Response to DPA Consultation Paper CP9/2012

Introduction

Jones Day is a global law firm that represents corporate clients in fraud, corruption and sanctions matters. The consultation gives rise to issues of broad principle and practical application. This response seeks to address the practical issues approaching them from a practitioner viewpoint and trusting that others will address the issues of principle.

Jones Day supports the proposed introduction of Deferred Prosecution Agreements (DPA's), believing that there are potential benefits both for its corporate clients and society generally. However, if the ambitions set out in the consultation document are to be met then it is essential that procedures for the administration of DPA's address the genuine concerns of the commercial organisations who will be parties to such agreements. We are not certain that as presently envisaged we could make a compelling case to a prospective client that self reporting with a view to being offered a DPA would represent the best course of action in any given situation.

It is our view that DPA's will only work if they promote self reporting and they will only do this if commercial organisations have confidence that there will be certainty of outcome and that they will be better off through self reporting as opposed to waiting for law enforcement to knock at the door. Our detailed response is set out below.

CONSULTATION PAPER	**COMMENT**
FOREWORD Para 8	DPA's are designed to achieve the goal of ensuring a higher proportion of economic crime is identified, investigated and dealt with. In large part this is to be achieved through self reporting which is referenced in the consultation but also through commercial organisations investigating their own conduct. The consultation is rather more coy on this topic with oblique references to "incentivising self-policing" (para 43 second bullet). The policy justifications for sanctioning internal investigations are plain. They are in truth the only means by which the stated goal can be achieved against a backdrop of declining budgets for law enforcement and prosecution authorities. The reality of internal investigations needs to be acknowledged and grasped because it will impact significantly on how the system operates in practice and will have implications down the line that need to be understood and addressed.
EXECUTIVE SUMMARY Para 14.	"Currently commercial organisations have little incentive to self-report offending to investigating and prosecuting agencies, especially if such self-reporting may result in a criminal conviction and all that entails." This sentence admirably sets out the obstacle to self reporting but it is not clear that the proposed scheme for DPA's creates fresh incentives to promote self reporting..
Para 31	To state that the only circumstance in which an organisation can make admissions of wrongdoing is in the context of criminal proceedings does not give the whole picture. As well as civil recovery orders, dealt with later

	in the consultation, consideration should be given to the Office of Fair Trading's (OFT) long established leniency policy that allows a company to admit wrongdoing in return for immunity from prosecution or reduced penalties. The leniency policy has grappled with many of the issues that are live in this consultation and it would seem sensible to take what lessons there are to be learned from the experience of the OFT and their colleagues in the EU when engineering the DPA framework. If for no other reason, it would seem sensible to ensure that there is the greatest possible consistency of approach in the way that the government tackles the commission of economic crime by commercial organisations. At a theoretical level there is little to distinguish cartel activity from bribery. Both are offences that distort the fair operation of markets and yet currently those who commit the cartel offence have a well established framework they can use to mitigate or avoid altogether the sanctions against them while those guilty of bribery are at the mercy of an ill defined prosecutorial discretion. It would seem both sensible and fair to take this opportunity to even matters up and incorporate elements of the leniency policy into the guidance that supports the operation of DPA's. This would go some way to create the certainty that business requires if it is to be encouraged to self-report.
Para. 34 (see also Para 95)	This paragraph contemplates the commercial organisations avoiding prosecution while the culpable individuals within the commercial organisation are charged with criminal offending. Whilst understanding the different policy motivations that underlie the OFT leniency programme (in particular the desire to encourage one participant in a cartel to provide evidence against the others) perhaps some consideration could be given to extending the deferral of prosecution to the employees of the subject commercial organisation. Notwithstanding, some thought must be given to the issues that arise when prosecuting individual employees using the product of an internal investigation conducted by the commercial organisation. Several questions of principle are raised when an individual stands trial on evidence significantly gathered by a party who would in other circumstances be a co-defendant. There are too, more practical issues around disclosure of the product of the internal investigation in criminal proceedings and the extent to which a claim to LPP can be maintained over the product of the investigation. These issues were very much to the fore in the failed OFT prosecution of BA. These issues need to be clearly addressed in any guidance that is issued. (Discussed further at Q's 18 & 19)
Paras 49 - 51	These paragraphs cite criticism of civil recovery orders (CRO's) in cases of serious economic crime. In fact CRO's have been a highly effective means of affording a resolution to allegations of criminal wrongdoing that falls short of criminal prosecution. The principal attraction is the ability of the corporate to achieve certainty of outcome in negotiations with the prosecuting authority. This essential element should be a feature of the new DPA regime. The major criticisms of the CRO disposal are the lack of transparency and

	the slightly artificial nature of the orders agreed. DPA's would resolve these issues but if commercial organisations are not persuaded that they can achieve the required certainty of outcome, prosecuting authorities may continue to use CRO's with their attendant drawbacks.
Q1	Yes. To the extent that DPA's provide a more transparent means of dealing with corporate offending than is currently available they improve on existing arrangements. In particular the recognition and acceptance by the commercial organisation of criminal wrongdoing is a significant advance on cases where presently CRO's are used.
Q2	No. It is difficult to see why DPA's should be restricted to economic crime. The principles have equal applicability to all areas of corporate offending including for example health and safety prosecutions. Furthermore, thought might be given to extending the DPA regime to cover individuals working within commercial organisations that are subject of a DPA. This might mitigate criticism that DPA's allow big business to buy itself out of trouble while the individual goes to prison.
Paras 89 - 93	"a decision by prosecutors following investigation on whether to offer and enter into a DPA." This proposal fails to address the concerns of businesses as summarised at para 14 of the Executive Summary. Commercial organisations may be disinclined to self report if they will not learn their fate until after the investigation has been concluded. The consultation envisages the investigation having reached a point where prosecutors can apply a Code Test to determine whether prosecution or DPA is appropriate. Necessarily this will entail that a thorough investigation has been completed. If the investigation is conducted by law enforcement it could last for years and the corporate will be pray to the negative impact of ongoing uncertainty. If the commercial organisation is asked to conduct an internal investigation it could potentially spend £ millions with no assurance as to the likely outcome. If it is genuinely anticipated that commercial organisations will self report, there must be an early indication of the outcome they can expect and they will need to know that they can rely on that indication save where significant new information emerges. Some thought might also be given to a "no names" process (as operates in OFT cases and tax investigations) that allows professional advisors to get agreement in principle to a certain disposal before disclosing the identity of their client. The proposed process also fails to take account of the reality of how many of the cases involving commercial organisations come to light. Often the commercial organisation is facing investigation in a number of jurisdictions. It will often be in the best interests of the commercial organisation to obtain a global settlement. For this to happen the procedure for DPA's in the UK needs to be nimble enough to keep pace with procedures in the US and other jurisdictions.

Q3	Yes.
Q4	Yes. To the extent that it is not already covered by the phrase "action taken by the commercial organisation" the fact of self reporting should be a factor as well as the extent to which the matter would have come to the attention of law enforcement were it not for the self report. Given that DPA's are intended to allow prosecutors to deal with more corporate offending than is possible under current arrangements it should also be permissible to take into account the capacity of the law enforcement/prosecution authority to deal with the matter should a DPA not be considered appropriate. As well as issues of resource, in considering this point it should be possible to take into account factors such as the ability of law enforcement to obtain evidence of the relevant offending. So for example, in a case where prima facie there is the most egregious offending but the evidence required to prove it is held in a jurisdiction where it is notoriously difficult to obtain mutual legal assistance, this might be a factor that tends towards the offer of a DPA.
Q5	No views
Q6	Commercial organisations take decisions based on business reasons. They will want to know how much, in general terms, agreeing to a DPA will cost. As a minimum the guidance should set out penalty ranges and details of aggravating and mitigating factors that will enable commercial organisations and their advisors to plot where on the range they fall.
Para 107	Requiring a judge at this advanced stage in proceedings to sanction the DPA and granting the judge the power to reject the agreement reached between the commercial organisation and the prosecutor creates an unacceptable degree of uncertainty that will deter self reporting.
Q7	To the extent that judicial oversight and sanction is required it is accepted that the initial hearing should be in private. To expect a commercial organisation to publicly admit acts of criminal wrongdoing in a court at a time when there is no certainty of outcome would be yet another disincentive for self reporting and engagement in this process.
Q8	No. To the extent that judicial sanction is deemed necessary the test to be applied should be one of reasonableness and the judge's ability to reject DPA's should be limited to those agreements which no reasonable prosecutor could have entered into. The proposed "interests of justice" test invites the judge to substitute his/her judgement for that of the parties to the agreement and creates uncertainty. In exercising oversight of the DPA as agreed between the parties the judge must be in a position to consider not only the circumstances of the case but the broader practical issues such as availability of resources which may have played a part in the decision to enter into the DPA.
Q9	Yes and the parties should take account of what is said but the judge's ability to set aside the agreed terms should be limited to cases where the

	terms are manifestly unreasonable or disproportionate. In circumstances where the judge does intervene to alter the agreed terms it should be possible for either side to the DPA to withdraw their agreement.
Q10	Yes.
Q11	Yes there should be a reduction principle but there should be scope to increase the discount above one third to recognize and incentivise self reporting and exemplary co-operation.
Q12	Yes this adds the element of transparency that is the major benefit of the proposal.
Q's 13,14 & 15	Variations to the DPA should be capable of being agreed between the parties and recorded in consent orders formally endorsed by the court. Active consideration of variations by the court should only be necessary where the parties cannot agree. (Option 3). In this regard the practice would follow that adopted in restraint proceedings.
Q16	Yes
Q17	Yes
Paras 146 - 151	This section of the consultation document lacks clarity. Para 148 states that in criminal proceedings against an individual "information provided by a commercial organisation could be used against that person although admissions made by the commercial organisation could not." Para 151 states that documents created by a commercial organisation in the course of a DPA discussion are to be treated as if obtained under compulsion. "The prosecutor would not be able to use that evidence to prosecute the commercial organisation or individual in respect of the offence which is the subject of the DPA unless an exception applies." These two statements appear contradictory. It may be that the first statement intends to deal only with pre-existing material but this is not made clear. Is para 151 intended to read as applying to cases where a DPA process has not resulted in agreement or does it apply to all DPA discussions? The scope of "DPA discussions" is not defined and neither is the class of "documents created" defined. On its broadest interpretation no document created by a company engaged in an internal investigation in contemplation of a DPA would be admissible against the company or any employee in criminal proceedings. Unexplored by this consultation are the mechanics of disclosure in circumstances where the company agrees a DPA but an employee or employees are prosecuted.
Q18	Further work is needed in this area to make clear what is being proposed and to provide clear guidance on how issues of disclosure and admissibility will be resolved in cases with multiple parties subject to different outcomes.
Q19	In straightforward cases where the only parties are the commercial

	organisation and the prosecutor the proposed arrangements are suitable. Indeed, in many cases the commercial organisation will have conducted the investigation and will thus have access to all relevant material. As stated above in answer to Q18, matters become more complicated when individuals or other commercial organisations are charged with criminal offences on the same fact pattern. To what extent if any should the negotiations between the parties to the DPA be exempt from disclosure to the defendants in criminal proceedings? Where an internal investigation has been conducted by lawyers acting for the commercial organisation subject to the DPA, to what extent will a claim to legal privilege prevail over a request by the defendants in criminal proceedings for disclosure of the product of such an investigation? This will be a major consideration for commercial organisations when deciding whether to enter into a DPA. One of the benefits of a DPA is the ability to minimise reputational harm. If, despite the DPA, the detailed inner workings of the commercial organisation are to be aired in public at the trial of individual employees much of this benefit will be lost.
Q20	No. If the comments set out above are adopted it is difficult to envisage circumstances in which the parties to a DPA would wish to challenge the agreement but it is possible that interested third parties may wish to challenge not so much the DPA but the decision not to prosecute. It is proposed in this document that the test applied by the judge exercising oversight of the process should be one of reasonableness. It might be possible in rare cases to give interested third parties the opportunity to be heard on this issue at the public hearing. This would reduce the scope for judicial review considerably.
Q21	No. It is acknowledged at paras 75 and 76 that DPA's are to some extent punitive in nature. Despite the obvious potential benefits to commercial organisations who may wish to take advantage of the new disposal, third parties who may object to the use of the new power could argue that it is retrospective punishment and thus unlawful. (Welch v United Kingdom (17440/90))
Q22	See above.
Q23	No

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