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Matthew Grey  
Ministry of Justice Law and Rights,  
Judicial Policy and Criminal Trials  
6th Floor  
102 Petty France  
London SW1H 9AJ

By email: [dpasconsultation@justice.gsi.gov.uk](mailto:dpasconsultation@justice.gsi.gov.uk)

Dear Mr Grey

### **Deferred prosecution agreements**

ICAEW is pleased to respond to your request for comments on *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

Felicity Banks  
Head of Business Law

T +44 (0)20 7920 8413  
E [felicity.banks@icaew.com](mailto:felicity.banks@icaew.com)



## ICAEW REPRESENTATION

### DEFERRED PROSECUTION AGREEMENTS

**Memorandum of comment submitted in August 2012 by ICAEW, in response to Ministry of Justice consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements, published in May 2012**

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## INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* published by Ministry of Justice on 17 May 2012, a copy of which is available from this [link](#).

## WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community, as well as with members of the Forensic Special Interest Group Committee and other relevant committees. The Business Law Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

## KEY POINTS

5. The key points we would like to make in response to the consultation are:
  - Crimes committed by or on behalf of businesses are unjust and economically damaging. Everything that can be done to make them riskier and less profitable for business should be done, subject to the principles of justice and to fair and proportionate costs of investigation and punishment. This would include the introduction of deferred prosecution agreements (DPAs) where these represent a just and effective addition to the prosecutorial tool-kit.
  - DPAs will be ineffective, unless there is a realistic chance of prosecution – prosecutions will remain very difficult in those cases where criminal liability depends on establishing that the 'directing mind and will' of an organisation was at fault. Nor is this in keeping with the principles of company law, which provides that the shareholders delegate responsibility for the management and control of their company to the board of directors, acting as their agent, not to an individual who provides a unique directing mind and will.
  - The introduction of DPAs should be followed as quickly as practical, by fundamental review of the principles of corporate liability for criminal activities carried out on their behalf.

### The proposed model for deferred prosecution agreements

6. We are attracted to the idea of DPAs, as an additional tool with which to ensure that corporate entities can be held to account for crimes committed by them or on their behalf. However, we are aware that members of the legal profession have a number of concerns about the detail and practicality of the proposals. We have noted the thoroughness with which the Ministry of Justice is consulting the legal profession, and hope that this change in the law will have a more effective outcome as a result.

7. In particular, we hope that DPAs will not be introduced without research into the following matters where answers are not yet apparent from the consultation document:
- The introduction makes much of the advantages of international investigations being able to be carried out in the most appropriate jurisdiction. But there is nothing in the consultation which indicates that a UK DPA will be sufficient to prevent an action in the US. Nor is it clear whether the implications within an EU context have been considered.
  - DPAs could be useful in increasing the effective investigation and punishment of less serious economic crime as well as ones committed by major organisations. Is it envisaged that they will be available in relation to crimes usually triable in magistrates courts, as well as the high court? In these cases, will the magistrate be able to take the place that a judge would take in more serious cases?
  - Which types of commercial organisations will be able to use DPAs? Will they be open only to companies, or will they also be available to charities, community interest companies, partnerships and sole traders?
  - Will they be available in relation to tax frauds, and if so have discussions been held with HMRC, and their comments taken into account?

#### Reform of the law on corporate criminal liability

8. We understand the desire of the Government to address one reform for the improvement of law enforcement on the business and economic criminal at a time. However, deferred prosecutions themselves would work better in a jurisdiction where corporate criminal liability is more consistent, more logical, and more in line with the way in which most companies are operated.
9. A comprehensive reform of corporate criminal liability would also have benefits in clarifying societal expectations of corporate entities and their employees, and hence have additional benefits for the rule of law and fair competitive markets in the UK and overseas.
10. The current proposals address 'economic crime' only, which is defined as including fraud, bribery and money laundering. The law enforcement agencies and prosecution authorities mentioned in the consultation consist of the Serious Fraud Office and the Crown Prosecution Service only. However, there are a number of other relevant crimes and enforcement authorities, such as:
- The Office of Fair Trading, in relation to criminal cartels;
  - The Financial Services Authority, in relation to market abuse;
  - Police forces, in relation to very serious environmental crime;
  - A number of regulatory authorities in relation to serious breaches of regulatory requirements.
11. Better consistency would be achieved if all these types of crime are defined in similar terms, together with similar conditions for leniency and prosecution policy.
12. Specific provisions in relation to corporate liability has been included in a number of more modern reforms such as criminalisation of cartels and the corporate bribery offence, but even in these cases consistent approaches have not been taken. Differing arrangements have been introduced in relation to reasonable efforts to prevent the offence taking place, and arrangements for leniency. For example, we have no fundamental problems with either the statutory guidance on anti-bribery procedures issued by the Ministry of Justice, or the authoritative guidance on avoiding committing the cartel offence issued by the OFT. But the fact that they take a completely different approach to dealing with a very similar problem –

ensuring that companies effectively deal with the risk that criminal offences will be committed on their behalf – means that companies wishing to put in place procedures for both have a much more difficult task.

13. As noted in the consultation, there are enforcement problems due to the cross-border nature of much modern commerce. Any reform of the law therefore needs to take into account cross border as well as domestic considerations. This will be best achieved if it can be done in a way which is simple for British business to implement, and where foreign governments can easily understand the benefits of applying similar policies.
14. We would be pleased to do anything we can to further the Ministry's work in promoting the rule of law, and high standards of integrity, within all businesses operating in the UK and British businesses working in all jurisdictions. ICAEW have produced a review of law and practice in relation to business and economic crime within which we summarise the main categories of economic and business crime<sup>1</sup>, as well as national and international options for defining and tackling it.
15. The consideration of ways in which corporate crime could be reformed would not need to start from first principles. The Bribery Act already provides a useful model on which a general system of corporate crime could be based. The Law Commission work on criminal liability in regulatory contexts also considered general issues on criminal liability for businesses<sup>2</sup>. The Commission have put this work on hold, but hope to deal with it as part of a full scale project on corporate liability in the future. We suggest that they are encouraged to embark on this project without delay. We also suggest that the Ministry of Justice works closely with the Department for Business Innovations & Skills, to ensure a consistent approach to business management, regulation and risk control across government.

## **RESPONSES TO SPECIFIC QUESTIONS/POINTS**

**Q1. Do you agree that deferred prosecution agreements have the potential to improve the way in which economic crime committed by commercial organisations is dealt with in England and Wales?**

16. Yes.

**Q2. Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?**

17. We think that DPAs should be available (in principle) in relation to any crime committed for or on behalf of a business entity. The difficulties outlined in the consultation paper tend to apply equally to all corporate crime.
18. Paragraph 72 of the consultation defined economic crime as 'fraud (which includes any financial, fiscal or commercial misconduct or corruption<sup>32</sup>), bribery (specifically offences under the Bribery Act 2010), and money laundering'. We note that this definition of fraud is very wide, encompassing most if not all corporate crime. However, it would be simpler and more transparent if companies were to be subject to actual or deferred prosecution in relation to their

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<sup>1</sup> A copy is available from [http://www.icaew.com/en/technical/legal-and-regulatory/~/\\_media/Files/Technical/Legal-and-regulatory/business-crime-and-misconduct/tecpln9710-crime.ashx](http://www.icaew.com/en/technical/legal-and-regulatory/~/_media/Files/Technical/Legal-and-regulatory/business-crime-and-misconduct/tecpln9710-crime.ashx)

<sup>2</sup> A copy of our response to that consultation is available from [http://www.icaew.com/en/about-icaew/what-we-do/consultations-and-representations/representations/~/\\_media/Files/Technical/icaew-representations/2011/icaew-rep-09-11-corporate-criminal-liability-law.ashx](http://www.icaew.com/en/about-icaew/what-we-do/consultations-and-representations/representations/~/_media/Files/Technical/icaew-representations/2011/icaew-rep-09-11-corporate-criminal-liability-law.ashx)

underlying criminal offence (including such typical business related crime as engaging in a criminal cartel or serious environmental misconduct) rather than the related fraud offence.

**Q3. Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA?**

**Q4. Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?**

**19.** Prosecutors should also give active consideration to the criminal offense or offenses that will be included within the scope of the DPA. The commercial organisation will need to have clarity over future action that could be taken against them. That will not be the case, if the facts that they have agreed to can be used in a prosecution of a different crime.

**20.** Paragraph 87 proposes that the duration of a DPA should be between one and three years. We consider that additional action should not need to be carried out to extend an agreement, where (for acceptable reasons) not all the conditions have been fulfilled. In particular, an agreement should not lapse without prosecution where the organisation has not yet paid the financial penalties and reparations agreed, nor put in place adequate procedures to prevent the misconduct from being repeated.

**21.** A DPA should always address adequate procedures, including training, certification and monitoring, to prevent a repetition of the offence. Acceptance of a DPA implies (or should imply) that the entity admits to having inadequate procedures to guard against committing the crime in the first place.

**22.** We do not think that any business entity should ever be subject to criminal liability (and thus to actual or deferred prosecution) where it already had adequate procedures to prevent the criminal offence from taking place.

**Q5. Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?**

**Q6. What do you think would be most useful in a guideline for DPAs?**

**23.** We agree that guidance on DPAs would be essential to ensuring clarity and consistency. We have no strong views on who should issue such guidance, or its content, but it is very important that it is authoritative and can be relied upon by both prosecutors and commercial entities. The Sentencing Council would appear to be appropriate.

**24.** The guidelines need to be in place before the first DPAs are negotiated.

**Q7. Do you agree that the preliminary hearing should take place in private?**

**25.** Yes.

**Q8. Do you agree that the first test for a judge to apply at a preliminary hearing is whether a DPA is 'in the interests of justice'?**

**26.** Yes.

**Q9. Do you agree that at a preliminary hearing the judge should also apply a test as to whether the emerging conditions of a DPA are 'fair, reasonable and proportionate'?**

**27.** Yes.

**Q10. Do you agree with the proposed possible contents of a DPA as outlined?**

- 28.** We are concerned that the inclusion of specific provision for the provision of relevant information and material to allow prosecution of individuals, and the agreement to replace implicated individuals, could place too much emphasis on the punishment of individual employees or officers, when the culpability should lie with the company, as managed by its Board of Directors. We do not think that a company should be able to escape liability by scapegoating certain of its employees, where they were acting within the cultural norms of the company concerned. Nor do we think that individual employees should have undue liability for criminal actions where they carried out in good faith, believing that they were doing so with the approval of a business entity and on its behalf.
- 29.** The agreement should include confirmation of the criminal offence to which it relates, and an assurance that the agreed facts contained in it will not be used for the prosecution of any other criminal offence not covered by the agreement. Without this, the company will not have the closure which must be one of the motivating factors for entering into a DPA.
- 30.** We also believe that the implementation of adequate procedures for the avoidance of repetition of the criminal activities should be an invariable part of a DPA. See also our response to Question 4 above.

**Q11. Do you agree that there should be a reduction principle, relating only to the financial penalty aspect of a DPA, and that the maximum reduction should be one third of the penalty that would have been imposed following conviction in a contested case?**

- 31.** We agree that there should be reduction in the financial penalty charged, to incentivise co-operation. A business entity entering into a DPA will be subject to other expenses, including disgorgement, reparations and the costs of the introduction and maintenance of adequate procedures and their monitoring. In many cases, these will be greater than the financial penalty – any reduction should take into account the total financial effects of the agreement as a whole on the company. As noted in paragraph 7 of the foreword and is implicit in a number of places in the consultation, it is important that commercial organisations can be held to account without unnecessarily affecting employees, customers, pensioners, suppliers and investors. Our preference would be for reductions to penalties of greater than 30% to be charged where a company could be driven into insolvency when taken together with other costs.
- 32.** No reduction should be available in relation to the costs of disgorgement, reparations and the costs of the introduction, maintenance and monitoring of adequate procedures to prevent repetition of the criminal activity.

**Q12. Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?**

- 33.** Yes.

**Q13. Do you believe that it is right that the court should determine whether a variation to a DPA is appropriate, where a change of circumstances has occurred?**

**Q14. Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?**

**Q15. Do you believe that it should be possible for the parties to a DPA to be able to make amendments to it, within limits defined by that DPA?**

- 34.** Provisions for the variation of agreements should be included in the original agreement terms. These could include provisions for variation by prosecutors alone or by agreement between

the parties. Amendment to the provisions of the agreement should be reserved to the court, including where variations are proposed which were not allowed for in the original agreement.

**Q16. Do you agree that there should be provision for formal breach proceedings and that it should operate as described?**

**35. Yes.**

**Q17. Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?**

**36. Yes.**

**Q18. Do you agree that the above proposals regarding admissibility are appropriate?**

**37.** As noted in the response to Question 10 above, we do not think that a company should be able to escape liability by scapegoating certain of its employees, where they were acting within the cultural norms of the company concerned. Nor do we think that individual employees should have undue liability for criminal actions where they carried out in good faith, believing that they were doing so with the approval of a business entity and on its behalf. Information obtained in the course of agreeing a DPA should not be used in the prosecution of individuals in these circumstances.

**Q19. What are your views on the appropriate approach to disclosure in the context of DPAs?**

**38.** ICAEW has no detailed information on requirements for disclosure, and so have no views on these proposals.

**Q20. Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?**

**39.** We have no comments on this matter.

**Q21. Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?**

**40.** Yes, we agree that DPAs should be available in relation to investigations and prosecutions of crimes that were committed before the introduction of DPAs. They should not, of course, be used in the case of conduct which was legal when it took place.

**Q22. Do you agree with the proposed process for DPAs, as outlined in this chapter, and do you have any suggestions for improvements or amendments to it which would support the overall policy objectives?**

**41.** We have no comments on this matter.

**Q23. Do you have any further comments in relation to the subject of this consultation?**

**42.** Please see our comments above, in the main body of our response.

**Q24. Do you have any comments in relation to our impact assessment?**

**Q25. Could you provide any evidence or sources of information that will help us to understand and assess those impacts further?**

**43.** The societal benefits noted in the Impact Assessment should also include the fact that there will be a net benefit to law abiding business entities, in that they will be competing in markets where fewer of their competitors are acting against the law. This will have general benefits to the national and international economy and to the rule of law.

**Q26. What do you consider to be the positive or negative equality impacts of the proposals?**

**Q27. Could you provide any evidence or sources of information that will help us to understand and assess those impacts?**

**Q28. Do you have any suggestions on how potential adverse equality impacts could be mitigated?**

**44.** We have no comments to make on the equality impact assessment.

**E** [felicity.banks@icaew.com](mailto:felicity.banks@icaew.com)

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