DPA Team
Serious Fraud Office
2-4 Cockspur Street
London
SW1Y 5BS

24 September 2013

Dear Sirs,

GC100 Response to consultation on Deferred Prosecution Agreement Code of Practice

Introduction

The GC100 welcomes the opportunity to respond to this consultation. As you may be aware, GC100 is the association for general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 127 members of the group, representing some 82 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

Executive Summary

GC100 supports the initiative to introduce a Code of Practice relating to deferred prosecution agreements (**DPAs**). GC100 is drawn from representatives of companies which aspire to the highest standards of business conduct. Those companies welcome initiatives which help them to deal with economic crime issues by providing full cooperation to prosecutors, seeking to resolve any issues quickly and making any necessary improvements in compliance. This is consistent with DPAs and the related draft Code of Practice (the **Draft DPA Code**), and GC100 is therefore supportive of the approach in general.

This objective would be further promoted if a wider range of tools were available to a prosecutor to deal with economic crime issues, alongside prosecutions and DPAs, including a clearer statutory footing for civil settlements and NPAs. GC100 would welcome an initiative to continue to expand the tools available for dealing with economic crime to give prosecutors the ability to find fair and efficient resolutions to a range of different cases.

GC100 consider there to be three key issues with the Draft DPA Code which merit further consideration. These are:

- Experience in other jurisdictions where mechanisms similar to DPAs exist, in particular the US, is that a significant majority of cases resolved by such agreements are generated by self-reports. GC100 considers that the Draft Code should provide clear guidance and incentives to further encourage a culture of self-reporting. Along with the development of a wider range of tools to tackle economic crime referred to above that will lead to a greater likelihood that improper conduct will be brought to the attention of prosecutors, an increased track record of penalties being imposed and a resultant improvement in compliance with criminal law. Whilst the current Draft Code includes some limited guidance on the credit to be given for self-reporting, GC100 considers greater clarity and detail is needed both with respect to how self-reporting impacts the process of initiating

DPA discussions and the eventual outcome. For example, the Draft Code does not directly address how a prosecutor will deal with a company that makes a self-report and where the company asks to open DPA discussions. GC100 considers the Draft Code would benefit from re-consideration from the perspective of the majority of DPAs arising from self-reports rather than prosecutor lead investigations.

- The second limb of the evidential test set out at paragraph 2(i)(b) for entering into a DPA is likely to lead to significant difficulties. GC100 considers that, as a DPA involves a company being charged, any test other than one closely related to the Full Code Test at the opening of discussions and the Full Code Test itself at the conclusion will give rise to difficulties that may otherwise undermine the DPA process. A lower threshold at conclusion, as envisaged by paragraph 2(i)(b), would create the possibility that a company could be charged, enter into a DPA but if that DPA was subsequently terminated, the prosecutor could not go on to prosecute as there was insufficient evidence to meet the Full Code Test.[1] In our view even one such occurrence would fundamentally undermine DPAs. They would no longer be deferred prosecution agreements as there would be no certainty that prosecution was the alternative. Further, for a board of a company to enter into an agreement where the company is charged with a criminal offence, in the absence of sufficient evidence to meet the threshold for charging, is unrealistic. See our response to Q1 below for a proposed alternative approach.

- The disclosure of all relevant facts, by both the company and the prosecutor, is a key factor in the credibility and success of DPAs. The board of a company need to have visibility of all of the relevant facts and the prosecutor should be under a clear obligation to disclose any matters it has investigated that undermine the prosecution case. The prosecution will often have considerably more evidence (e.g. from third parties or from tracing funds) than the company's management. If material comes to light after conclusion of a DPA which the prosecutor was aware of and which undermines the basis for the DPA then, as well as a challenge to the particular DPA in question, it will undermine confidence in the process and companies may become reluctant to engage. At present, the Draft DPA Code puts a stricter responsibility on the company to disclose than it does on the prosecutor. The obligations should be equally strict. Recent high profile cases show that prosecutors are far from infallible in making appropriate disclosures.

As an overarching comment, it is important the Draft DPA Code strikes a fair balance between prosecutor and company. Unlike Codes for prosecutors where the Code is dealing with exercise of statutory powers of the prosecutors, DPAs require the voluntary co-operation and agreement of the company. If the process is viewed as unfairly biased towards the prosecutor, Companies will be less willing or unwilling to engage. This different dynamic is not in our view properly reflected in the Draft DPA Code. The above issues are the most significant aspects. There are other examples which are raised in response to the specific questions. Companies need a sufficient degree of certainty and clarity together with incentives such that boards can conclude that it is in the best interests of all relevant stakeholders to enter into DPA discussions and DPAs.

The key points set out in the executive summary above are expanded on as appropriate below in response to the specific questions.

[1] Paragraphs 78 to 81 of the Draft DPA Code, acknowledge that a DPA based on the second option in the evidential test could result in a company being charged and entering into a DPA that was subsequently terminated, but then the prosecutor could not go on to prosecute as there would be insufficient evidence to meet the Full Code Test.

Q1: Do you agree with the test for entering into a DPA set out in paragraph 2?

GC100 agrees with the public interest stage of the test. However, for the key reasons set out above, in our view, the evidential stage of the test needs to be reconsidered.

Further, an invitation to enter into DPA discussions will be a matter which a board will consider seriously and carefully. An invitation may also trigger some significant consequences such as, does a disclosure to the market need to be made? Does the invitation have to be disclosed in tender documents? Does it affect any contractual representation and warranties given? Given these issues we consider that DPA discussions should only be initiated where a prosecution is in reality the alternative because there is or will likely to be evidence to meet the Full Code Test at the time the DPA is entered into. GC100 acknowledges and agrees that a lower evidential threshold may be appropriate at the start of DPA discussions. We would suggest that the Code provides that a DPA letter can be sent where the prosecutor is satisfied that there is a "realistic prospect of meeting the Full Code Test by the stage at which it is anticipated a DPA may be concluded", and the Full Code Test is the sole test for charge and conclusion of the DPA.

Further, in this context, we consider paragraph 18 needs amending to make it clear that issuance of the letter does not "initiate" negotiations. Entering into negotiations with a prosecutor may have many ramifications for a company (see above). As DPA negotiations are voluntary, the Code should be clear the negotiations commence once the company accepts the invitation from the prosecutor to do so.

Q2: 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?

Broadly, yes subject to the specific comments below. As a general point, paragraph 9 of the Draft DPA Code suggests that, in applying the public interest test, factors considered relevant and the weight to be given to those factors are matters for the "*individual prosecutor*". This approach creates a risk of inconsistent decision making by different prosecutors and provides no certainty for companies considering whether or not to enter into a DPA. If different prosecutors make different decisions on similar facts, it will be difficult to defend the process as transparent and fair and companies will be less willing to engage in the process. GC100 considers there should be a consistent policy applied.

In relation to paragraph 11(a)(v), GC100 notes that a company or its officers have no legal obligation to report "wrongdoing". Certain obligations may arise from the Proceeds of Crime Act, however, as currently drafted the Draft DPA Code is misleading in suggesting that it is an offence not to report "wrongdoing".

11(a)(vi) should be amended to read: "*Failure to report properly and fully the true extent of the wrongdoing <u>as known at the time of reporting</u>*". In circumstances where early self-reporting is being encouraged, see in particular paragraph 12(ii) of the Draft DPA Code, it is unlikely that a company will have a full understanding of the situation at the time of first reporting.

Paragraph 11(b)(v) should specifically include as a relevant factor that the improper conduct occurred at a time when P did not control the employees in question. For example, the conduct was within a company that was acquired, and occurred prior to the acquisition, or within a JV at a time when P did not have full control.

Q3: Do you agree with the approach to disclosure at paragraphs 30-35?

See point 2 of our key points above.

To expand upon that point, it should also be acknowledged in the Code that the prosecutor will often have much more information than the company's management, due to a prosecutor's investigatory powers to obtain information from third parties or the fact that many of those involved at the company may have left or been suspended and who may have been interviewed only by the prosecutor. The fact that negotiations to enter into a DPA necessarily take place prior to charge and before the statutory disclosure obligation is activated should not be a reasons to limit disclosure by the prosecutor. Therefore, in our view, the prosecutor should be under a strict obligation to disclose any evidence which substantially undermines the prosecution case prior to a preliminary hearing. The prosecutor would have to confirm to the court at the preliminary hearing that it has complied with this obligation. Concerns about non-disclosure by the prosecution has caused considerable difficulties in the prosecution of economic crime and, for DPAs to be effective, this issue needs to be addressed and supervised by the courts as without that companies may be unwilling to enter into a voluntary process.

Q4: Would it assist if examples of potential terms additional to those addressed at paragraphs 40-42 are included in the Code?

GC100 notes that the list of terms at paragraphs 40-42 of the Draft DPA Code is not exhaustive, and that a DPA may include a broad range of terms. On this basis, we do not consider it necessary to include any further potential terms in the code.

Q5: Do you agree with the approach to the use of a monitor at paragraphs 43-51?

Broadly speaking, GC100 agree to the approach to the use of a monitor. However, we consider that the work plan and the monitor's access to company information needs some further consideration.

In relation to paragraph 45, we consider that it would be disproportionate for a monitor to have complete, unfettered access to all aspects of a company's business during the course of the monitoring period. Rather, access should be granted to relevant areas of the company's business only. This is in order to keep the costs of the monitor proportionate. Further, the work plan referred to at paragraph 49 should sufficiently clear and detailed before the monitorship commences to limit the possibility of disagreement. The work plan should be agreed by the prosecutor. This should limit the scope for disagreement between the company, the prosecutor and the monitor as regards the monitor's role. The Code should include an escalation procedure for dealing with any disagreements between the parties relating to the scope monitorship.

Q6: 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?

Broadly, yes. GC100 agrees that each case will need to be considered on its own facts to ensure the monitorship is proportionate and focussed on relevant matters.

Q7: Is the approach to determining an appropriate level of a financial penalty term in paragraphs 53 to 57 clear?

Yes. We agree that broad discretion on the basis of the outline given is appropriate. We will respond separately to the consultation on sentencing guidelines.

Q8: 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.

Paragraph 36 of the Draft DPA Code specifies that the application for a DPA must include a statement of facts which must "*give full particulars relating to each alleged offence*" and "*include details of any financial gain or loss, with reference to key documents that must be attached*." However, paragraph 5(1) of Schedule 17 to the Act only requires the DPA to contain a "*statement of facts relating to the alleged offence, which may include omissions by [the company]*." It is not clear why a requirement to append documents evidencing such gain or loss has been introduced and that requirement is not consistent with the legislation. We do not consider that the Code should impose mandatory requirements for a DPA where Parliament has chosen not to. That could lead to DPA's not being entered into where the only point of disagreement is disclosure of documents, which would be inconsistent with Parliament's intentions. We suggest that this provision be amended to remove the requirement to append and/or publish key documents.

GC100 is grateful for the opportunity to contribute to this consultation and would be happy to discuss any aspects further.

Yours faithfully

Mary Mullally
Secretary, GC100
020 7202 1245