it should be made clear that these policies and procedures are not deemed to be an indication of what can amount to adequate procedures under s. 7 Bribery Act 2010.

197. **We agree (see footnote to paragraph 7.21).**

“ The DPA Code makes clear the importance of a case by case approach.”

Question 7: Is the approach to determining an appropriate level of a financial penalty term ... clear?

198. Sixteen respondents answered “yes” to this question.
199. Three respondents made the point that the DPA Code does not clarify what factors over and above those already required for entering into a DPA will make a further reduction in sentence appropriate. Clarification was requested as to the factors and the process for calculating the reduction.
200. Paragraph 8.4 emphasises that there is a broad discretion and that “parties should be guided by sentencing practice and pre-existing case law on this matter.” The DPA Code cannot provide sentencing guidelines.
201. Two respondents suggested that outside of the DPA scheme, credit is given for assistance first, and then the assistance is further reduced for a guilty plea and the DPA Code should be amended accordingly.
202. Paragraph 8.4 has been amended to to reflect agreement.

FLEXIBILITY VERSUS CERTAINTY

203. Two respondents suggested that whilst the DPA Code has tried to draw a balance between flexibility and certainty, the problem with this flexibility is that it is difficult to provide any real guidance as to the likely financial penalty upon a guilty plea, particularly given the lack of precedents to draw upon. Although the DPA Code contains a step by step guide, several of the steps in themselves provide a very broad discretion to the sentencing judge.
204. Another respondent suggested that some information on quantifying the likely range of penalties would be helpful. One noted that in the US there is no set formula for determining fines, but rather they are determined via negotiation.

“...any financial penalty is to be broadly comparable to a fine that the court would have imposed on P...following a guilty plea.” “

205. Paragraph 8.3 of the DPA Code quotes the Act, sch. 17, s. 5(4), which provides that any financial penalty is to be “broadly comparable to a fine that the court would have imposed on P...following a guilty plea.” To the extent that existing sentencing principles and guidelines quantify the likely range of penalties, the DPA Code therefore seeks to do so.
206. The DPA Code cannot provide sentencing guidelines. The Sentencing Council has issued guidance on sentencing economic crime including corporate offending. The parties will negotiate a penalty where appropriate by reference to existing guidelines and case law. It will be for the court to then determine whether the proposal is ‘broadly comparable to a fine that the court would have imposed upon P... following a guilty plea’ and therefore “fair, reasonable and proportionate.”

Question 7: Is the approach to determining an appropriate level of a financial penalty term ... clear?

WHETHER ADMISSION OF GUILT REQUIRED

207. Two respondents sought clarification as to whether a formal admission of guilt is required as a pre-requisite for reductions in sentence.

208. Admissions of guilt are not required by the Act. Entering into a DPA is treated by the Act for the purpose of sentencing to be equivalent to a guilty plea.

GENERAL OBSERVATIONS

209. Five respondents noted that an organisation entering into a DPA will incur numerous costs other than the fine, and suggested that the DPA Code should provide that these other costs be taken into consideration. These other costs include disgorgement, compensation, the costs of monitorship, fines paid to overseas regulators, and so forth. They submit that if the total costs are too great, then organisations will lack the incentive to enter DPAs.

210. Paragraphs 8.3 and 8.4 provide the flexibility for P's other costs to be taken into consideration if appropriate and make explicit that where compensation is appropriate, this should be given priority over a fine.

211. One respondent said that no consideration seems to have been given to confiscation, even though the impact of this can sometimes be greater than any fine.

212. In addition to a financial penalty, P may be subject to other financial orders including disgorgement of profits.

213. One respondent noted that publication of a DPA can be delayed where publication might prejudice the administration of justice. Whilst they consider this helpful and appropriate, they suggest that it might prevent a body of practice developing which would assist corporations and their advisors. Therefore, prosecutors might wish to consider putting in place a mechanism whereby DPAs can be published, but in a suitably anonymised and redacted form, so that the public have as much guidance available to them as possible of the prosecutor's approach to DPAs.

214. **The publication of a DPA will only be delayed for as long as the reason for non-publication remains. The steer given by the Act is transparency and publication as a starting point.**

215. One respondent suggested that paragraph 8.5 should specify whether the phrase "any coercive measures" includes the DPA itself. Another respondent interpreted the phrase "over and above mere compliance with any coercive measures" to mean the waiving of legal professional privilege. The respondents requested that the DPA Code provide further clarification on this.

216. **We think cooperation "over and above mere compliance with any coercive measures" is clear, particularly given the footnote, which refers by way of example to section 2 notices under the Criminal Justice Act 1987. The phrase refers to voluntary assistance including self-reporting. It does not imply waiving of legal professional privilege. The DPA Code has been amended at paragraph 3.3 to clarify the position regarding legal professional privilege.**

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice?

NEGOTIATIONS

217. One respondent suggested that where a prosecutor terminates DPA negotiations, it should be obliged to put its reasons in writing.
218. **The DPA Code has been amended at paragraph 3.2 to counsel that the giving of the gist for termination will ordinarily be appropriate.**
219. Two respondents submitted that it was important for the formal letter of invitation to include time limits in which the negotiations should proceed. They also both said that these time limits should be agreed rather than imposed upon the organisation, since the relevant circumstances are going to be more within the knowledge of the organisation than the prosecutor.
220. **It is agreed that a time limit should be set for negotiations but it will be appropriate to include this within the subsequent letter setting out the way in which discussions will be conducted. This will allow P to have some input into the time limit set. The words 'including appropriate time limits' have been added to paragraph 3.8 iii.**
221. Two respondents suggested that a requirement to agree all minutes could lead to arguments over precise wordings, and that it would be easier for parties to prepare their own notes (which could be exchanged if necessary), apart from particularly important meetings.
222. **The purpose of agreeing minutes is to avoid disputes arising further along in the process over what has been agreed and to identify any disputes at the appropriate time. If there is disagreement over the wording, the minutes can reflect this by including both views.**

“ We believe the duty to retain material is one properly placed on P and is consistent with other statutory provisions in respect of the retention of material. ”

223. It was suggested that for the purposes of document retention there ought to be a requirement for the prosecutor to identify the documents or type of documents that need to be retained.
224. **We believe the duty to retain material is one properly placed on P and is consistent with other statutory provisions in respect of the retention of material.**

CONFIDENTIALITY

225. Seven respondents noted that material disclosed to the prosecutor could be disclosed onwards in a number of unspecified circumstances as permitted by law. They noted that this is potentially very wide ranging and raises concerns about collateral investigations / prosecutions / civil proceedings in other jurisdictions. They suggested that further clarity is required, in particular in respect of the circumstances in which an organisation can stop the prosecution from disclosing information to others.

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice?

226. **The statutory gateways available to a prosecutor stipulate where onward disclosure is 'permitted by law' and safeguards have developed through case law to enable the document owner to intervene if appropriate. The prosecutor should not ordinarily agree variations. The DPA Code has been amended at paragraph 3.10 to reflect this.**

227. One respondent suggested that the requirement on the organisation not to pass on any information provided by the prosecutor ought to be variable in order to assist in internal investigations.

228. **In exceptional circumstances variation to the confidentiality provisions may be made. The DPA Code has been amended at paragraph 3.10 to counsel that variations should be fact specific and be made on a case by case basis.**

USE OF INFORMATION

229. One respondent expressed concern that the possible use of internal investigation interviews by law enforcement agencies may amount to exploiting the power that companies have over their own employees, to obtain statements from individuals that they would be otherwise unable to obtain. For the prosecution to use statements obtained under inherently coercive conditions undermines the right against self-incrimination, and raises the question of whether employees should have the statutory right to refuse to answer questions in internal investigations, in case their answers are handed over to law enforcement agencies. It was submitted that such statements would only be admissible against the company but this would create difficulties if the company and the individual employee were co-defendants.

230. **The use of interviews in any proceedings would be governed by the laws of evidence which provide the appropriate protections on a case by case basis.**

231. One respondent suggests that it would provide greater clarity if the DPA Code set out a non-exhaustive list of the types of documents that prosecutors are not able to use if a DPA negotiation failed.

232. **Schedule 17, paragraph 13 of the Act already describes the material that prosecutors are not able to use.**

233. The same respondent suggested that information contained in DPAs should not be used in criminal proceedings against those implicated by DPAs, only against the entity that signed the DPA.

234. **We are of the view that subject to the rules of evidence material so obtained may be used in these circumstances.**

235. Three respondents suggested that the reference at paragraphs 3.8 ii and 4.3 to "inaccurate, misleading or incomplete information" ought to contain a mens rea requirement.

236. **The Act uses the words [and] "knew or ought to have known that the information was inaccurate, misleading, or incomplete." Paragraphs 3.8 ii and 4.3 have been amended accordingly.**

THE STATEMENT OF FACTS

237. Three respondents make the point that it might be unrealistic to provide details of financial gain or loss, since this issue might be technical and subject to considerable debate.

238. One additionally noted that this requirement goes beyond paragraph 5(1) of schedule 17 of the Act, which only requires the DPA to contain a "statement of facts relating to the alleged offence, which may include admissions made by P".

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice?

239. The current wording is retained. We believe that the gain or loss is a fact related to the alleged offence. Financial gain or loss will ordinarily be material to the penalty. Where it is immaterial the Statement of Facts would state this.

240. Two respondents were concerned that the requirement to “admit the contents and meaning of key documents” does not accurately reflect paragraph 5(1), schedule 17 of the Act.

241. If a document is key to the agreed statement of facts then it will be necessary for P to admit the content and meaning of that document. The court does not have the power to adjudicate on factual differences in DPA proceedings and the DPA discussions will need to resolve such issues.

APPLICATION FOR APPROVAL

242. Two respondents disagreed that a private hearing to approve a DPA “is likely to be almost always necessary”; for the sake of transparency, they suggest that it should be in public. They submit that this accords with paragraph 8(5) of schedule 17 of the Act, which says that the hearing “may be held in private”.

243. It is an important aspect of the DPA process that the negotiations take place in private but enter into the public domain at the appropriate time when agreement has been reached. Paragraph 10.4 simply reflects the reality that it will not be appropriate for a public hearing when there is still uncertainty as to the outcome of the process. If there is approval there will be an adjournment for a public hearing to take place. The Code has been amended to reflect the reality that the process previously dealt with

under the heading ‘Final Hearing’ will almost always take the form of an ‘Application for Approval’ followed by a ‘Declaration in Open Court’ at a time allowing for the listing to be publicised in the normal manner (see new section 11 and paragraph 15.4).

VARIATION

244. One respondent suggested that paragraph 11.4, line 4, could be interpreted to mean that the court has no choice. They suggest that it could be better expressed as, “The court will approve the variation only if that variation is (a) in the interests of justice, and (b) the terms of the DPA as varied are fair, reasonable and proportionate.”

245. Agreed. Paragraph 11.4 has been amended.

246. One respondent notes that the DPA Code (at paragraphs 12.2 and 12.3) only envisages two situations in which variation of the DPA might be necessary. They suggest also making provision for variation where both parties and the court agree that it is necessary, e.g. where there has been an error or significant change of circumstances.

247. These are the only two situations outlined in the Act. Where the error or significant change of circumstances will make a breach likely then it is covered by the second situation described.

ISSUES OF MULTIPLE JEOPARDY

248. Seven respondents expressed concern that defendant organisations could be exposed to liability in multiple jurisdictions, and the DPA Code does not make sufficient provision so that the organisations avoid “multiple jeopardy”.

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice?

249. Separate guidance already exists with respect to the prosecutor resolving issues of concurrent jurisdiction. As with entering a guilty plea in a prosecution, P should only conclude a DPA when it is satisfied that issues of concurrent jurisdiction have been resolved to its satisfaction. The Corporate Prosecution Guidance directs the prosecutor to guidance on concurrent jurisdiction. Paragraphs 9.4 and 10.3 outline that a prosecutor must address issues such concurrent jurisdiction when explaining to the court why a DPA is in the 'interests of justice' and 'fair, reasonable and proportionate'.

would be helpful to know whether an organisation would be exposed to further penalties beyond those identified in the DPA as being commensurate with an early guilty plea. The respondent suggests that any such further penalties would be disproportionate.

253. The Act does not and therefore the DPA Code cannot provide penalties for breach. Rather the court may invite the parties to agree a proposal to remedy the breach or terminate for the breach. Paragraph 7.9 i. suggests a possible term of the DPA providing for the payment of an agreed rate of interest for late payment of a financial penalty.

BREACH OF DPAs

250. One respondent suggested that the DPA Code does not address how minor new offences are to be dealt with. They ask whether they could be the subject of the same DPA, or whether there would have to be a new DPA to deal with them. They draw attention to US "coverage provisions."

251. The draft indictment can include multiple offences where appropriate but where an offence is not particularised on the draft indictment then the terms of the DPA cannot cover these. The treatment of any subsequent offences would be considered by reference to the Code for Crown Prosecutors.

252. One respondent suggested that it would be helpful for the DPA Code to provide further clarification as to the penalties which would be imposed upon an organisation after breach of a DPA. They submitted that it

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