

# PETERS & PETERS

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RESPONSE TO THE ATTORNEY GENERAL'S OFFICE CONSULTATION

**THE INTRODUCTION OF A PLEA NEGOTIATION  
FRAMEWORK FOR FRAUD CASES IN ENGLAND AND  
WALES**

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## **Introduction**

1. The Attorney General proposes to introduce, by way of Attorney General's guidelines, a formalised plea negotiation procedure into the English criminal justice system.
2. The aim of the proposed plea negotiation procedure is to encourage more defendants to plead guilty at an early stage in fraud cases. Since fraud cases are difficult and expensive to investigate and prosecute and fraud trials tend to be lengthy and expensive, an increase in the number of early guilty pleas will lead to financial savings and will reduce the stress and anxiety which is often experienced by witnesses and victims as a result of lengthy trials.
3. The Consultation Paper also points out that informal negotiation, usually in private, between defence lawyers and prosecutors already takes place. The proposed formal procedures will render the process open and transparent, thereby increasing public confidence in the criminal justice system.
4. Peters & Peters, in principle, supports the introduction of a formalised framework to govern plea negotiations in fraud cases.
5. It is vital, however, that the possible benefits of a plea negotiation system be balanced against the potential erosion of a number of fundamental principles upon which our criminal justice system is founded:
  - a) that a person is "innocent until proven guilty";
  - b) the privilege against self incrimination;
  - c) the right of a defendant to disclosure of the case against him; and
  - d) that the burden is on the State, represented by the prosecution, to prove beyond reasonable doubt that a person is guiltyAll impose fundamental constraints on consensual or collaborative justice.
6. Peters & Peters welcomes the Consultation Paper's recognition that those entering into plea negotiations must have access to legal advice. However, serious

concerns remain concerning whether, in practice, such advice will be available to all defendants and whether the advice available will be of an adequate standard.

7. Finally, Peters & Peters has serious concerns about the proposal for the plea negotiation framework to be introduced by means of Attorney General's guidelines and that this fundamental change in our legal system is to be denied parliamentary scrutiny.

### **Parliamentary Scrutiny**

8. Mr Hockman states that "The proposals for England and Wales have the advantage that they do not require parliamentary legislation and can be introduced relatively easily under existing law". Although this is certainly an advantage in the administrative, bureaucratic sense, it is also a rather alarming example of parliamentary debate being denied to a fundamental change in our criminal justice policy.
9. Furthermore, the absence of primary legislation governing the plea negotiation system leaves it open to difficulties in several areas, with the resultant risk that it will be unworkable in practice. Issues such as the use made of materials disclosed or statements made by the defendant during negotiations, pre-charge disclosure, pre-charge access to legal advice, pre-charge access to a judge and compatibility with existing confiscation provisions could be more adequately addressed via primary legislation.

### **Access to adequate legal advice**

10. It is acknowledged in both the Committee's recommendations and the Consultation Paper that anyone entering into plea negotiations must receive legal advice. We would suggest that the basic requirements of such advice can be summarised as follows:

Access to lawyers who can advise:

- a) On the procedure to which the accused is already subject;
- b) The nature and possible outcomes of plea negotiation;
- c) The consequence of such outcomes:
  - i) penal, including loss of liberty, loss of reputation, financial penalty, disqualification, compensation orders, confiscation orders, community penalties and costs
  - ii) civil liability - exposure to third party claims - the effect of a conviction by negotiated plea in any subsequent class action
  - iii) the loss of employment or employment prospects
  - iv) possible deportation or difficulties in obtaining a visa to enter certain countries
  - v) the effect of the plea on investigations in another jurisdiction and the possible heightened exposure to an application for extradition to a third country
  - vi) debarment from office or ability to bid for certain contracts (also a concern for corporations).

11. Ideally the corporate or individual would receive all the necessary advice from a one stop firm with the addition of counsel. Corporations may be able to do just that, because they have the means to instruct law firms with these skills if they so choose. Individuals, on the other hand, must rely on access funded by:

- a) themselves - if their assets are adequate and not the subject of restraint orders which cannot ordinarily be varied to provide for such expenditure,
- b) by insurance through Director and Officer policies which may or may not afford sufficient cover but will often be refused because the insured admits delinquency which is an excluded risk,

- c) through the generosity and goodwill of a corporate employer, whose sentiment is very likely blunted by either itself being the victim of the fraud or where the corporation and officer/employee are alleged accomplices will nonetheless be hesitant to assist lest such largesse be criticised by shareholders and/or the agency with which the corporation is co-operating. A salutary reminder of this problem is provided by an ongoing case in the United States involving the former partners of KPMG. In *United States v. Jeffrey Stein*<sup>1</sup> the trial Judge dismissed tax fraud charges against a number of former partners of the accountancy practice because he found that they had been deprived of their constitutional rights as a result of the prosecution, so it was alleged, pressuring the firm to stop funding the accused ex-partners if they, themselves, wanted to arrange a satisfactory outcome for the firm as a whole. This case is currently under appeal.

There is surely something of a paradox where corporations which are almost always well funded, and which are anyway both immortal and immune to imprisonment, should be best able financially to take care of themselves; whereas, loyal and long serving officers or employees can find themselves exposed to the vagaries and uncertainties of a criminal justice system made more oppressive by the prospect of enforced entry into plea negotiations without adequate professional assistance.

- d) Funding may be provided by third party well-wishers. In practice these usually turn out to be few in number, and the suspect's previously dependable close friends who, if their emotions and wallets are still engaged, would prefer to provide for the suspect's dependents than enrich a bunch of lawyers.'
- e) The Public Purse.

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<sup>1</sup> U.S. v. Stein, \_\_\_ F. Supp. 2d \_\_\_, No. S1 05 Crim. 0888 LAK, 2006 WL 1735260 (S.D.N.Y. June 26, 2006) ("Stein I")

12. The draft framework refers to the Criminal Justice and Immigration Bill 2007, now the Criminal Justice and Immigration Act 2008, and its provisions conferring powers to allow pre-charge legal aid to be granted in appropriate circumstances. Section 56(6) of that Act allows for the introduction of regulations which “may provide that, in prescribed circumstances, and subject to any prescribed conditions, a right to representation may be provisionally granted to an individual where:

- a) the individual is involved in an investigation which may result in criminal proceedings, and
- b) the right is so granted for the purposes of criminal proceedings that may result from the investigation”.

These regulations “may, in particular, make provision about:

- a) the stage in an investigation at which a right to representation may be provisionally granted;
- b) the circumstances in which a right which has been so granted
  - i) is to become, or be treated as if it were, a right to representation under paragraph 1, or
  - ii) is to be, or may be, withdrawn”

13. It will be vital to establish, prior to the introduction of any plea negotiation system, whether, and if so when, these regulations will in fact be introduced, what the “prescribed circumstances” will be and at which stage of the investigative process legal aid will now be available.

14. Legal aid, even if available at an early stage, is certainly not going to provide adequate remuneration sufficient to attract the sort of expertise and experience that is necessary to provide adequate support to a party to plea negotiations. Here again, one must recall the recent confiscation proceedings which have collapsed because the legally aided accused could find no senior member of the bar who was willing to undertake the work at the rate offered by the public purse.

15. The number of law firms and members of the Bar continuing to offer publicly funded advice and representation in serious and complex fraud matters has significantly diminished and is likely to diminish further as the full impact of the Carter Review becomes ever more apparent.

### **Confidentiality and the privilege against self incrimination**

16. The framework seeks to promote openness and transparency within the plea negotiation process so as to improve public confidence and ensure that justice is seen to be done.

17. However, this must be balanced against the fundamental principle of the privilege against self incrimination. Defendants will be reluctant to enter into open negotiations with the prosecution if there is a risk that information they provide could be used against them in the event that no agreement is reached and the case proceeds to trial, or in any other subsequent proceedings.

18. The framework deals with this point at paragraph 3:

*“It will be presumed that nothing said by the suspect in the course of such discussions will subsequently be used against him. However, Prosecutors may agree with the suspect the circumstances in which anything said by him in furtherance of the discussions can be used by the prosecution in evidence against him. This should be reduced in writing beforehand”.*

19. Confidentiality issues and the defendant’s privilege against self incrimination are, therefore, effectively to be governed by contract between prosecution and defence in the plea agreement. We would submit that the use to which statements made during negotiation may subsequently be put ought to be governed by primary legislation or, failing that, should at least be the subject of clear, official guidelines. The Consultation Paper rightly points out that “these are difficult questions”. Their resolution should not be left to the individual prosecutors and defendants involved in each case.

20. The framework anticipates that disclosure of materials to co-defendants will be governed by the Criminal Procedure and Investigations Act 1996, (CPIA). It is likely that information provided by a defendant during plea negotiations will qualify as “prosecution material” under section 3 of the CPIA and may therefore fall to be disclosed to any co-defendants. It is difficult to see how the prosecution’s statutory disclosure obligations to co-defendants could be superceded by the plea agreement. Defendants in multi-party cases will be reluctant to enter into negotiations, which will not necessarily lead to a plea agreement in all cases, if there is a risk that any information provided in the course of the negotiations may find its way to co-defendants. If the matter subsequently proceeds to a full trial, this material could be introduced as evidence by co-defendants whose interests may conflict with those of the defendant. Furthermore, it would be impossible to limit the use to which co-defendants may put such material under the plea agreement, as co-defendants will not be party to that agreement. Such scenarios may lead to defendants making abuse of process arguments on the basis that they cannot receive a fair trial if tried together with co-defendants to whom plea negotiation materials have been disclosed. It is difficult to see how this issue might be resolved other than by way of primary legislation.
21. As the Consultation Paper points out, it would be for the Courts to decide finally whether evidence disclosed to the prosecution (and potentially by the prosecution to co-defendants) is admissible. It is perhaps worth noting that The Court of Appeal in *Goodyear* ruled that the fact of a sentence indication having been requested and/or given, together with any associated evidence, is inadmissible in a subsequent trial.
22. It is interesting to note that under the oft-derided US plea-bargaining system, the prosecution may not use any statements made by the defendant during the negotiations in a subsequent trial if the negotiations break down or are rejected by a judge<sup>2</sup>.

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<sup>2</sup> See Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, vol. 11.3, ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), at page 31.

23. There are also a number of practical questions that need to be addressed: would the fact itself that plea negotiations had taken place be admissible in a subsequent trial where no agreement had been reached? Would associated documentation, for example the proposed 'pre-negotiation document', be admissible at trial? Surely the mere fact that a defendant had engaged in negotiation, thereby entertaining the possibility of pleading guilty, would be prejudicial if presented to a jury.
24. The issue of access to adequate legal advice becomes all the more crucial if defendants are to be expected to negotiate on such complex issues as confidentiality, privilege and admissibility of evidence.

### **Equality of arms and pre-charge prosecution disclosure**

25. The proposed system of plea negotiation in fraud cases appears, in the Consultation Paper, to be likened to the alternative dispute resolution mechanisms used in civil law<sup>3</sup>. However, a criminal prosecution differs fundamentally from a civil dispute between two private individuals. The prosecution, representing the State, makes an accusation against an individual. The prosecution is always in a stronger position than the individual because it possesses all the information about the strength, or weakness, of the case. The prosecution is generally in possession of all the evidence, some of which, according to the common law and now legislation, it must disclose to the individual at various stages.
26. No one would argue against early dialogue between prosecution and defence, but only if both parties to such dialogue are equally matched in experience and expertise, and both know the strength of the Crown's case and, indeed, such weaknesses as are known only to the Crown.

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<sup>3</sup> Consultation Paper, at page 10: "the more positive equivalent 'settlement' has been confined to civil cases".

27. The framework deals with disclosure, at paragraph 4, as follows:

*“Consonant with the general common law duty of the prosecution to act fairly and assist in the administration of justice, the Prosecutor must provide to the defence any material which he does not intend to use but which he, as a responsible prosecutor, recognises should be disclosed at an early stage”.*

28. The Consultation Paper points out the obvious difficulty with pre-charge plea negotiation, which is that the disclosure provisions of the CPIA 1996 will not have been triggered at that stage. Defendants will therefore have to rely on the prosecutor’s judgement as to what is fair and likely to assist the administration of justice.

29. The Consultation Paper envisages that disclosure will be made in accordance with common law principles. However, in the case of *R v. DPP, ex p Lee*<sup>4</sup>, the Court confirmed that the introduction of the CPIA provisions has in practice limited the extent of disclosure that must be made pre-charge, under the common law.

30. If early negotiations are to take place in an atmosphere of openness and transparency, it is vital that the defendant has full knowledge of the case against him and access to the evidence in support of that case, as well as evidence that may weaken it. Equality will not be achieved if the defendant must rely on the fairness of individual prosecutors. How, in such circumstances can a defendant have any confidence that he is in possession of all the relevant information?

31. There are two separate considerations at issue here; the first a practical one, the second a matter of fundamental legal principle:

- a) Defendants will be reluctant to enter into negotiations if they believe that they are not privy to all the relevant evidence, whether or not this is in fact the case, thereby frustrating the purpose of the plea negotiation framework.

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<sup>4</sup> [1999] 2 All ER 737

- b) Without properly defined safeguards guaranteeing defendants' right to disclosure, there is a real risk that innocent people will feel pressured into pleading guilty because the case against them appears overwhelming, when in fact there may have been some piece of exculpatory evidence which was not disclosed to them.
32. The Attorney General should follow the example of New South Wales<sup>5</sup>, where the prosecution is obliged to serve on the defence a full brief of evidence, together with unused material.
33. The proposed plea negotiation system should include an additional clear and pre-defined mechanism for disclosure to be made pre-charge. That way, defendants will be able to reach an informed agreement in the knowledge that they are in possession of all the facts. A failure by the prosecution to follow the disclosure mechanism might constitute a breach of the agreement, perhaps giving the defendant an opportunity to change his plea or leading to a re-assessment of the sentence.
34. The current Attorney General's guidelines for pre-charge disclosure refer only to disclosure "of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings". Since the plea negotiation process replaces a full trial of the case, the defendant, in order to reach an informed agreement, will effectively need to have had disclosed to him all materials which are currently disclosable under the CPIA. This should include materials relevant to sentencing, since the agreement will include proposals for sentence.
35. The current lack of certainty in the proposed rules governing disclosure further emphasises the need for defendants to be properly advised.

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<sup>5</sup> Referred to at page 264 of the Fraud Review

**Burden of proof and the need for a full investigation prior to the commencement of plea negotiations**

36. The Consultation Paper appears to indicate<sup>6</sup> that pre-charge negotiation and plea agreement could lead to a reduction in investigative costs, suggesting, it would seem, that a plea agreement may be reached before a full investigation has been concluded. This would result in defendants being encouraged to plead guilty to charges when there may not yet be a full understanding or appreciation of the criminality involved.
37. There is a real risk, in such circumstances, that unsuitable charges will be laid which may not reflect the criminality of the case or the involvement of a particular defendant. This risk is amplified in fraud cases which often involve multiple parties and where the question of guilt or culpability depends on each individual's role and state of knowledge. It may not be obvious to the defendant himself whether or not he is guilty because the offences and potential defences are often complex and technical.
38. Unsuitable charges laid as a result of an incomplete investigation could be either excessive or insufficient, or indeed simply not fit the criminal behaviour in question. Situations where a defendant guilty of a serious offence is allowed to plead to a lesser charge at an early stage because a full investigation has not been carried out are unlikely to inspire public confidence in the criminal justice system.
39. Furthermore, there is an inherent risk associated with plea negotiation that pressure will be brought to bear on a defendant to plead guilty to offences of which he is not guilty. The Consultation Paper maintains that the framework will not imitate the US system, which, it is widely acknowledged, places undue pressure on defendants due to the length of sentences which may be imposed on a defendant who opts to proceed to a full trial<sup>7</sup>. However, the Fraud Review

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<sup>6</sup> At page 14

<sup>7</sup> See Stephen C. Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, vol. 11.3, ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), at page 20

proposes increases in sentences for fraud<sup>8</sup>, paving the way for the very same discrepancies between sentences imposed following trial and those handed down on guilty pleas tendered as part of a plea agreement.

40. For these reasons, plea negotiations should only be allowed to commence once a full investigation has been undertaken, there is a clear understanding of the case against the defendant and the evidence available at least discloses a case against the defendant.

**Pre-charge access to a judge and judicial independence:**

41. The Consultation Paper anticipates that plea negotiations will begin pre-charge. However, judicial consideration and therefore approval of the plea agreement is to take place only at the defendant's first appearance before the Crown Court. Since the offence(s) to be charged will form an integral part of the agreement, it is illogical for the defendant to be charged before the certainty of judicial approval has been obtained. It is vital, therefore, that a system be introduced to allow the parties pre-charge access to a judge. The system should also permit the judge to give a pre-charge Goodyear indication as to the maximum sentence that would be imposed.

42. Presumably, in most cases, the plea agreement will contain provisions in relation to sentence, as this is likely to be the issue of greatest importance to the defendant. The framework appears to suggest<sup>9</sup>, that if the judge accepts the proposed plea agreement, he may give a Goodyear indication on sentence, presumably indicating that he would not impose a sentence greater than that proposed in the agreement.

43. The judge's powers and obligations would thereafter be governed by the existing guidelines set by the Court of Appeal in Goodyear. To that extent, as far as judicial independence is concerned, the draft framework does not technically alter the position which has resulted from the decision in Goodyear.

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<sup>8</sup> At pages 248-249

<sup>9</sup> At paragraph 12.2

44. The Court in *Goodyear* emphasised that the defendant's right to appeal against sentence and the Attorney General's right to refer an unduly lenient sentence are unaffected by the sentence indication procedure. The Court suggested that leave to appeal against sentence may be sought where, for example, insufficient allowance has been made for matters of genuine mitigation. It would be important to ensure that the defendant's right to appeal against sentence and conviction is not eroded by the plea negotiation system. One can easily envisage a scenario, particularly if negotiations are entered into and a plea taken at an early stage, where new evidence comes to light after the defendant has pleaded guilty and been sentenced. A defendant's right to seek leave to appeal and, by extension, the Court's power to hear such appeals must not be affected by entering into a plea agreement. This could be achieved by the introduction of legislation providing that any clause or provision of a plea agreement which purports to waive or limit the defendant's right to appeal against conviction or sentence will be invalid.
45. An issue which the Court of Appeal in *Goodyear* did not specifically address is whether a judge who has been asked to give and/or has given an indication as to sentence can, subsequently, try that case if the defendant pleads not guilty. It seems to have been assumed by the Court in *Goodyear* that the indicating judge and trial judge would be the same person.
46. The question takes on a greater significance in the context of plea agreements, since the defendant will have indicated a willingness to plead to a particular charge and sentence; whereas under the *Goodyear* system, the defendant merely enquires what the sentence would be if he were to plead. If a judge were to reject a plea agreement and the matter were to proceed to a full trial, would that judge's ability to try the case impartially not be severely hampered by the knowledge that the defendant had previously indicated a willingness to plead guilty? Furthermore, the judge's decision to reject the agreement would reveal a pre-evaluation of the evidence and expose the judge's view that the proposed charges and/or sentence were either too lenient or excessive<sup>10</sup>. It is submitted that in these circumstances a

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<sup>10</sup> See Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, vol. 11.3, *ELECTRONIC JOURNAL OF COMPARATIVE LAW*, (December 2007), at pages 29 and 35.

different judge would have to be allocated for case management and trial purposes.

**Confiscation of criminal assets:**

47. The framework anticipates that the plea agreement would include recommendations as to sentence together with ancillary measures such as compensation orders, costs, and confiscation orders amongst others. However a difficulty arises in the case of confiscation orders made under the Proceeds of Crime Act 2002 (POCA). Whether confiscation proceedings are to be initiated and, if so, the amount of any confiscation order to be made are matters which defendants in fraud cases are likely to want to reach definitive agreement on as part of the plea agreement. If confiscation is to form part of the agreement, then defendants will expect to agree an amount which is less than the amount that would have been ordered by the Court following a trial.

48. However, section 6 of POCA has had the effect of imposing a virtually mandatory requirement on Crown Court judges to proceed with confiscation proceedings; and sections 7-10 set out a detailed and inflexible method for calculating the amount of the order. There is some doubt as to whether an agreement on confiscation reached between a defendant and a prosecutor would be binding in law, since no agreement could supercede the provisions of POCA. We would argue, therefore, that primary legislation is needed in order to address this potential conflict between the plea negotiation framework and existing confiscation legislation.

**Consultation questions:**

Question 1: Does the proposed plea negotiation framework adequately meet recommendation 62 of the Fraud Review?

49. Whilst the proposed plea negotiation framework plainly offers specific guidance, for the reasons advanced Peters & Peters does not believe that plea negotiations will make a significant impact until wider problems with regard to the

investigation and prosecution of fraud cases are addressed and adequate safeguards are in place to secure expert advice to the suspect and measures in place to safeguard against suspects feeling oppressed into entering into or concluding plea negotiations

Question 2: Does the framework provide sufficient protection for the interests of society and the suspect for statements made and documents provided during the negotiation? If not what alternatives would be preferable?

50. No. Improved safeguards must be put in place to regulate the way in which information provided by a defendant to the prosecution during the plea negotiation process may be used as evidence against him should the negotiations subsequently fail and the matter proceed to trial. The problem of disclosure of such materials as “prosecution material” to co-defendants also needs to be addressed. These matters, we submit, would best be dealt with by way of primary legislation.

Question 3: Does the Framework adequately address disclosure issues and if not what alternatives can provide a better solution?

51. No. additional thought needs to be given to the defendant’s entitlement to pre-charge disclosure. We would submit that this issue, also, should be the subject of primary legislation.

Question 4: Does the framework adequately ensure that victims can have confidence in the outcome of any plea agreement reached? If not, what alternatives would provide a better protection for victims?

52. Plea-negotiation leading to early guilty pleas is likely, in general, to reduce the extent and duration of any stress suffered by victims as a result of being caught up in the legal process. However, it may have a detrimental effect on the public’s perception of whether justice is being done. Victims may feel that justice has not

been done if a defendant, having admitted his guilt, is then able to bargain his way to a reduced sentence<sup>11</sup>.

Question 5: Is judicial independence sufficiently protected by the proposed Framework and, if not, what alternatives could be recommended?

53. The framework requires judicial approval of the plea agreement and allows for the judge to accept, reject or modify a plea agreement put before him. So on the face of it, judicial control of the criminal justice process is preserved. However, see above under “Pre-charge access to a judge and judicial independence”.

Question 6: Does the Framework ensure that the Crown are not prejudiced in presenting their case at trial following a failure to reach a plea agreement, or to reach one that is acceptable to the Court? If not, what alternative mechanisms could be devised?

54. No comment

Question 7: Does the Framework adequately protect the rights of the suspect? If not, what further or alternative safeguards would be effective?

55. No. Peters & Peters has serious concerns about the effect that the proposed plea negotiation framework would have on a several of a defendant’s fundamental rights: the right to adequate legal advice, the right to disclosure of the case against him, the privilege against self-incrimination and the right to have the case against him proved by the prosecution to the criminal standard. See answers to questions 1 and 2 and comments made above.

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<sup>11</sup> Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, Crim. L.R. 2000, Nov, 895-910, pages 3-4

Question 8: Does the Framework address the relevant issues of principle that need to be considered prior to the introduction of a formal mechanism for negotiations in fraud cases into English Law?

56. No. As mentioned already, questions remain over many fundamental issues of principle. Crucially, the framework does not provide for these questions to be considered by parliament.