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TRANSPARENCY INTERNATIONAL CANADA RESPONSE TO GOVERNMENT OF CANADA CONSULTATION ON DEFERRED PROSECUTION AGREEMENTS

This report is in response to Public Services and Procurement Canada's (PSPC) open consultation between September 25 and November 17, 2017: "Deferred prosecution agreements consultation: Expanding Canada's toolkit to address corporate wrongdoing".

PSPC provided a discussion guide for their current thinking on the topic, which included a series of questions for which they sough specific advice.

Transparency International Canada has responded to the specific questions in the discussion guide, drawing upon its pervious documents related to this subject, which can be found on TI Canada's website and are attached to this submission:

1. "Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada"
2. Report "Victim Impact Surcharges in Corruption Offences"
3. Victim Impact Statement given by the Executive Director of Transparency International Canada in October 2012

The responses were discussed amongst TI Canada's Legal Committee, and coordinated by TI Canada Chair Paul Lalonde and Treasurer, Stefan Hoffmann-Khunt.

James Cohen
Interim-Executive Director

November 17, 2017
Toronto, Canada

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1 Usefulness of deferred prosecution agreements as part of the Canadian criminal justice system

Q1	In your view, what are the key advantages and disadvantages of DPAs as a tool for addressing corporate criminal liability in Canada?

i. Please refer to pages 6 to 9 of the report "Another Arrow in the Quiver? - Consideration of a Deferred Prosecution Agreement Scheme in Canada" as published by Transparency International Canada in July 2017 ("TI-C DPA report", see Attachment 1), where a detailed list and description of various advantages and disadvantages of DPAs as a tool within the Canadian justice system are discussed.

ii. Summary of advantages: (see pages 6 to 8 of the TI-C DPA report)
- Benefits for both parties and victims;
- Certainty as an incentive to bolster compliance and enforcement;
- Improved flexibility of the criminal justice system;
- Limiting negative impacts on innocent third parties;
- Consistency with current legal framework.

iii. Summary of disadvantages: (see pages 8 to 9 of the TI-C DPA report)
- Undermining the criminal justice system;
- Unfair advantage for corporations;
- Innocence of third parties;
- Demobilizing shareholders and other stakeholders.

2 Scope of offences

Q2	For which offences do you think DPAs should be available and why?

i. For a detailed response please refer to page 27 of the TI-C DPA report.

ii. We note that a similar questions was asked in the consultation process for the Integrity Regime and we request that our answers given in both responses be read together.

3 Role of the courts

Q3	What role do you think the courts should play with respect to DPA's?

i. Please refer to page 28 of the TI-C DPA report. We believe it to be very important to subject a potential Canadian DPA regime to strict judicial oversight, similar to the UK model.

ii. In comparison, the newly proposed Australian DPA processes require approval from the director of public prosecution before an offer of a DPA can be made to a company, whereas in the UK it is up to the respectively assigned prosecutor within the SFO to decide whether an offer of a DPA will

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be made.

TI-C would like to ensure maximum transparency, predictability, demonstrated legitimacy and accountability in the DPA related processes. Judicial intervention at an early stage would support these objectives. The approval process should therefore be looked at very carefully by the Government of Canada, particularly in the light of the experiences of the UK and Australia, as well as any other experiences of judicial oversight in similar processes.

4 Conditions for negotiating a deferred prosecution agreement

Q4	What factors should be taken into account in offering a DPA?
Q5	When would a DPA not be appropriate?

i. The factors driving a decision to proceed by way of DPA should be similar to the factors considered in the sentencing context with an underlying principle of proportionality driving decisions. Specifically, we believe that DPAs should only be available to first-time corporate offenders that have acknowledged the wrong committed and demonstrated remorse through conduct that includes thorough internal investigations and the adoption of appropriate compliance reforms.

ii. Factors to be taken into account when considering to offer a DPA to a company can be similar to those factors that generally are taken into consideration when a court imposes a sentence on an organization (see page 8 of the TI-C DPA report) as well as the following mitigating or aggravating factors as the case may be:

- Level of cooperation with the authorities or lack thereof;
- Whether or not the company self-disclosed its wrongdoing;
- Level of pervasiveness of the conduct at issue;
- Level of senior management involvement in the misconduct;
- Measures taken by the company to prevent recurrence or lack thereof;
- The company's efforts to implement an effective compliance program;
- Level of cooperation of the company with the authorities to support prosecution of individuals responsible for the conduct;
- Extent of potential collateral effect of a conviction on blameless third parties including the public, employees, suppliers, shareholders or pension beneficiaries.

The TI-C DPA report describes in more detail the factors to be considered within the DPA models of the United States (pages 10 to 11) and the UK (pages 18 to 19).

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iii. DPAs should be a discretionary tool, with only the prosecutor permitted to invite the defendant to enter into negotiations. Corporations should not have a right to demand that DPA negotiations be commenced.

iv. DPAs would not be appropriate when the factors mentioned above under (i) and (ii) are not met to the satisfaction of the prosecutor and for offences other than those identified in the answer to question 2 (see the TI-C DPA report, page 27).

5 Potential deferred prosecution agreement terms

Q6	What terms should be included in a DPA?
Q7	What factors should be taken into account in setting the duration of a DPA?

i. See pages 28 to 30 of the TI-C DPA report, which provides a detailed listing of standard measures to be included in the terms of a DPA.

ii. Similar factors as listed in response to question 4 would also have to be considered when determining the duration of a DPA. Such factors would have to be made transparent and published and the results of the consideration given to such factors should be subject to judicial oversight. There furthermore should be a publicly available guidance document that describes the factors to be considered.

iii. Given its ongoing practice of issuing guidelines to prosecutors, the federal government could provide supplemental guidance concerning the appropriate application of DPA legislation, similar to those guidance documents issued in the United States and the UK.

6 Publication

Q8	Under what circumstances should publication be waived or delayed?

i. We generally advocate for maximum transparency and disclosure and we would recommend exceptions to publication only in exceptional circumstances, where non-publication is clearly in the public interest.

ii. However, in cases where publication could undermine another ongoing investigation, a delay in the publication (or redacted disclosure) could be warranted.

iii. Likewise, publication could be postponed or partial in cases where full disclosure may compromise the national security or international relations of Canada.

iv. Should disclosure have been delayed, it should be ensured that full disclosure will be made as soon as the reasons for such non-disclosure are no longer applicable.

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v. Exceptions to disclosure should be subject to judicial oversight (grounds for non-disclosure should established to the satisfaction of the Court).

7 Process of addressing non-compliance

Q9	How should non-compliance be addressed?

i. In principal the default reaction to non-compliance should be to lift the deferral and re-start the prosecution of the company.
ii. However, in cases of either non-compliance of an immaterial nature or non-compliance where the company can demonstrate that it had used its best efforts to comply, has a legitimate explanation for the non-compliance or the non-compliance was caused by a third party not under the company's control, there should be enough flexibility within the terms of DPAs for the prosecutor to either provide for reasonable extensions of the duration of the DPA or to consider the conditions for release from the DPA as fulfilled.

8 Potential use in court of deferred prosecution agreement negotiation material

Q10	When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

i. Regarding the use of DPA negotiation material, we would suggest to adopt a compromise similar to the process existing in the UK, in which the Statement of Facts in a concluded DPA can be used subsequently in any case, and in which the use of declarations made by an accused in failed DPA negotiation can only be used in the prosecution of perjury or contradictory version cases.
ii. It will be very important to create and publish clear guidance on the handling, further use and potential restriction of further use of information produced during the negotiation of a DPA.
iii. The TI-C DPA report does not explore in sufficient detail the question of appropriate handling of investigation and other material that is made available to the prosecutor in the context of a DPA negotiation. The proper handling and the predictability of further use of such material is considered very important for successful and fair DPA procedures and we recommend for the Government of Canada to conduct further analysis and consultation with experts on this issue.

9 Compliance Monitoring

Q11	How should compliance monitors be selected and governed?

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Q12 What use should be made of compliance monitoring reports?

i. For a detailed analysis of these questions please refer to the TI-C DPA report on pages 30 to 31.

ii. Furthermore, an analysis of the use of monitors in the United States including the handling of certain issues related to the appointment of monitors that led to significant political and public debate is detailed on pages 13 to 14 of the TI-C DPA report.

10 Victim compensation

Q13 Under what circumstances should victim compensation (that is, anticipatory restitution) be included as a DPA term?

i. Although not directly answering the question at hand, Transparency International Canada did commission a report on "Victim Impact Surcharges in Corruption Offences" (see Attachment 2), which did explore the topic of restitution in CFPOA cases.

ii. Furthermore, although again not in direct response to the question at hand, we would like to refer to a Victim Impact Statement given by the Executive Director of Transparency International Canada in October 2012 (see Attachment 3) in the context of one of the CFPOA cases at court.

iii. Generally, corruption and other economic crimes are not “victimless”. Restitution should be considered more carefully in the context of DPA’s and we encourage the Government of Canada to conduct more thorough analysis and consultation on this issue. To the extent that restitutionary payments under DPA’s could be used to support the fight against corruption and compensate victims, we believe this could be a positive outcome of DPAs.

Attachment 1: "Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada"
Attachment 2: Report "Victim Impact Surcharges in Corruption Offences"
Attachment 3: Victim Impact Statement given by the Executive Director of Transparency International Canada in October 2012