SFO serious fraud office

CPS

The CPS incorporates RCPO

This response is filed by the Fraud Lawyers Association ("the FLA"), an organisation established in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of solicitors and barristers who practise mainly in the area of criminal and civil fraud: www.thefraudlawyersassociation.org.uk/.

Question 1: Do you agree with the test for entering into a DPA set out in paragraph 2?

In one fundamental respect we do not agree.

The evidential test for bringing criminal prosecutions in England and Wales is well known and well respected. It is proposed to abandon it for DPAs. The 'reasonable suspicion...and reasonable grounds...' test proposed in substitution (see 1.2.i.b) is a dangerous dilution of one of the basic safeguards of English criminal law. This diluted test is proposed to apply not only at the Schedule 17 paragraph 7 stage (approval of proposal to enter an agreement) but even at the paragraph 8 stage (approval of terms of an agreement). Thus at a final hearing, when a bill of indictment has been preferred, when a judge is to be asked to approve the fact and terms of an agreement, yet the evidential test may still not be met. How could that be right? How could a judge be confident in that state of affairs? More to the point, for the purposes of a prosecutorial code, how could a responsible prosecutor be satisfied with that? The 'reasonable suspicion...and reasonable grounds...' test reads like the test for the lawfulness of a police officer's arrest. To speak it slowly out loud, layer by layer, is to be struck by how far short of the Full Code Test for prosecution it falls.

This proposal envisages a scenario in which a bill of indictment has been preferred and yet the prosecutor promoting it has not been required to investigate the alleged criminality enough to know whether a prosecution could, in the normal course of events, be justified. If it were said in response "Well, of course, that would not happen in practice", then the proposed dilution is otiose and should be removed. If it were said "Well, the defendant will have volunteered for the agreement and thus confessed the offence on the indictment", then the prosecutor will have misunderstood the brutal commercial considerations which may have driven the defendant into his lap. There is a constitutional reason why the English law places upon the prosecutor's shoulders the burden of establishing to his own satisfaction that the Full Code Test is met: in an adversarial system founded on the presumption of innocence, in a system where the prosecutor is proudly independent, the individual (and a corporate individual should be no different) is to be protected against the opportunity for other organs of the State unfairly to exploit their far reaching powers. Every prosecutor is confident that he himself would never abuse such a power (such a dilution) or allow another organ of the State to do so... until one does. History tells us that it is always safer to remove the temptation. In this case it is would be most unwise to introduce that temptation in the first place.

In practical terms there are two further, subtler objections to the proposal. First, if the prosecutor relies on the diluted evidential test, knowing that the Full Code Test has not been met, if the resultant DPA is breached he may find that the prosecution cannot be resurrected. How embarrassing – how disturbing for the principle of DPAs generally – would that be?

Second, there is a risk that the diluted test will be blurred with or into the Public Interest Test. In the same way that it would be wrong for a tribunal of fact at trial, finding itself not quite persuaded to the requisite standard that a defendant were guilty, to convict but thereafter merely to conditionally discharge (rather than imposing the more serious merited sentence), so it would be wrong for a prosecutor, finding himself not quite persuaded to the requisite standard that there were sufficient evidence to prosecute a defendant, to proceed against that defendant but to offer to enter into a DPA (rather than taking a more serious and merited course). How corrosive – how disturbing – would that be? Again, the temptation would be better not introduced.

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

The FLA makes the following comments in relation to the additional public interest factors both in favour and against prosecution that are proposed in the Code.

Additional public interest factors in favour of prosecution

11.a.iii. *The offence was committed at a time when the company had an ineffective corporate compliance programme.*

As we set out in more detail below in response to Question 5, a company is not legally obliged to operate a general corporate compliance programme, and in circumstances where it is required to operate a corporate compliance programme for a specific purpose the form of such a programme is not prescribed. For this reason, the FLA does not consider it appropriate for the Code to assume, implicitly or otherwise, that a corporate compliance programme should always have been in place, or that it should take a particular form, and would urge caution in the assessment of the effectiveness or otherwise of any such programmes.

In most cases of serious fraud when the evidential stage of the Code has been met a corporate compliance programme is very likely to be considered by the prosecutor to have been ineffective to some degree. If the wrongdoing under consideration is for an offence contrary to s.7 The Bribery Act 2010 (for failing to have adequate provisions in place) the failure to have an effective programme will itself constitute the wrongdoing.

As currently drafted the Code has the potential to exclude the possibility of a DPA for any offence contrary to s7 of the Bribery Act, and, in the absence of a corporate compliance programme, potentially also for all other types of offences. Consequently it may act as a deterrent to self reporting in a category of cases where it would otherwise be in the public interest that a DPA is considered, particularly where effective remedial steps have subsequently been taken. A blatant disregard for compliance at one end of the scale is very different from a well intentioned compliance programme that has been ineffectively delivered. The Code should be clear that a DPA may be possible in relation to an offence contrary to s7 of the Bribery Act, and that a prosecutor will exercise discretion in assessing this factor.

11.a.v. *Failure to report wrongdoing within reasonable time of the offending coming to light*

If wrongdoing is suspected a company would in the first instance be expected to take a number of steps to assess the nature and extent of this before making a decision to self-report. These steps will be fact specific but will often include an internal review followed by an internal investigation. Current guidance from the SFO makes it clear that any self reporting may lead to prosecution and there is no scope for seeking any other form of dialogue with them. In circumstances where a company has to make a complex and significant decision to self report it will be appropriate that they take into account the result of any internal review and, in some circumstances any internal investigation, before making that decision. When assessing whether a company has reported wrongdoing within a reasonable time it should be recognised that a delay while awaiting the outcome of an appropriate internal review or investigation may well be justified and reasonable. The Code should make it clear that completing these steps prior to reporting wrongdoing will not be viewed adversely and will not lead to a greater prospect of prosecution.

Additional public interest factors against prosecution

11.b.i A genuinely proactive approach adopted by the corporate management team etc. and the additional comments at 12 i.. & ii.

In assessing the approach adopted by the corporate management team and the totality of the information they provide to the prosecutor the Code does not make it a requirement that a company waive their legal professional privilege (LPP). We agree and welcome this approach. LPP is a fundamental right for any person (individual or corporate) and underpins our criminal justice system. If the prosecutor sought to require a waiver of LPP this could lead to a number of perverse and undesired outcomes such as reluctance to self report or to carry out an internal audit. It may even discourage a company from taking legal advice in the first place on the basis that the content of that advice might later end up in the hands of the prosecutor and subsequently be disclosed to other parties or deployed in proceedings against the company. This approach is consistent with that of the Office for Fair Trading. When dealing with criminal cartel investigations the OFT allows leniency applicants to retain LPP.

Paragraph 12.ii. sets out a number of factors for the prosecutor to consider when assessing whether a genuinely proactive approach has been adopted. As part of this assessment the Code states that errors in the conduct of internal investigations which lead to adverse consequences will militate against the use of DPAs. The FLA is concerned that the prosecutor might not be in the best position to assess 'errors' in internal investigations.

When an internal investigation is conducted and the material from the investigation is subsequently shared with the prosecutor the burden of responsibility for the conduct of the investigation, up to that point, has been borne by the company rather than the prosecutor. For an employee suspected of wrongdoing who is invited to attend an interview there is a tension between the obligation to answer questions put by their employer and their rights as a suspect. As a minimum an employee who is suspected of wrongdoing should be given an opportunity to seek independent legal advice prior to such an interview. The company should not be considered uncooperative by assisting employees to obtain separate legal representation, in accordance with appropriate D&O insurance policies. A failure to treat an individual employee fairly during an internal investigation has the potential to undermine public confidence in the DPA process and to erode the right to a fair trial in accordance with Article 6 of the European Convention of Human Rights. When assessing errors in the conduct of internal investigations the Code should make clear the expectation of fairness in this regard.

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

No.

There is a serious problem here. The problem is one of imbalance, of sanction and of safeguard. It is best understood by reading the discussion presented by the Criminal Procedure Rule Committee's consultation paper on proposed new rules to govern DPAs. This can be found online at www.justice.gov.uk/courts/procedure-rules/criminal/docs/Invitation-to-comment-on-deferred-prosecution-agreement-rules-June-2013.pdf. The paragraphs to focus upon are numbered 20 to 30. The draft rules consulted upon can be found at http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/Consultation-draft-Part-12-DPA-procedure-rules-June-2013.pdf. The draft rule to focus upon is numbered 12.2(3). It is our strong view, shared it would seem with the members of the Criminal Procedure Rule Committee, that the statutory sanction for the provision of inaccurate, misleading or incomplete information should be buttressed – in the promotion of just outcomes – by a declaration by each party (see CrPRC [20]) which would lay the foundation for the imposition of sanctions (see CrPRC [26]) for either party's failure (see CrPRC [27]). The Criminal Procedure Rule Committee proposes that the same principles requiring the provision of relevant information would apply to the prosecuting authority as to the corporation under investigation. The same declaration, the committee suggests, should be required from the prosecutor, namely that he had not supplied inaccurate, misleading or incomplete information (see CrPRC [30]). What the Committee

have recognised is that – however well intentioned most prosecutors may be – the absence of sanction is, over time, a recipe for blur and creeping exception. The troubled history of disclosure suggests that they are right.

Our suggestion is that, rather than waiting for the Criminal Procedure Rules to impose this requirement upon them, the prosecuting authorities should embrace the disclosure implications of draft rule 12.2(3) and go well beyond the elusive vocabulary deployed in their present draft code at paragraphs 17.ii and 31. 'Sufficient information to play an informed part in the negotiations' is far too vague in circumstances where – forgive the repetition – in adversarial proceedings where innocence is presumed, the prosecutor holds most of the high cards. Rather than persisting (see paragraphs 26 and 42.v of the present draft code) in the imbalance the risks of which the Rule Committee exposes, the code should from the outset embrace the spirit of the CPIA's obligations, and voluntarily adopt their terms at this pre-CPIA stage in an investigation. To do otherwise would be to leave the prosecutor embarrassed by the Looking Glass metaphysics of paragraph 33 of the present draft code: the CPIA applies before a DPA can be approved, but is then immediately suspended. This would not be a comfortable pin on which to justify having balanced an angel if later disclosure misjudgements were to emerge.

For the avoidance of doubt, it is our suggestion that these disclosure obligations (and the declaration which would bind the prosecutor to their noble discharge) should extend well beyond the example given in paragraph 31 of the draft code and to material which might sensibly be relevant to a company's calculation whether it would wish to enter into a DPA at all (and if so, on what terms). In other words it should even include material in the prosecutor's possession which might encourage a company to think that it could altogether avoid such an outcome (and its concomitant enormous expense). For the reasons given elsewhere above, a defendant's 'voluntary' agreement to be bound by a DPA may often be less a heartfelt confession than a brutal commercial calculation. And even in circumstances where the CPIA statutorily applied, the Crown's normal disclosure obligations would not be suspended by a defendant's guilty plea (a principle which draft paragraph 34 acknowledges).

Two points about paragraph 19.ii of the present draft. First, although the paragraph 19.ii reminder to a corporate defendant – that any material which it discloses during the DPA process may find its way to third parties if others are charged – is likely to be a powerful disincentive to many considering whether to engage in a DPA process the effectiveness of which will be measured against its provision of such material, yet we agree that there is no escaping it. But, second, should the reminder not be extended to embrace the risks to corporate defendants posed by onward disclosure of their 'confidential' material to prosecutors abroad if MLA is properly requested? For many multinationals the SFO and the CPS are but two of their potential critics.

Finally, a semantic point. Paragraph 32 of the present draft code addresses requests for disclosure by P. If these are indeed 'reasonable and specific', should they not be granted rather than merely 'consider[ed]'?

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

No.

We do not consider it appropriate for prosecutors to be able to, unilaterally, propose terms additional to the suggested terms already set out in paragraph 5(3) of Schedule 17. The appropriate terms which should instead be left to be agreed between the parties as part of the DPA negotiations, on a case-by-case basis. Indeed, we envisage that very few terms would be appropriate to consider in each case.

We would be particularly concerned about any suggestion that the additional terms proposed in the initial MOJ consultation paper – the proposed requirement to replace implicated individuals, and/or to pull out from the market in which the wrongdoing is admitted – would ever be appropriate to include in a DPA. These terms were deliberately not reproduced in paragraph 5(3) of Schedule 17, no doubt as a result of concerns raised in responses to the

MOJ consultation.

We strongly agree with the second general principle identified in paragraph 42 of the draft Code –that the terms of a DPA must be proportionate to the offence, and tailored to the specific facts of the case. Whilst we recognise that the suggested terms in paragraph 5(3) of Schedule 17 are not exhaustive, we believe that the addition of any further suggested terms in the Code would only serve to undermine the open-mindedness required on the part of the prosecutor and the judge alike in order for the terms agreed to be proportionate and tailored to the circumstances of the offence and of the company.

We expect both the prosecutor and the judge to approach any proposed DPA on the basis that the suggested terms already set out in paragraph 5(3) of Schedule 17 should all be included, unless there is a reason to exclude any of them. For all practical purposes, there will be a presumption that they should be included; albeit a rebuttable one. This presumption undermines the company's bargaining position – in our view unfairly so, as we envisage very few circumstances in which it would justify imposing all the terms set out in paragraph 5(3) of Schedule 17 in a single DPA. Any additional terms suggested in the Code would have the same effect in practice. The more suggested terms the more onerous the negotiating burden on the company becomes, as the company will be forced to demonstrate why each is not appropriate in the particular circumstances.

In this connection, we note the suggestion in paragraph 42 of the draft Code that the proposed basis of the DPA and its terms is to be set out in an agreed written application to the court. We trust that the application would not require the company to also set out the justification for the omission of any of the suggested terms in paragraph 5(3) of Schedule 17 (or in the Code to the extent that the Code contains any additional suggested terms, which we do not consider it should).

We recognise that paragraph 42(vii) of the draft Code suggests, at least in relation to those terms which are "financial" in nature – i.e. compensation, financial penalty, costs, charitable donations and disgorgement of profits – that there is no compulsion to include all or any of them, and that they are each a matter of negotiation with the company and subject to judicial oversight. Nevertheless, for the reasons set out above we do not believe that this position could realistically be maintained in practice. Nor do we accept that the approach should differ depending on whether or not the terms are considered to be "financial" in nature – as we point out elsewhere in this response, the "non-financial" terms may be equally if not more costly for a company to comply with.

We oppose the further suggested terms under the heading "General" in paragraph 42 of the draft Code as a matter of principle. We would, as a matter of principle, also oppose the prioritisation of any of the suggested terms over others. In order to ensure that the terms of a DPA can be proportionate in any given case, the Code should fetter neither prosecutorial nor judicial discretion.

On the substance of the particular additional terms proposed, we make the following observations.

Warranties

The draft Code suggests that, as a mandatory term of a DPA, a company must warrant that any information provided to the prosecutor throughout the DPA negotiations is not inaccurate, misleading or incomplete. We note that the draft Criminal Procedure Rules propose a separate but identical undertaking to the court, to be given by both the company as well as personally by the individual representative providing the undertaking on the company's behalf. We would oppose such a term unless it is appropriately qualified, i.e. by reference to what was known to the company at the time the information was provided after making appropriate enquiries. It would be unfair and disproportionate if a DPA could be breached as a result of information which the company had no reason to believe to be inaccurate, misleading or incomplete at the time it was provided.

Continuing disclosure obligations

The draft Code suggests that the terms of a DPA should also include an obligation on the company to notify the prosecutor of, and to provide on request, any material which comes to its attention whilst the DPA is in force, which the company knows or suspects would have been relevant to the offences charged. An obligation in these terms would, in our view, be

disproportionate. Relevance is not a test easily applied in this context, and is potentially open-ended. We suggest that the obligation be limited to material which goes to the accuracy or completeness of information previously provided to the prosecutor.

In keeping with our comments on the absence of any express references to LPP elsewhere in the Code, we have assumed that there is no suggestion that this disclosure obligation should extend to any material protected by LPP, and that the company would not be expected to provide a waiver to this effect as a condition or term of a DPA.

We welcome the confirmation elsewhere in the draft Code that the prosecutor's disclosure obligations also continue for the duration of the DPA. We note only that, whereas the sanction for a company's breach of its continuing disclosure obligations would be the potential termination of the DPA and resurrection of the prosecution, no sanction appears to be provided for any breach of the prosecutor's continuing disclosure obligations.

Terms of payment

The draft Code suggests that payments required under a DPA should be paid within seven days of the final hearing unless not fair, reasonable or proportionate. It would, in our view, be unfair and disproportionate if a late payment could lead to breach and termination of a DPA. Whilst we do not oppose prompt payment we believe this would be best dealt with otherwise than by the terms of the DPA itself.

Cooperation obligations

One of the suggested terms in paragraph 5(3) of Schedule 17 is an obligation on the company to cooperate with any investigation related to the alleged offence. The draft Code suggests a related but separate term, by which the company would be required to "confirm" its cooperation with "sector wide investigations". It is not clear what is meant by this concept. Significantly, it is not clear whether it is limited to UK investigations only or whether it extends to investigations by overseas authorities in the same sector. For the reasons given elsewhere in this response, the extraterritorial implications of DPAs are, in our view, likely to be a significant disincentive for companies where the alleged wrongdoing is not confined to the UK. Nor is it clear whether the obligation would be limited to sector wide investigations already in existence at the time the DPA is entered into or whether it would also extend to future investigations. Finally, it is not clear what is meant by "cooperation" or how compliance with the obligation would be assessed. In light of these concerns, it does not appear to us to be appropriate to insert such an open-ended term into a DPA, breach of which would potentially lead to the DPA being terminated and proceedings against the company resurrected.

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

No.

We strongly disagree with the implicit suggestion in the Code that the appointment of a monitor could be a potentially appropriate term in any DPA, regardless of the nature of the alleged offence and the circumstances of the company.

As noted in response to Question 2, a company is not at present required to maintain internal compliance programmes other than in relatively narrow circumstances, for specific purposes (e.g. if the company is PRA/FCA authorised and subject to Handbook provisions on internal systems and controls, and/or if the company is subject to the Money Laundering Regulations 2007). The appointment of a monitor to oversee the operation of an internal compliance programme should, accordingly, only be appropriate where a company is already subject to a legal obligation to operate such a programme, and perhaps only where the charges against the company specifically relate to the company's failure to comply with this obligation.

Although any UK company and any overseas companies doing business in the UK would be at risk of incurring liability under s7 of the Bribery Act 2010 for failing to have adequate procedures in place to prevent bribery for its benefit, there is no positive obligation as such on companies to operate anti-bribery procedures. The Code should, in our view, be careful to

make this distinction.

We recognise that it might also be appropriate for a DPA to require a company to operate an internal compliance programme (other than and/or additional to any internal compliance programme required by law) in circumstances in which it would have been appropriate for the prosecutor to apply for a Serious Crime Prevention Order on conviction for a serious offence (which, in accordance with ss1-41 and Schedules 1 and 2 of the Serious Crime Act 2007, would include some, but not all, of the offences for which DPAs would be appropriate). However, such a requirement should be independent of any obligation to appoint a monitor to review compliance with the programme. The circumstances which might warrant a requirement to operate an internal compliance programme would not necessarily also warrant the appointment of a monitor.

Question 6: Do you agree that the examples of the policies and procedures at paragraph 52 that the monitor may be tasked to identify are in place is sufficiently comprehensive?

No.

We consider that a monitor's remit should be limited where the elements of an internal compliance programme are only prescribed by the terms of the DPA rather than by law, and that it is important that the Code makes this clear. We do not consider it appropriate for the suggested terms of a monitor's appointment, as the appropriate terms are likely to vary according to the circumstances of the case (for the reasons already indicated in response to Question 5). We note that many of the terms proposed in the draft Code would only be appropriate where the offence the company is alleged to have committed is bribery.

Furthermore, we do not consider it appropriate for the terms of a DPA to circumvent the safeguards which would otherwise have applied if a requirement to operate an internal compliance programme had been imposed by way of a Serious Crime Prevention Order. Importantly, any internal compliance programme imposed under a DPA should not be require the company to provide a prosecutor (whether via the monitor or otherwise) with any confidential or privileged information.

Question 7: Is the approach to determining an appropriate level of a financial penalty term in paragraphs 53 to 57 clear?

Background

The purpose of the Code is to give guidance to prosecutors when negotiating DPAs, applying to the court for approval and in relation to oversight of DPAs after their approval by the court.

Financial penalty is not listed as one of the matters that the DPA Code must or may address (see Paragraph 6 of Schedule 17), although the list of matters that may be included is not definitive.

At the same time as the consultation on the DPA Code, the Sentencing Council (SC) has issued its own consultation on draft sentencing guidelines on Fraud, Bribery and Money Laundering Offences (SC Guidelines), which include guidelines for corporate offences in this area. The SC Guidelines note that there is currently no guideline for sentencing organisations convicted of financial crimes, that the only punishment available is a fine, that there have been no corporate prosecutions in this area and consequently no established sentencing practice. With this background in mind, the SC has sought to achieve a balance between providing a level of certainty with the need for flexibility. The FLA is responding separately to this SC consultation; however in this response we address the overlap with the DPA Code.

Paragraph 53 of the Code refers to the duties of the prosecutor to draw to the judge's attention to relevant information, including statutory provisions and the relevant SC Guidelines and guideline cases.

Paragraph 55 repeats the statutory requirement that any financial penalty is to be "broadly

comparable to a fine that the court would have imposed upon P…following a guilty plea." And refers to this enabling regard to pre-existing guidelines.

Therefore a key question is whether "Section 8. Financial Penalty" if the Code provides any real guidance to prosecutors or is simply a restatement of the law or guidance that is held elsewhere, which may result in confusion rather than assistance and/or whether there are other factors that should be included in any DPA Code on this topic.

Overview of FLA comments

Our comments to this section of the Code relate to the following issues: firstly, whether there is sufficient guidance in the current draft to set out in how the regime under s73 of the Serious Organised Crime and Police Act (SOCPA) will apply in DPA cases; second, whether the Code is compatible with the SC draft guidelines; third, whether there needs to be any additional care taken to ensure that this incentive to assist does not create unfairness in the DPA process; and finally, identifying some examples of inconsistency in this area between the legislation, codes and guidelines, which may cause confusion.

Guidance in relation to additional discount

Paragraph 56 of the Code states that a financial penalty must provide for a discount equivalent to that which would be afforded by an early guilty plea. It goes on to state,

> "*But there may also be an additional reduction where an organisation assists, for example, in the investigation or prosecution of offending by others. This reflects the regime under section 73 of the Serious Organised Crime and Police Act ….The discount to reflect the assistance provided to the authorities is not prescribed by the legislation".*

This is the only example that is provided of where an additional reduction may apply.

CPS guidelines set out that s73 SOCPA relates to agreements for plea and reduction in sentence by co-operating defendants who have not benefited from immunity from prosecution or a restricted use undertaking but who have, nonetheless, assisted or offered to assist in the investigation or prosecution of others. This is in contrast to the DPA where (as set out in paragraph 38 of the Code), there is no requirement for formal admissions of guilt in respect of the offences charged but for the entity to admit the contents and meaning of key documents referred to in the statement of facts. It appears to us that if there is guidance on this section it should clarify whether admissions of guilt are a requirement before any additional reduction would be considered. If it is a requirement, this could create a situation where companies with a lesser criminal culpability (in particular if the evidential test referred to at 2(i)(b) is maintained – see our earlier comments to Question 1) would not benefit from an additional reduction.

The CPS guidance to agreements under s73 also confirms that reductions in sentence are not mandatory, but that in determining sentence the court may take into account the extent and nature of the assistance given or offered – the choice of sentence being a matter for the court alone.

Paragraph 56 of the draft guidelines state that "the parties should be guided by sentencing practice and pre-existing case law on this matter" and refers specifically in a footnote to *R v Blackburn* [2007] EWCA Crim 2290 and *R v Dougall* [2010] EWCA Crim 1048. However, it is not clear what, if any "guidance" is provided by this, particularly as any DPA will turn on the particular facts.

Paragraph 39 of *R v Blackburn* [2007] EWCA Crim 2290, sets out principles for application of s73 agreements:

> *"The first factor in any sentencing decision is the criminality of the defendant, weight being given to such mitigating and aggregating features as there may be. Thereafter, the quality and quantity of the material provided by the defendant in the investigation and subsequent prosecution of crime falls to be considered. Addressing this issue, particular value should be attached to those cases where the defendant provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, and does so, with added force where the information either produces convictions for the most serious offences, including terrorism and murder, or prevents them, or which leads to disruption to or indeed the break up of major*

criminal gangs. Considerations like these then have to be put in the context of the nature and extent of the personal risks to and potential consequences faced by the defendant and the members of his family. In most cases the greater the nature of the criminality revealed by the defendant, the greater the consequent risks. The vast majority of the earlier authorities were decided before the arrangements for calculating the discounts for a guilty plea were formalised, as they now have been by statute (s.152 of the Powers of Criminal Courts (Sentencing) Act 2000 and s. 144 and s. 174 (2) (d) of the Criminal Justice Act 2003) and the definitive guidelines, Reduction in Sentence for a Guilty Plea, issued by the Sentencing Guidelines Council, and in particular the statement of purpose in paragraphs 2.1 – 2.6. When it applies, the discount for the guilty plea is separate from and additional to the appropriate reduction for assistance provided by the defendant (R v Wood [1997] 1 CAR(S) 347). Accordingly, the discount for the assistance provided by the defendant should be assessed first, against all other relevant considerations, and the notional sentence so achieved should be further discounted for the guilty plea. In the particular context of the SOCPA arrangements, the circumstances in which the guilty plea indication was given, and whether it was made at the first available opportunity, may require close attention. Finally we emphasise that in this type of sentencing decision a mathematical approach is liable to produce an inappropriate answer, and that the totality principle is fundamental. In this Court, on appeal, focus will be the sentence, which should reflect all the relevant circumstances, rather than its mathematical computation."

This suggests that it may only be in certain and exceptional cases that additional reductions may apply. If this is correct, the Code should make this clear.

R v Dougall [2010] EWCA Crim 1048 relates to the s73 agreement with the SFO under which he agreed to plead guilty and to assist the SFO and the US Department of Justice in their investigations and subsequent prosecutions for corruption offences. In return for his assistance the US authorities entered into a non-prosecution agreement – while in the UK Mr Dougall received a reduced sentence when the Court of Appeal overturned the decision of the first instance judge by imposing a suspended prison sentence.

The Code does not clarify what factors, over and above the assistance that is required in any event to be eligible for a DPA, will mean that a reduction of sentence is appropriate.

Although not referred to in the DPA Code, the Sentencing Council's Consultation on Fraud, Bribery and Money Laundering Offences, states that the courts should take into account both s73 and s74 of SOCPA). Section 74 allows a specified prosecutor to refer a sentence back to the sentencing court for review if certain conditions are met and the defendant is still serving the sentence. Therefore, in order to provide consistency, guidance should be provided for the circumstances where s74 may become relevant.

SC draft guidelines

The SC draft sentencing guideline on Fraud, Bribery and Money Laundering Offences, notes that this is the first time guidelines have been drafted for corporate offences in this area. The only punishment available to the courts for a corporate offender is a fine, but as there have been no corporate prosecutions in this area there is consequently no established sentencing practice. In their draft guidelines the SC has sought to achieve a balance between providing a level of certainty with the need for flexibility.

The Code may be referring to this level of flexibility when it states at paragraph 56, "The extent of the discretion available when considering a financial penalty is broad."

The problem with this flexibility or discretion is that it is very difficult for the DPA Code to provide any real guidance to what the likely financial penalty would be for a guilty plea, in particular where there are no relevant precedents to draw from.

Although the SC draft guideline provides a step by step process, several of these provide a very broad discretion to the sentencing judge. Step 1 relates to compensation. Then step 2 determines the offence category by reference to culpability and harm factors and step 3 determines the starting point by applying a multiplier derived from the culpability level to the harm figure. The possible range is 20 to 400%. Step 4 then enables an "Adjustment of fine" which provides a list of non-exhaustive factors for the court to consider in making any

adjustment to the fine (reduction or increase) to ensure it is proportionate. It is then at step 5 that the court will consider any factors which would indicate a reduction, such as assistance to the prosecution, with specific reference to S73 and 74 of SOCPA and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given. Step 6 then requires the court to take into account any potential reduction for a guilty plea in line with s144 of the Criminal Justice Act 2003 and the *SC Guilty Plea* guideline.

The current Code provides no guidance at all to how the prosecutor of parties should apply the SC guidelines to DPAs, beyond affirming that the judge's attention should be drawn to it. This may be as far as the Code can and should go in this area.

Fairness

As stated above, paragraph 56 of the Code also refers to additional discounts where the organisation provides assistance in relation to the investigation or prosecution of others. It appears likely that these 'others' will include individuals who worked for the organisation who is entering in to the DPA either directly or as an agent.

Although a comparison has been made to the discount provided to assisting defendants under SOCPA, in fact the circumstances of an organisation entering in to a DPA is potentially very different as they will be conducting an internal investigation early in the process. The potential discount therefore provides the organisation with an incentive to prioritise such an internal investigation to identify and place blame on an individual or individuals and thereby reduce the corporate culpability and increase the likelihood of receiving an additional discount. As set out in our response to Question 2, where a company suspects an employee of wrongdoing and interviews them as part of an internal investigation, there is a tension between the employees obligation to answer questions put by their employer (or face dismissal for gross misconduct) and their rights as a suspect. In essence, the employer is not required to provide the same level of protections as would be afforded if the investigating authority conducted an interview. The DPA sentencing regime should not encourage employers or the investigating authorities to exploit this situation.

Question 8: Do you have any further comments on the draft Deferred Prosecution Agreement Code of Practice? Please refer to the relevant section of the draft Code when responding.

Lack of incentives for companies to enter into DPAs

We find it difficult to envisage that DPAs will ever be relied on in practice, if the Code is adopted in its current form. Whilst the evidential test is in our view set too low, for the reasons outlined in response to Question 1, the public interest test appears to us to be set unrealistically high, for the reasons outlined in response to Question 2. Even in the rare case where the public interest test would be satisfied, we are of the view that companies are unlikely to be prepared to enter into a DPA on the basis proposed in the draft Code.

One reason why a company might be reluctant to enter into DPA negotiations would be the potential implications for the company's exposure to civil and criminal liability in the UK and overseas as a result of the prosecutor's third party disclosure obligations. Concerns about potential criminal liability would not be limited to cases where the alleged wrongdoing is carried out in jurisdictions which do not recognise double jeopardy protections; which would otherwise rule out a prosecution for the conduct which has already been the subject of a DPA in the UK. We can envisage at least one further scenario: where it transpires, after DPA negotiations have been entered into but before a DPA has been approved, that the UK prosecutor is not, in fact, in a position to initiate any proceedings against the company. This might be the case if another country is better placed to prosecute the conduct – for example, in accordance with guidelines for deciding which jurisdiction should prosecute (and/or a Eurojust recommendation to this effect). The UK prosecutor might then be obliged to pass on, at the request of foreign authorities pursuant to formal mutual legal assistance arrangements, any material which has come into its possession as a result of DPA negotiations. In order to address this problem, we would suggest that the Code provides appropriate assurances that the prosecutor, firstly, would not enter into DPA negotiations in circumstances in which there is a risk that another jurisdiction may be considered better placed to prosecute the conduct

and, secondly, would resist mutual legal assistance requests for material provided in the course of DPA negotiations to the extent that such requests may be resisted. The Code should be sensitive to the considerations arising in cross-border conduct more generally, for example in formulation of the public interest test, as well as in any guidance the Code provides on appropriate terms, in order to better reflect the reality of a company's position where wrongdoing has taken place in more than one jurisdiction. For example, the Code may need to consider how the DPA process should interact with steps taken by the company as part of immunity/leniency regimes, both in the UK and overseas.

Safeguards against abuse of powers by prosecutors

Even if DPAs were to prove workable, we would be concerned about the lack of safeguards in the draft Code to protect companies against any abuse by prosecutors of their powers. Whilst specific safeguards which would otherwise be available in criminal investigations might not arise during DPA negotiations, because the company's voluntary provision of material dispenses with the need to exercise investigatory powers, and whilst specific safeguards which otherwise apply to criminal prosecutions might be suspended along with the proceedings themselves as a result of a DPA, we see no reason why the obligation on investigators, prosecutors and judges alike to respect the company's Convention rights should not still apply to the DPA process in its entirety – including the negotiation stage.

As pointed out in response to Question 2, prosecutors and judges should also be mindful of their obligations to respect the Convention rights of the company's employees, which may be compromised as a result of DPA negotiations and any resulting DPA.

We have also expressed concern about the lack of sanctions for breaches of the prosecutor's disclosure obligations, in our responses to Questions 3 and 4. We have suggested, in our response to Question 3, that a potential solution would be to extend the court's oversight over the DPA process to include consideration of the prosecutor's compliance with the Code as a condition of approving any proposed DPA. Breaches by the prosecutor of obligations imposed by the Code would be difficult for the company to detect without the court's assistance (indeed, for the court's oversight to be truly effective, judges may need to review the material in the prosecutor's possession). Furthermore, unless the matter is considered at the point at which approval is sought it is difficult to see what remedy would be appropriate to compensate a company for any breaches of the prosecutor's obligations which only come to light after the company has already entered into the DPA.