

## Crime and Courts Bill

### Fact Sheet: Deferred Prosecution Agreements

#### **Tackling Economic Crime**

1. Tackling and combating financial and economic crime, which encompass an array of offences such as theft, fraud and bribery, is a key commitment within the Coalition agreement<sup>1</sup>. Economic crime, both by organisations and individuals, causes severe harm to its direct victims and grave damage to our economy. In 2012, the National Fraud Authority estimated that fraud committed by all types of offenders cost the UK £73 billion per year.<sup>2</sup>
2. Prosecutors tackling economic and financial crime by organisations (principally the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS)) currently have two key approaches available to them: criminal prosecution or, where this is not possible or appropriate, pursuing a civil recovery order against the person or organisation concerned. Both involve lengthy investigation and in the case of a criminal prosecution there is a strong likelihood of protracted court proceedings with no guarantee of a successful conviction. In the event of a successful prosecution, the penalty is a financial one. Civil recovery orders on the other hand, even when successful, are solely a mechanism to recover the proceeds of “unlawful conduct” and do not enable sanctions for wrongdoing or compensation of victims.
3. The resource and financial costs involved in investigating and prosecuting an organisation suspected of committing an economic or financial crime can also be high. For example, a case which results in a late guilty plea by the defendant costs the SFO around £1.6m and takes around eight years to conclude, including any monitoring and reporting requirements.<sup>3</sup> Ultimately the number of cases that can be pursued to an outcome is limited.

#### **A New Tool to Deal with Economic Crime**

4. The Government is committed to ensuring that investigators and prosecutors have the right tools to effectively tackle economic crime and maintain confidence in the justice system; deal with economic crime swiftly, efficiently and cost effectively; ensure that wrongdoing is effectively addressed; provide flexibility and innovation in outcomes, such as restitution for victims and greater protection of employees, customers and suppliers; and drive prevention, compliance, self-policing and self-reporting amongst organisations.

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<sup>1</sup>[http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition\\_programme\\_for\\_government.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf)

<sup>2</sup> *Annual Fraud Indicator*, National Fraud Authority (2012)

<sup>3</sup> Deferred Prosecution Agreement Impact Assessment - <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements>

5. To this end the Government published, in May 2012, the *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements*.<sup>4</sup> The consultation document sought the public's views on proposals to introduce a new enforcement tool to help tackle economic crime, called Deferred Prosecution Agreements (DPAs). Of the 75 responses to the consultation, 86% agreed that DPAs have the potential to improve the way that economic wrongdoing by organisations is dealt with.
6. The Government published its response to the consultation on 23 October 2012.<sup>5</sup> In an accompanying written ministerial statement, the Government announced its intention to establish DPAs and simultaneously tabled amendments to the Crime and Courts Bill to give legislative effect to DPAs in England and Wales.

### **Deferred Prosecution Agreements**

7. DPAs will represent another important tool in the fight against economic crime. Each DPA will be a voluntary agreement between a prosecutor and an organisation that, in return for compliance with certain terms, the prosecutor will defer a criminal prosecution.
  - DPAs will be available solely for offending behaviour by organisations in respect of specified economic and financial crimes. The proposals have been designed to respond to the particular problems involved in prosecuting organisations for economic crime. The public consultation did not identify a broader need for DPAs to be available in relation to other types of crime, where the prosecutorial challenges are not as acute, and 77% of respondents agreed that economic crime was the right focus for DPAs, at least initially. DPAs will not be available to individuals as there are already a number of alternatives to prosecution, and where a successful prosecution is brought the ultimate punishment of imprisonment is available.
  - Once an allegation of criminal wrongdoing comes to light, whether self-reported or otherwise, and an appropriate investigation has taken place, prosecutors will consider whether the case is suitable for a DPA or whether a prosecution would be more appropriate. A decision on whether to proceed with a DPA will be taken in accordance with a DPA Code of Practice for Prosecutors produced jointly by the Director of Public Prosecutions and the Director of the Serious Fraud Office. The draft Code will be subject to a public consultation and the final version will be published. Once a decision to proceed with a DPA has been taken, the prosecutor and organisation would negotiate the content of a DPA.

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<sup>4</sup> Cm 8348, [https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting\\_documents/deferredprosecutionagreementsconsultation.pdf](https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf)

<sup>5</sup> Cm 8463 - <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements>

- The terms and conditions of a DPA will be tailored to the particular alleged wrongdoing and will vary on a case by case basis. However, every DPA will include an agreed statement of facts and an expiry date. The DPA will also include terms providing for some or all of the following matters:
  - i. Payment of a financial penalty;
  - ii. Reparation to victims;
  - iii. Donations;
  - iv. Disgorgement of profits;
  - v. Implementation of or changes to a compliance programme;
  - vi. Monitoring requirements (including costs of such if a third party is involved); and
  - vii. Cooperation with a related criminal investigation.
  
- The primary incentive and benefit to an organisation entering into a DPA is avoidance of a prosecution and potential criminal conviction. However the potential for a reduction of the financial penalty element of a DPA, reflecting the reduction of sentence for a guilty plea indicated at the first reasonable opportunity, will provide an additional incentive for organisations to co-operate with investigators and prosecutors in working towards the conclusion of a DPA. In determining the level of any financial penalty, the amount agreed by the parties must be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea. Both parties will need to take account of the various factors that would be considered by a sentencing court, including relevant sentencing guidelines, the totality of the terms of a DPA taken as a whole,, and the means of the organisation. There may also in appropriate cases be scope for the parties to agree a further reduction in the financial penalty to recognise particular assistance provided by the organisation in the course of an investigation or prosecution. This approach will ensure that the financial penalty agreed and approved under a DPA will be at a similar level to the potential fine upon conviction, whilst providing the parties and ultimately the court with a significant margin of discretion.
  
- Judges will play a vital scrutiny role to ensure that the DPA process is transparent. A preliminary hearing would be held in private before a judge in the Crown Court, who in light of the facts and alleged wrongdoing would determine whether a DPA would be “in the interests of justice”. The judge would then consider whether the proposed terms, including any proposed financial penalty, are “fair, reasonable and proportionate”. A final approval hearing would start in private to allow the full proposed agreement to be set out before the judge and to enable any final issues to be resolved. If content, the judge would formally approve the DPA in open court. 92% of respondents to the Government's consultation agreed with this approach. Alongside this approval, an indictment would simultaneously be laid in the Crown Court and immediately suspended. The suspension of the indictment, and the possibility that a prosecution would follow if it were to be lifted,

would act as the incentive to the organisation to comply with the DPA. Following the court hearing and subject to any temporary restriction on publicity required by law, the Agreement would be published and made available to the public and the media.

- Once the terms of a DPA have been complied with by the organisation and the Agreement expires, the proceedings would end with a bar to any fresh proceedings being brought in respect of the same offence. To ensure full transparency at the end of the DPA process, the prosecutor will be required to publish details of how the organisation has complied with the terms and conditions of the DPA.
  - In exceptional circumstances the terms of a DPA may need to be varied, for example where failure to do so would result in a genuinely unavoidable breach. Where a variation is required, the parties will need to agree any variation before presenting it to the court for approval. The judge will apply the same two tests as were applied pre-agreement (the “interests of justice” and “fair, reasonable, and proportionate” tests). Where a variation cannot be agreed or is not approved by the judge, the original DPA will stand. Details of any approved variations would be published.
  - In the event that a prosecutor considers the organisation has failed to comply with the terms of the Agreement the prosecutor will have discretion to institute breach proceedings which may lead to an application to the court to terminate the DPA and, potentially, prosecution. For breaches which come before the court, the judge may decide to terminate the DPA of its own motion.
8. DPAs will ultimately enable prosecutors to secure a just outcome, with tough penalties for wrongdoing and reparation for victims, without the uncertainty, expense, complexity or length of a full criminal trial. Organisations will be encouraged to self-report wrongdoing and be held accountable for their actions but without employees, customers, pensioners, suppliers and investors being unfairly affected and penalised by the impact of a lengthy trial and conviction - which can result in exclusion from EU and US public procurement exercises, and in some cases put the commercial organisation out of business.
9. DPAs would be available in respect of conduct which pre-dates commencement of the scheme, although not in relation to matters where proceedings have already been instituted. This is to ensure that the benefits arising from DPAs can be realised as soon as possible.

**Ministry of Justice**  
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