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Ministry of Justice
Law and Rights, Judicial Policy and Criminal Trials
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31 July 2012

Dear Sirs

Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements

This letter and the accompanying appendix set out the response of PricewaterhouseCoopers LLP ("PwC" or "we") to the Consultation Paper issued on the 17 May 2012 by the Ministry of Justice concerning a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred Prosecution Agreements ("DPAs"). The Consultation Paper raises 23 specific questions on the DPA proposals and 5 ancillary questions dealing with the Impact and Equality Impact Assessments published at the same time. PwC's detailed response is set out in the appendix to this letter, adopting the question numbering and sub-headings used in the Consultation Paper for ease of reference.

In summary, PwC fully supports the intention behind the proposals to introduce DPAs and believes that, subject to addressing certain important legal and practical issues, DPAs have the potential significantly to improve the ability of the UK criminal justice system to address serious economic crime by commercial organisations. Past experience has demonstrated that UK prosecutors require new tools to secure appropriate penalties for wrongdoing and achieve better outcomes for victims of serious economic crime. It is equally important that the criminal justice system should encourage self-policing and self-reporting by commercial organisations, by providing a more efficient and proportionate response to cases where companies wish to do the right thing and take responsibility for failings in their corporate governance and internal controls. DPAs can bring these goals into alignment by balancing the various criminal justice purposes of punishment, reduction of crime, rehabilitation, public protection and restitution. By providing a more holistic response to corporate crime, DPAs can improve certainty for law enforcement,

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commercial organisations and victims alike, by bringing the full range of a company's response to identified wrongdoing into the criminal justice system.

DPAs should also help address inefficiencies and unintended consequences in the current criminal justice system. The requirement to show board-level complicity in corporate crime currently narrows the options for resolution to criminal prosecution or civil recovery, making it more difficult to achieve a proportionate settlement suitable to address the wrongdoing identified and to support corporate rehabilitation. On the one hand, particularly in complex, cross-border cases, law enforcement agencies face an almost impossible task to gather adequate reliable evidence to prosecute potentially multiple offences occurring in multiple jurisdictions. Lengthy, expensive investigations – many of which may ultimately be doomed to failure – are an inevitable result, as has been borne out all too often by past experience. On the other hand, commercial organisations wishing to resolve economic crime issues, address the underlying corporate problems and move on with their business are instead faced with drawn-out investigations and consequential damage to corporate reputation and share price, along with other potentially disproportionate collateral effects. The potential for serious detrimental impact on a variety of entirely innocent stakeholders (suppliers, customers, employees, pensioners, investors, etc) under the existing arrangements is significant and, in our view, a major barrier to a fair and proportionate resolution of cases of corporate economic crime. To address these inefficiencies, DPAs need to be implemented in an innovative and pragmatic way, so as to reflect the increasingly complex reality of business activity and corporate decision making in a global economy.

However, the very real potential benefits of DPAs to our system of justice will only be realised if a number of key issues are addressed. Above all, DPAs must be seen to be a way to do efficient, cost-effective justice that is commensurate with the seriousness of the crime or crimes in question, while giving meaningful credit to commercial organisations that cooperate and disclose information and evidence without which the prosecution would have no case. Critical success factors for a DPA regime will include:

- Appropriate judicial oversight of the DPA process, requiring suitably experienced judges equipped with guidance, *inter alia*, as to:
    - The sorts of characteristics which would tend to make a particular case more or less suitable for a DPA;

    - The necessary elements of a DPA and the extent to which those may be allowed to be amended (if at all) without further judicial intervention; and
    - Principles governing sentencing and the amount of credit to be afforded to a commercial organisation for timely self-reporting, cooperation, disclosure, remediation efforts, and any other relevant factors;

- Clarity and appropriate safeguards around the use to which information and evidence provided by a commercial organisation in the context of investigations and negotiations between that organisation and the relevant law enforcement agency may be put for purposes other than a DPA, should either party decide to withdraw from DPA negotiations, or the Court decline to approve a DPA;

- Clarity as to how DPAs negotiated in the UK will be coordinated with actions taken by law enforcement agencies and/or regulators in other jurisdictions in relation to the same or related matters. An extension of this would be the need for clarity as to how the UK authorities will protect commercial organisations entering into DPAs from mandatory or discretionary exclusion from public tenders under EU procurement directives, as well as consequences relating to other regulatory authorisations; and

- As far as possible, reasonable certainty for commercial organisations as to how the DPA process will work and what will be expected of them in achieving a just and appropriate outcome.

While the legal and practical challenges to implementing an effective and just DPA regime are considerable, they are not in our view insurmountable. DPAs have been a feature of the US justice system for many years and have undoubtedly been effective in that jurisdiction, as well as having a significant impact internationally because of the wide reach asserted by US law and the US courts. Furthermore, there is arguably precedent for at least some aspects of the proposed DPA regime, for example in the form of the existing Hansard arrangements administered by HMRC in relation to tax investigations, to the extent that the Hansard regime already provides a basis for cooperation and negotiation between the tax authorities and corporate tax payers as a way of avoiding prosecution subject to conditions. In any event, the UK authorities will wish to implement DPAs in a way that fits with the somewhat different structures and traditions of the UK legal system (as compared with the US system). However, the various hurdles that need to be

cleared should not be allowed to obscure the fundamental point that the proposed DPA regime – taken together with encouragement of self-reporting and self-investigation – has the potential to improve significantly the productivity and effectiveness of UK law enforcement agencies in combatting economic crime.

We would be pleased to discuss any aspect of this reponse with you at any stage.

Yours faithfully

Owen Jonathan
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For and on behalf of PricewaterhouseCoopers LLP

Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements

Appendix: Answers to specific questions

Chapter 3 – Purpose and principles

1. **Do you agree that deferred prosecution agreements have the potential to improve the way in which economic crime committed by commercial organisations is dealt with in England and Wales?**

Yes.

PwC has extensive experience of conducting investigations of fraud and corruption in the context of large, international commercial organisations. We recognise that economic crime has become increasingly complex and multi-jurisdictional in scope, creating huge challenges for law enforcement agencies, which can only operate directly in their own jurisdiction, resulting in lengthy, costly and protracted investigations and court proceedings for all parties concerned.

We consider DPAs have the ability to balance the various criminal justice purposes of punishment, reduction of crime, rehabilitation, public protection and restitution. Additionally DPAs can improve certainty for commercial organisations and victims (including unintended victims such as employees, shareholders and investors, customers and suppliers) alike, by bringing the full range of a company's response to identified wrongdoing into the criminal justice system, thereby contributing to a just outcome.

We also believe that law enforcement agencies (particularly the SFO), by deploying the DPA process in conjunction with other measures such as self-reporting by commercial organisations, will be able to make far more effective use of their limited resources.

2. **Do you agree that deferred prosecution agreements should be applied only in cases of economic crime? Could or should they be used more widely?**

As we understand the terms of the proposed DPA regime, the term “economic crime” principally covers fraud, bribery and money laundering. This is arguably a relatively narrow definition, although we recognise that there are already self-reporting and settlement regimes in place for certain other forms of economic crime, such as, for example, cartel offences.

We see no reason in principle why DPAs could not also be applied to other corporate offences, where many of the same challenges to effective investigation and prosecution are likely to exist. We do not propose to list all possible categories of offence that might be suitable, but offences such as those relating to health and safety might be an example.

Chapter 4 – The proposed model

The decision by prosecutors on whether to offer and enter into a DPA. (Paragraphs 91 - 95 inclusive)

3. **Do you agree that these are the right factors to which prosecutors should have regard in considering whether to enter into a DPA**

Yes, subject to the following observations.

We think the Code of Practice should set out clear guidance as to the circumstances in which the DPP or Director of the SFO could legitimately consider entering into a DPA with a commercial organisation whilst remaining illustrative and non-exhaustive. Commercial organisations are becoming increasingly sophisticated and diversified and there is no one-size-fits all solution. Rather than creating a prescriptive list of factors, the DPP or Director of the SFO may wish to consider additional aggravating or mitigating factors on a case-by-case basis.

For example, in determining whether to offer a DPA and in addition to the key factors identified in paragraph 94 of the Consultation Paper, the DPP or Director of the SFO may also have regard to the period of time which the wrongdoing occurred (days; months; years); the nature of the business of the commercial organisation; any attempt by the commercial organisation to "forum shop"; and the existence and effectiveness of the commercial organisation's pre-existing compliance programme.

With regard to the nature of the offence as a factor to be considered in determining the suitability of a DPA, as Thomas LJ noted in the Innospec judgment, corruption of a Government official is the very top end of serious corporate offending and equally any movement of funds related to corruption will attract consideration of money laundering offences; very serious criminal conduct in any view. The fact that bribery is a serious matter is not in dispute. However, it cannot be the intention of these proposals that the egregiousness of bribery as an offence generally would be grounds for ruling that no bribery offence could be dealt with by way of a DPA. In practice, we would expect that DPAs will be of particular value in dealing effectively and justly with bribery cases, where the extent of individual culpability is often difficult to establish but where there is potential nonetheless for very substantial corporate criminality and harm.

The DPA is likely to be the key incentive to the commercial organisation making a voluntary self disclosure to the relevant law enforcement agency. Paragraph 91 of the Consultation Paper envisages an investigation having taken place prior to the prosecutor considering whether to enter into a DPA or whether to prosecute. We consider that any guidance should determine what sort of investigation is envisaged and by whom it should be carried out. It will be important to any

process that any action by the commercial organisation to investigate does not compromise evidence or provide a commercial organisation with the opportunity to cause delay. Equally, commercial organisations who genuinely wish to cooperate and make full disclosure need to be guided as to the nature and extent of investigations they are expected to undertake and the manner and timing of reporting to the relevant law enforcement agency, as well as what will ultimately need to be put before the Court in order to enable a judge to rule on the proposed DPA.

Finally, we consider it important that the guidance when published sets out to whom the self disclosure reports and a request for a DPA should be submitted.

4. **Do you think that it would be appropriate to include any further components in a Code of Practice for DPAs for prosecutors?**

Any Code of Practice will need to clearly define how the Criminal Procedure and Investigations Act 1996 ("CPIA 1996") and any data protection issues are to be determined and dealt with. It will be important to ensure that the provisions of the CPIA 1996 are applied throughout the negotiations leading up to the DPA considerations and prior to the submission to the judge for approval. Should the judge choose not to approve a DPA then the case might be prosecuted, and material created in the case including all discussions between the parties and any discussions with overseas jurisdictions, will potentially be disclosable.

The Code of Practice should also determine how information will be managed and exchanged with other regulators that might have responsibility for enforcement, such as the OFT or FSA, as well as law enforcement agencies in overseas jurisdictions.

Multi jurisdictional enforcement is likely to figure significantly in many of the DPAs negotiated and accordingly the Code of Practice should also set out clearly how issues on primacy, information exchange and the sharing of any penalties or proceeds of criminal conduct following an agreed DPA might be approached and dealt with, particularly where law enforcement agencies overseas are actively involved e.g the US Department of Justice ("DOJ") or the US Securities and Exchange Commission ("SEC").

Guideline for DPA

5. **Do you agree that the Sentencing Council is the right body to develop such a guideline for DPAs?**

We have no particular view on whether the Sentencing Council is the right body to develop the guidelines. We do believe that any guidelines issued need to be, and be seen to be, from an independent expert body set out in very much the same way as existing sentencing guidelines are

structured. Importantly, however, judges should be able to exercise discretion based on all the facts of the case (each case will be judged on its own particular facts as set out and agreed).

6. **What do you think would be most useful in a guideline for DPAs?**

We do not believe that the current sentencing guidelines provide sufficient clarity to support the proposed DPA process. It will be important that DPAs are supported by a new sentencing tool that combines the benefits of outline guidance, to provide companies with a detailed indication of possible penalties, and the benefits of more flexible principles, to allow the DPA to recognise particular circumstances such as extraordinary cooperation by the company.

In the US, the DOJ operates according to sentencing guidelines, set out in a sentencing manual that is accessible to the public, and uses a defined metric for determining the range of fines and credit for any pre existing compliance programme, cooperation, etc. A comparable mechanism in the UK is currently used by the HMRC in negotiated settlements. In such instances set out in HMRC's code of practice they determine mitigation according to Disclosure (20%), Cooperation (40%) and Seriousness (40%).

Whatever guidelines are chosen, it will be important to provide clarity to the commercial organisation in negotiating its position with the law enforcement agency, and for both parties in approaching the Court for approval. This will be particularly important for commercial organisations seeking a global settlement in response to a multi-jurisdictional investigation.

Commencement of proceedings before a judge

7. **Do you agree that the preliminary hearing should take place in private?**

Yes.

As envisaged, the preliminary hearing is the first instance the prosecutor will notify the judge of its provisional intention to enter into a DPA. The judge will then form a view on whether or not the DPA is in the interests of justice or alternatively may seek additional information or order further investigations prior to forming a decision in principle. We strongly support the principle that this process should take place in private to protect the identity and confidential admissions made by a commercial organisation while any issues are being resolved. Indeed, in our view all discussions, hearings and other activities connected with the DPA should be kept confidential up until the hearing at which the judge is asked to approve the DPA. In this regard, some clarity around the interaction between DPA negotiations and the existing obligations of listed companies to disclose material matters under UKLA and other relevant regulations would be helpful.

If the judge was of the view that a DPA might not be appropriate given the circumstances of the offending and facts as known then such an early indication would save the prosecutor and suspect commercial organisation valuable time and expense, enabling them to concentrate their resources in preparation for a full criminal trial.

8. **Do you agree that the first test for a judge to apply at a preliminary hearing is whether a DPA is 'in the interests of justice'?**

Yes, on the understanding that the parties who will be attending the preliminary hearing are able to agree the offences to which any DPA might be applied.

9. **Do you agree that at a preliminary hearing the judge should also apply a test as to whether the emerging conditions of a DPA are 'fair, reasonable and proportionate'?**

Yes, to the extent that these tests are not already contained within the test of what is in the interests of justice. The terms of a DPA should properly reflect both the extent and gravity of wrongdoing, as well as the timeliness and extent of cooperation, disclosure, remediation and restitution by the commercial organisation, as appropriate. Importantly, judicial scrutiny must ensure that DPAs are not deployed in an oppressive manner in the absence of adequate evidence of wrongdoing.

Content and judicial approval of final agreement

10. **Do you agree with the proposed possible contents of a DPA as outlined?**

In principle, yes.

The agreed statement of facts to be appended to the DPA will be of critical importance. First, the transparency of the DPA and the basis upon which it has been agreed will aid public understanding and enhance confidence in the justice of the outcome. Secondly, the presentation of factual admissions of the commercial organisation will also have a bearing on any other actions, including civil actions that may be brought against the organisation.

The scope and formulation of any remedial actions stipulated will also be of considerable importance. These will, of course, be case specific, but they will undoubtedly be scrutinised as sources of guidance for wider use. The challenge will be to formulate them in such a way that is appropriately tailored to the particular circumstances of the case and the commercial organisation in question, but practical and workable and not overly prescriptive. This becomes particularly

challenging where there is a need to make significant changes to the culture of an organisation as a whole and engender greater focus on ethics and integrity. This can be of central importance to the success of a remediation programme, but will be difficult to capture succinctly and clearly in a DPA document.

11. **Do you agree that there should be a reduction principle, relating only to the financial penalty aspect of a DPA, and that the maximum reduction should be one third of the penalty that would have been imposed following conviction in a contested case?**

No. We do not agree that any reduction should necessarily be restricted to the financial penalty element of the DPA, nor that there should be a maximum reduction of one third.

The financial penalty element may be a relatively small part of the overall monetary sanctions that might be levied on the commercial organisation, which might also include disgorgement of profits or other financial benefits (see also our response to question 23, where we deal with quantification). A reduction of the financial penalty element only might therefore not be sufficient to encourage that organisation to self-report or cooperate more fully. It should not be forgotten that in some cases, a commercial organisation will, through its cooperation, self-investigation and disclosure, be adding very signifiantly to the information and evidence available to the relevant law enforcement agency as to the nature and extent of wrongdoing. It will therefore be voluntarily contributing to a potential increase in overall monetary sanctions. It is only reasonable to expect a commercial organisation to do this, if there is a prospect of a meaningful reduction in the overall sanctions that would otherwise be imposed on conviction at trial.

The suggestion of a maximum one third reduction seems arbitrary. We acknowledge that Crown Prosecution Service guidance suggests one third reduction for guilty pleas made at the earliest possible opportunity, but this is not described as a maximum reduction. In addition, we do not believe that the rationale for this fraction as set out would provide a fair and proportionate approach in all DPA cases, which will often involve self-reporting, restitution and additional mitigating factors and not just an early guilty plea.

In order to provide an incentive to the corporate it would in our view be more appropriate to apply mitigation across a general scale taking into account the disclosure, cooperation and seriousness of the offence and for the resulting mitigation percentage to then be applied by the judge against any monetary sanctions that the Court decides to impose. Above all, judges and prosecutors should be given guidance and flexibility.

It is important to remember that the majority of the cases culminating in a DPA will not be contested cases or the equivalent. They will inevitably be voluntary style disclosures and plea

style agreements. The companies will, in most cases, be providing information/evidence that may lead to the investigation/prosecution of individuals and other legal entities. As a consequence of such action the subject of the DPA ought to able to be given a reduction level greater than the one third proposed if the Court believes that this is a just outcome in all the circumstances.

In our view the present proposal would not incentivise cooperation to the extent envisaged by the Consultation Paper. Conversely, if commercial organisations perceive that appropriate credit is given for voluntary disclosure and cooperation, there is a real possibility that considerably more cases will emerge that way.

12. **Do you agree that it would be appropriate for the final stage of the DPA process to take place in open court?**

Yes. This is a crucial aspect of the final DPA agreement in order to ensure that the there is both clarity and transparency around what has been agreed.

We consider that once final issues have been resolved between the parties, and the judge has determined that approval of DPA would be in the interests of justice and that the agreement and its constituent parts are fair, reasonable and proportionate, it would be appropriate for a judge to approve the DPA in an open court.

The timing of the agreement, however, may need to be coordinated with any criminal actions planned against any individuals both here and in overseas jurisdictions in order that the right to a fair trial is not prejudiced by the publication of the DPA.

Non compliance with or breach of the DPA

13. **Do you believe that it is right that the court should determine whether a variation to a DPA is appropriate, where a change of circumstances has occurred?**

Yes. The mechanism for this in our view should be clearly set out in the guidance.

14. **Do you believe that the prosecutor should be empowered to vary the terms of a DPA, within limits defined within that DPA?**

Yes. On the basis that the DPA is itself approved by the Court, then any provisions within the DPA permitting variations of one kind or another will also by definition have been pre-approved by the Court also. It may be desirable for guidance in relation to DPAs to define in principle the sort of

matters that might be dealt with in this way. In any event, the judge should ultimately determine what degree of flexibility might be built into a particular DPA in the circumstances. The ability to manage appropriate variations in this way would have the obvious benefit of reducing any unnecesary burden on court time and on the judge. It would seem disproportionate, for example, to require a separate hearing to enable the prosecutor to agree to a reasonable extension of some deadline or other.

The terms and conditions as set out in the DPA will be both substantive and administrative in nature. To help facilitate a commercial organisation to fulfil the terms and conditions of the DPA, the language of the DPA must be practical and tailored to specific individual cases.

On occasion, the parties may need to vary the terms of the DPA. In this instance, we think it would be realistic to empower the prosecutor to vary terms and conditions which have been predetermined by the Court (during the final approval stage) as being suitable for variation. The variation may be considered an amendment to the DPA and should be notified to the Court and attached to the original DPA records.

Judicial oversight is necessary to ensure that the DPA remains fair and proportionate.

15. **Do you believe that it should be possible for the parties to a DPA to be able to make amendments to it, within limits defined by that DPA?**

Refer to our answer to question 14 above.

Formal Breach Proceedings

16. **Do you agree that there should be provision for formal breach proceedings and that it should operate as described?**

The DPA, as approved by the judge, should set out how a breach is to be dealt with. The Consultation Paper envisages that any dispute in relation to whether a breach has occurred, the extent of a potential breach or failure by a commercial organisation to agree to a variation should be placed before a judge for determination. Prior to the commencement of formal breach proceedings, we think that the prosecutor and the commercial organisation should have the opportunity to negotiate a resolution (behind closed doors) before seeking judicial approval for such resolution.

Practically, we think that guidelines should distinguish between different forms of breach, which will vary in their nature and gravity. For example, a commercial organisation may substantively breach a DPA by continuing to pay bribes. This might reasonably be viewed as a more serious breach than the case of a commercial organisation which commits an administrative breach by, say, failing to submit a periodic report on time. The sanctions for breaches should, like the DPA itself, be proportionate to the nature of the breach and could, in appropriate circumstances, extend to a termination of the DPA and a move to a full prosecution.

Revival of the substantive prosecution

17. **Do you agree that judges should have discretion, following a breach, to insist that a DPA should be terminated?**

Refer to our answer to question 16 above.

Admissions

18. **Do you agree that the above proposals regarding admissibility are appropriate?**

We agree that DPAs should be open and transparent and essentially treated in effect as though they are Court judgments (since they will receive judicial approval). It therefore makes sense that the proposals regarding admissibility respect the well established common law privilege against self-incrimination.

We consider that the handling of such material provided by the corporate in negotiating through the DPA process needs to be clearly defined within any guidance notes so that there is clarity of understanding for all parties. This is particularly important given the proposals for early judicial involvement and public hearings in the DPA process. We are also concerned that the proposals do not deal with the sharing of DPA discussions/information with overseas jurisdictions (that might lead to requests for individual extraditions or the commencement of proceeding overseas), particularly when the information is used to make further enquiries. Uncertainty or inconsistency from one jurisdiction to another on this issue will add complexity and costs to the DPA process and could lead companies to reach a settlement with a non-UK jurisdiction that has clearer procedures and safeguards.

Disclosure

19. **What are your views on the appropriate approach to disclosure in the context of DPAs?**

Unused material

Disclosure of unused material to the defence should apply to all aspects of the DPA whether or not it is formally proceeded with. All relevant material, including discussion notes and communications with overseas jurisdictions, where a multi jurisdictional/concurrent jurisdiction case was in consideration, should be made available. It is particularly important to clarify how the DPA disclosure safeguards will interact with the CPIA 1996 if the DPA is not proceeded with and the case moves into the prosecution phase as a result.

Onward disclosure

The onward disclosure regime that has been proposed is aligned with the existing disclosure regime that applies to all other law enforcement agencies. No further guidance is necessary. It is right that any information provided by the commercial organisation, whether by compulsion or otherwise, should not be disclosed to any other party unless required or permissible by law, or for the purposes of the DPA process.

20. **Do you agree with our proposals regarding the susceptibility to judicial review of decisions made in relation to DPAs as outlined above?**

Yes.

The view implicit in the Consultation Paper is that a DPA does not constitute a decision not to prosecute. We therefore assume that the reference in paragraph 160 of the Consultation Paper is to situations where neither a DPA is entered into nor a prosecution commenced. We agree that the existing law where a decision not to prosecute can be challenged by judicial review should not be altered and also agree that DPAs should not be subject to judicial review on the basis that they will be treated as Court judgments once approved by a Crown Court judge. Following this regime will add clarity and certainty from the point of view of both prosecutors and commercial organisations entering into DPAs.

We concur with the views expressed and believe that the matter should be addressed within the Code of Practice in order to clarify that any decision to pursue a DPA will have been taken in

accordance with the prosecutor's own settled policy and under the supervision and with the approval of the Crown Court.

Introduction and application of DPAs

21. **Do you agree that DPAs should be available in relation to conduct which took place before the commencement of any legislative provisions introducing them?**

Yes, for the reasons given in the Consultation Paper.

In practice, instances of wrongdoing may span an extended period of time and it would be arbitrary and unhelpful to have a strict cut-off between those offences occurring prior to and those after the introduction of DPAs. In our view the essential factor is not so much the timing of the offence, but the timing of its discovery. Clearly, if a commercial organisation has known of a criminal offence for a substantial period of time and has neither reported it nor sought adequately to investigate and remediate it, then a different view might be taken by prosecutors and the Court by contrast to a case where a commercial organisation discovers an offence which it investigates and reports on a timely basis, but which transpires on investigation to have occurred on one or more previous occasions going back over a period of time.

22. **Do you agree with the proposed process for DPAs, as outlined in this chapter, and do you have any suggestions for improvements or amendments to it which would support the overall policy objectives?**

We should like to see the guidance address and explain a new code of practice for the prosecutors that would underpin all the decision making processes ensuring transparency and fairness.

The guidance should also make plain what prosecuting office will be considered as the lead prosecutor in each case, the criteria for determining the lead office and also set out the process by which any company making a self disclosure might request a DPA, i.e. what the investigating agency would expect and how it would be dealt with by the prosecution department, leading up to any consideration of a DPA.

As there are likely to be close links to offences in other jurisdictions and dual considerations needed, the process for DPAs will need to set out how the question of primacy will be determined and agreed. Any DPA process relating to potential offending in other jurisdictions should in our view be capable of engaging with the relevant parties to determine the most effective and efficient outcome.

23. **Do you have any further comments in relation to the subject of this consultation?**

International coordination and sharing of monetary sanctions

Any DPA in relation to multi jurisdictional enforcement casework should have the ability to determine a global settlement that would enable the various prosecutors involved to coordinate and agree who has primacy over the offence and for the decision to be written into any DPA with an order from the Court determining any financial penalty that should be ordered to be paid to the foreign jurisdiction in relation to any offence admitted and relating to the overseas jurisdiction. As a consequence it is our view that the DPA legislation should be complimented by agreed arrangements for the sharing of monetary sanctions with relevant overseas jurisdictions where appropriate in order to ensure that the determination of global style settlements is dealt with both practically and proportionately.

EU debarment and other regulatory consequences

It is important that the DPA process clarifies the status of DPAs under EU procurement law. The Consultation Paper recognises the disproportionate nature of mandatory exclusion of suppliers convicted of active bribery and certain other economic crimes (e.g. paragraphs 14, 27 and 33). However, the Consultation Paper does not address the possibility that commercial organisations admitting wrongdoing under a DPA might still be exposed to discretionary exclusion of suppliers, allowing procurement authorities across the EU to refuse to consider a commercial organisation's tenders on the basis that it is an "unreliable supplier". The UK implementing regulations and government guidance do not distinguish suppliers found to have committed "grave professional misconduct" in their line of business from suppliers convicted for other criminal offences, even under contested prosecutions. Furthermore, there is no guidance on the circumstances in which discretionary exclusion is appropriate or as to the duration of exclusion from EU procurement, again creating an unfair and unhelpful equivalence between suppliers that have self-reported, cooperated in the prosecution of individuals and undertaken to strengthen their internal controls with unrepentant suppliers that have taken no steps to demonstrate their reliability.

This does not seem consistent with the overall purpose of the DPA proposals, as it would unfairly penalise those companies agreeing to be held to account. Uncertainty over whether DPAs expose companies to discretionary procurement exclusion would also be a significant factor militating against self-reporting.

The proposals regarding admissibility state that a DPA "should be treated as seriously as a criminal conviction", but with no proposal for ensuring that EU procurement authorities take into account other relevant factors about supplier reliability - such as corporate self-reporting and agreed DPA reform and/or remediation (as set out in paragraph 112, bullets 5 and 6). This problem has already been noted by commentators in respect of convictions under Section 7 of the Bribery Act, due to the general absence of UK Government guidance on the duration or threshold for discretionary exclusion. In consequence, the proposals do not provide a clear and consistent response and may still fail to encourage self-reporting by commercial organisations wishing to do the right thing. In our view the proposals could be improved by clarifying that agreed DPAs would be treated as corporate "self-cleansing" for purposes of EU law, replacing the uncertainty of discretionary exclusion in preference for the clear requirements of the DPA. This might follow the default approach of the World Bank regarding conditional blacklisting of companies.

Aside from EU debarment, there may also be regulatory authorisations, registrations or approvals which are a pre-requisite of doing business for a particular commercial organisation and which would be subject to review and possible withdrawal on a criminal conviction. These may similarly be affected by the way in which a DPA is interpreted, and therefore clarity as to the implications of a DPA in this broader context will also be important to the success of the regime.

Quantification of financial benefits/profits to be disgorged

When considering the determination of the financial benefit/disgorgement of profits, it will be important as a principle to determine what will be recovered from the corporate: the profit or the benefit (e.g. total revenues, contract size, etc). If the Court determines it should be the benefit figure then this might be so large as to effectively force the corporate out of business.

Consequently the financial benefit to the company (profit/benefit or in some instances losses) should be determined before the matter is brought to the Court and ought to be part of the preliminary hearing (referenced earlier). The judge will need to be satisfied with the quantification process used and reasonableness of the figures, where necessary with the help of expert evidence at the preliminary hearing, before approving the DPA.

Impact Assessment questions:
1. **Do you have any comments in relation to our impact assessment?**
No.
2. **Could you provide any evidence or sources of information that will help us to understand and assess those impacts further?**
No.
Equality Impact Assessment questions:
3. **What do you consider to be the positive or negative equality impacts of the proposals?**
None.
4. **Could you provide any evidence or sources of information that will help us to understand and assess those impacts?**
No.
5. **Do you have any suggestions on how potential adverse equality impacts could be mitigated?**
No.