The viability of deferred prosecution agreements (DPAs) in the UK: the impact on global anti-bribery compliance

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The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance

Abstract
Deferred prosecution agreements (DPAs) provide an alternative enforcement tool to tackle economic crime. Prosecutors tailor punishment and remediation measures more accurately to satisfy the principles of prosecution. Companies in question can avoid criminal charges, provided they comply with agreed terms and conditions. The use of DPAs is conducive to relieving collateral consequences, while being able to deter, punish and reshape corporate behaviour. In principle, enforcement authorities can maximise the leverage with criminal liability over companies to cultivate a robust corporate culture against bribery. It is argued that an effective global anti-bribery regime rests with not only the transnational cooperation, but also adequate governance and rigorous compliance. With the DPAs having risen in prominence as a mainstay of the U.S. enforcement regime, it remains to be seen whether the potent tool will be viable and further reshape the future enforcement landscape of the anti-bribery regime in the UK and even on a global basis.

Introduction
Bribery represents a serious impediment to multinational companies’ (MNCs’) governance integrity and fair competition in the global market. An eruption of high-profile scandals has triggered anti-bribery enforcement agencies to strengthen their policing of corporate behaviour. The prevalent bribery of foreign officials has prompted legislation, which also suggests the need for more effective law enforcement to crack down on the unlawful conduct. Considered as the toughest legislation on bribery in the world, the Bribery Act (BA 2010) helps to sustain increased global enforcement of anti-bribery laws. For the sake of saving precious juridical resources on the one hand, and attenuating adverse collateral effects arising from criminal liability on the other, the UK introduced a framework of deferred prosecution agreements (DPAs) through the Crime and Courts Act 2013.

1 Cindy Schipani, Junhai Liu and Haiyan Xu, ‘Doing Business in a Connected Society: The GSK Bribery Scandal in China’ (2016) 64 (1) University of Illinois Law Review 63, 102
2 SEC, ‘SEC Charges Siemens AG for Engaging in Worldwide Bribery’ (15 December 2008) <http://www.sec.gov/news/press/2008/2008-294.htm>; DoJ, ‘Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines’ (Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion) (15 December 2008) <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>; John Coffee, Jr., ‘No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 (3) Michigan Law Review 386, 459
3 Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78o, 78dd-1 to -3 (2006 & Supp. IV 2011); UK Bribery Act 2010; PRC Criminal Law (Amendment 2011) Article 164; Walter Perkel, ‘The Foreign Corrupt Practices Act’ (2003) 40 (2) American Criminal Law Review 683, 704
4 John Hasnas, ‘Foreword to Corporate Criminality: Legal, Ethical and Managerial Implications’ (2007) 44 (4) American Criminal Law Review 1269, 1278
5 Crime and Courts Act 2013 s45; The Crime and Courts Act 2013 (the Act) received Royal Assent on 25 April 2013.
approval. It represents a critical weapon to resolve allegations of corporate crime. As a discretionary tool, a DPA is reached between prosecutors and defendants where the latter are accused of bribery. It involves the suspension of a criminal indictment for an agreed period, in exchange for the defendant fulfilling certain agreed conditions.\(^6\) Final approval of a DPA will rest with the court. The prosecutor will notify the court that the suspended criminal proceedings should be discontinued on the condition that the defendant has satisfied the terms and conditions once a DPA expires.\(^7\) Should there be any breach, the court can bring it to an end leaving the SFO to proceed with a criminal prosecution.\(^8\) Corporations can thus avoid the stigma of a criminal conviction and the collateral consequences that a prosecution may bring, but are still effectively punished for their crimes.\(^9\) Given that the use of DPAs reflects a shift towards a more U.S. style approach, the paper examines whether the distinct UK-based DPAs will represent an effective alternative to corporate criminal enforcement.\(^10\) Proceeding in six parts, the paper explores whether DPAs would play a constructive role in reshaping the UK and even the global anti-bribery landscape. Part I starts with an introduction of DPAs in the context of tackling global economic crime. The collateral consequences of subjecting companies to a criminal prosecution can be devastating, which partly justifies the legitimacy of the innovative approach. To a great extent, the deterrent tool’s efficiency in combating bribery relies on a credible threat of prosecution. Part II discusses the evolving framework under which the court plays significant but controversial roles in overseeing the DPAs. A crucial question lies in the degree of judicial oversight and the mechanism for achieving the goal. Part III looks into challenges through a case study, demonstrating that the functionally equivalent approach results inevitably in divergence in enforcement practices, despite the legal convergence between jurisdictions. This part analyses whether a single global settlement via DPAs is viable and considers how to cater for trans-jurisdictional matters and level the international playing field. Some practical impediments are in the way to achieve the goal, such as an issue of double jeopardy. Part IV proposes how an MNC can effectively avoid exposure to multiple jurisdictions through enhancing internal governance. A conclusion is given based on the above discussion in the final part of the paper.

### A. Prosecution’s Collateral Consequences vis-à-vis DPAs’ Virtues

Criminal prosecutions are not always an ideal mechanism to pursue wrongdoers,\(^11\) given that collateral consequences are sometimes immense and even hurt innocent parties.\(^12\) The reputational damage and potential follow-on litigation may cause credit downgrades as a

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\(^6\) Crime and Courts Act 2013 Schedule 17

\(^7\) SFO, *Deferred Prosecution Agreements Code of Practice* Crime and Courts Act 2013 (11 February 2014) §14.5

\(^8\) UK Ministry of Justice, ‘Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations’ CP(R)18/2012 (23 October 2012)

\(^9\) Albert Alschuler, ‘Two Ways to Think about the Punishment of Corporations’ (2009) 46 (4) American Criminal Law Review 1359, 1392

\(^10\) Sara George, Alan Ward and Richard McGarry, ‘Deferred Prosecution Agreements-in Jeopardy of Falling Short?’ (2014) 15 (2) Business Law International 115, 122

\(^11\) Jennifer Arlen and Reinier Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regime’ (1997) 72 (4) New York University Law Review 687, 779

\(^12\) ‘Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions Developments in the Law’ (1979) 92 (6) Harvard Law Review 1227, 1375 at 1234
result of deteriorating financial health.\(^\text{13}\) Whilereshapingacorporatebehaviour,DPAsenable
MNCs to avoid such catastrophic effects. Two goals can be achieved through incentivising
responsible corporate behaviour while mitigating adverse collateral effect.\(^\text{14}\) It is of utmost
significance to pursue legitimate avoidance of the risks arising from organisational indictment
and alleviate further uncertainties of trials.\(^\text{15}\)

1. Collateral Consequences of Corporate Prosecutions

Prosecutors are increasingly concerned with catastrophic consequences resulting from
bringing a bribery action to court.\(^\text{16}\) MNCs may face devastating debarment, the so-called
corporate death sentence, or even become collapse.\(^\text{17}\) The potential damage could risk
causing unjust harm to innocent parties.\(^\text{18}\) DPAs are designed to mitigate companies’ further
loss and protect those who have not been involved in the wrongdoing. The enforcement tool
enables prosecutors to have an alternative tool to tackle bribery and ensure nearly the same
punitive effects while avoiding the adverse results.\(^\text{19}\) It is worthy to note that the DPA
mandate should not be justified merely because of the collateral consequences.\(^\text{20}\)

(a) Debarment: Corporate Death Sentence

Criminal prosecution could result in debarment from public procurement contracts, which is
also known as a death penalty to a business.\(^\text{21}\) For instance, the Public Procurement Directive
(2004/18/EC) of the EU mandates the exclusion of suppliers convicted of corruption.\(^\text{22}\)
Meanwhile, the procurement system would lose the opportunity to incentivise positive

\(^\text{13}\) Michael Yangming Xiao, ‘Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate
Crime’ (2013) 23 Cornell Journal of Law and Public Policy 233, 253

\(^\text{14}\) Gabriel Markoff, ‘Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal
Convictions in the Twenty-First Century’ (2013) 15 University of Pennsylvania Journal of Business Law 797, 842

\(^\text{15}\) Andrew Manuel Crespo, ‘The Hidden Law of Plea Bargaining’ (2018) 118 (5) Columbia Law Review 1303, 1424

\(^\text{16}\) Ved Nanda, ‘Corporate Criminal Liability in the United States: Is a New Approach Warranted?’ in Mark
Piethand Radha Ivory (eds), Corporate Criminal Liability: Emergence, Convergence and Risk (New York, Springer, 2011) 63-89 at 80

\(^\text{17}\) Drew Isler Grossman, ‘Would a Corporate Death Penalty Be Cruel and Unusual Punishment’ (2016) 25 (3)
Cornell Journal of Law and Public Policy 697, 722

\(^\text{18}\) Andrew Weissman and David Newman, ‘Rethinking Corporate Criminal Liability’ (2007) 82 (2) Indiana Law
Journal 411, 451

\(^\text{19}\) Cindy Alexander and Mark Cohen, ‘The Evolution of Corporate Criminal Settlements: An Empirical
Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements (2015) 52 (3) American Criminal
Law Review 537, 594

\(^\text{20}\) Jennifer Arlen and Marcel Kahan, ‘Corporate Governance Regulation Through Non-Prosecution’ (2016) 84
University of Chicago Law Review 323, 387

\(^\text{21}\) Gabriel Markoff, ‘Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal
Convictions in the Twenty-First Century’ (2013) 15 University of Pennsylvania Journal of Business Law 797, 842; Jessica Tillipman, ‘A House of Cards Falls: Why “Too Big to Debar” is All Slogan and Little Substance’ (2012) 80 Fordham Law Review Res Gestae 49, 58

\(^\text{22}\) The Directive requires that contractors that are convicted by final judgement of any of the following crimes be
debarred from public procurement: (1) participating in a criminal organisation; (2) corruption; (3) fraud; or (4)
money laundering.
corporate behaviour.\textsuperscript{23} The debarment will drive corrupt activity further underground and even undetectable indefinitely,\textsuperscript{24} since it discourages companies from voluntary disclosure to enforcement authorities.\textsuperscript{25} The criminal liability weakens considerably the principal’s threat to self-report bribery because of such a strong disincentive. Even though a DPA disposing of bribery offences does not trigger mandatory exclusion but may trigger discretionary exclusion in the UK,\textsuperscript{26} the chilling effect undermines counterproductively the deterrence. As such, threats by a corporation to take such preventive action will fail to deter agent’s future bribery.\textsuperscript{27} This echoes Arlen and Kraakman’s finding that the undesired consequence compromises deterrence of the internal safeguarding measures.\textsuperscript{28} The EU Public Procurement Directives 2014 softens the rules on debarment, which may, to some extent, mitigate the debarment risk.\textsuperscript{29} It still remains a dilemma regarding whether to self-disclose unlawful conduct.

\textbf{(b) (Un)just Harm on an Innocent Party}

A guilty plea entails severe collateral consequences to innocent third parties and delays prompt restitution of victims.\textsuperscript{30} Harm extends beyond an entity in question to its shareholders, other stakeholders and even the wider economy.\textsuperscript{31} Their interests may be affected by large fines and enormous compliance expense, including the costly corporate monitorship.\textsuperscript{32} As Alschuler observed, “the embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.”\textsuperscript{33} A plausible issue arises as to whether shareholders should be viewed as an innocent party. They are, in principle, responsible for corporate wrongdoing since they have the power to choose corporate management.\textsuperscript{34} In the arena of corporate governance, shareholders normally take financial risks whenever they invest.\textsuperscript{35} Criminal liability is one of the assumed investment risks prior to the purchase of

\begin{footnotesize}
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\item[23] Jessica Tillipman, "A House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance" (2012) 80 Fordham Law Review Res Gestae 49, 58 at 55
\item[24] Wulf Kaal and Timothy Lacine, ‘The Effect of Differed and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013’ (2013) 70 (1) The Business Lawyer 61, 120
\item[25] Drury Stevenson and Nicholas Wagoner, ‘FCPA Sanctions: Too Big to Debar?’ (2011) 80 (2) Fordham Law Review 775, 820
\item[26] UK Public Contracts Regulations 2015 (SI2015/102); OCG Guidance on the Mandatory Exclusion of Economic Operators, 2010
\item[27] Jennifer Arlen and Reinier Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes’ (1997) 72 (4) New York University Law Review 687, 779 at 712 & 715
\item[28] Jennifer Arlen and Reinier Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes’ (1997) 72 (4) New York University Law Review 687, 779 at 715
\item[29] EU Directive 2014/24 on public procurement was implemented in the UK by the Public Contracts Regulations 2015 on 26 February 2015.
\item[30] Jennifer Arlen and Reinier Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regime’ (1997) 72 (4) New York University Law Review 687, 779
\item[31] Nicholas McLean, ‘Cross-National Patterns in FCPA Enforcement’ (2012) 121 (7) Yale Law Journal 1970, 2012
\item[32] Sara Sun Beale, ‘A Response to the Critics of Corporate Criminal Liability’ (2009) 46 American Criminal Law Review 1481, 1505
\item[33] Albert Alschuler, ‘Two Ways to Think about the Punishment of Corporations’ (2009) 46 (4) American Criminal Law Review 1359, 1367
\item[34] Albert Alschuler, ‘Two Ways to Think about the Punishment of Corporations’ (2009) 46 (4) American Criminal Law Review 1359, 1392
\item[35] Jonathan Macey, ‘Agency Theory and the Criminal Liability of Corporations’ (1991) 71 Boston University Law Review 315, 340
\end{itemize}
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corporate stock. Shareholders will also benefit virtually from illicit gains indirectly provided that the bribery goes undetected. Otherwise, they are required merely to surrender unjust enrichment, when the corporation is forced to disgorge illicit profits. Shareholders are not penalised in substance, and collateral risks are thus not adequately justifiable for DPAs as opposed to prosecution in this regard. Despite the argument around shareholders, prosecutors have long recognised the profound collateral consequences, which leads them to act with great deliberation in criminalising corporate behaviour.

(c) Positive and Negative Affect: Weighing the Gains and Losses

Corporations are sensitive to the expected cost of bribery. Whether or not to self-report remains a complex balancing decision. In October 2016, Walmart purportedly rejected a proposal to pay $600 million to settle an FCPA investigation. It has finally spent $840 million on the investigation into its compliance failures, which took enforcement agencies nearly six years. Apparently, neither the corporate defendant nor prosecutors wins in substance in such a lengthy process. The frequency of prosecution has declined particularly against those high-profile corporations. Although criminal conviction has a destabilising effect, by no means should MNCs rely on the negative effect in an effort to avoid prosecution. Any defence based on collateral consequences must be subjected to increased scrutiny. The court also balances the equities at issue, weighing the DPA’s costs and benefits. In this vein, DPAs are valuable alternatives, which potential settlement appeals simply to avoid the cost and uncertainty of a trial. It is worth examining whether DPAs are appropriate to resolve the allegation in the UK.

36 Christopher Kennedy, ‘Criminal Sentences for Corporations: Alternative Fining Mechanisms’ (1985) 73 California Law Review 443, 482
37 Jonathan Macey, ‘Agency Theory and the Criminal Liability of Corporations’ (1991) 71 Boston University Law Review 315, 340
38 SFO, ‘Shareholder Agrees Civil Recovery by SFO in Mabey & Johnson’ (13 January 2012) <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx>
39 Gabriel Markoff, ‘Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century’ (2013) 15 University of Pennsylvania Journal of Business Law 797, 842
40 Wulf Kaal and Timothy Lacine, ‘The Effect of Differed and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013’ (2013) 70 (1) The Business Lawyer 61, 120; Erik Paulsen, ‘Imposing Limits on Prosecution Discretion in Corporate Prosecution Agreements’ (2007) 82 New York University Law Review 1434, 1469
41 Michael Addady, ‘Walmart Rejects Paying $600 Million Settlement in Bribery Investigation’ Fortune (7 October 2016)
42 Aruna Viswanatha and Sarah Nassauer, ‘U.S. Asks Wal-Mart to Pay $300 Million to Settle Bribery Probe’ Wall Street Journal (9 May 2017)
43 Brandon Garrett, ‘Globalized Corporate Prosecutions’ (2011) 97 (8) Virginia Law Review 1775, 1875
44 Brandon Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations (Cambridge, Harvard University Press, 2016) 1-18
45 Jennifer Arlen and Marcel Kahan, ‘Corporate Governance Regulation Through Non-Prosecution’ (2016) 84 University of Chicago Law Review 323, 387
46 Michael Yangming Xiao, ‘Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime’ (2013) 23 Cornell Journal of Law and Public Policy 233, 253
2. Transplant DPAs into the UK Enforcement System

As discussed earlier, DPAs not only enable a company to avoid these financial repercussions and reputational damage disaster scenario, but also have the same punitive and deterrent effect as a guilty plea.\(^47\) The Serious Fraud Office (SFO) uses DPAs to reach settlements with companies, whereby it agrees to suspend criminal proceedings provided that they can meet certain conditions.\(^48\) A defendant is typically required to admit guilt and pay significant fines, restitution and disgorgement of fees.\(^49\) A decision whether to enter into a DPA will rest with the Director of the SFO and the Director of Public Prosecutions.\(^50\)

(a) The DPAs’ Virtues

DPAs incentivise corporations to establish an effective compliance programme, through which they could shield them ultimately from criminal liability.\(^51\) As a sword over the entities’ head, DPAs strike a critical balance between penalty and deterrence, and minimise collateral consequences.\(^52\) Companies and prosecutors are thus allowed to resolve high-stakes claims of bribery through the former’s comprehensive cooperation and enhancement of rigorous compliance measures.\(^53\) The scheme helps to avoid the reputational damage, lengthy investigations and uncertain proceedings. A DPA will not trigger mandatory debarment under the EU Public Procurement Regime, since it is not a criminal offence.\(^54\) The cost-efficient outcome through cooperation may justify the use of other routes as opposed to a criminal prosecution.\(^55\) The enforcement tool not only allays a financial burden, but also ensures that innocent parties are not unduly punished for the corporate wrongdoing.\(^56\) The use of DPAs can free up precious judicial resources, enabling enforcement authorities to investigate a higher proportion of bribery.\(^57\) By encouraging self-disclosure, the increasing detection of unlawful conduct leads to more corporate accountability.\(^58\)

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\(^{47}\) Julie O’Sullivan, ‘How Prosecutors Apply the Federal Prosecutions of Corporations Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanctions’ (2014) 51 (1) American Criminal Law Review 29, 78

\(^{48}\) SFO, ‘Deferred Prosecution Agreements: New Guidance for Prosecutors’ (14 February 2014) <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx>

\(^{49}\) Brian Lewis and Steven Woodward, ‘Corporate Criminal Liability’ (2014) 51 (4) American Criminal Law Review 923, 962

\(^{50}\) SFO, Deferred Prosecution Agreements Code of Practice Crime and Courts Act 2013 (11 February 2014) §2.1

\(^{51}\) Nick Werle, ‘Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review’ (2019) 128 (5) Yale Law Journal 1366, 1438

\(^{52}\) Benjamin Greenblum, ‘What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements’ (2005) 105 (6) Columbia Law Review 1863, 1904 at 1884

\(^{53}\) Lawrence Cunningham, ‘Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform’ (2014) 66 (1) Florida Law Review 1, 86

\(^{54}\) Jennifer Arlen, ‘The Potential Promise and Perils of Introducing Deferred Prosecution Agreements outside the U.S.’ (NYU Law and Economics Research Paper No. 19-29, 15 August 2019)

\(^{55}\) Jonathan Fisher, Marine Blottiaux, et al., ‘The Global Financial Crisis: The Case for a Stronger Criminal Response’ (2013) 7 (3) Law and Financial Market Review 159, 166

\(^{56}\) Gregory M. Gilchrist, ‘The Expressive Cost of Corporate Immunity’ (2012) 64 (1) Hastings Law Journal 1, 57

\(^{57}\) David Uhlmann, ‘Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability’ (2013) 72 (4) Maryland Law Review 1295, 1344

\(^{58}\) Michael Patrick Wilt, ‘Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecutions’ (2016) 43 (1) American Journal of Criminal Law 61, 104
investigations per year has increased tenfold in the U.S.\textsuperscript{59} Two hundred and nine settlements have been entered into during 2005-2012 while only twenty-one reached during 2000-2004.\textsuperscript{60} Some high-profile agreements, like Siemens AG in 2008, demonstrate the efficacy of DPAs.\textsuperscript{61} The corporate crime would not have been able to be uncovered without the innovative enforcement tool.\textsuperscript{62} From prosecutors’ perspective, uncertainties of a trial will be avoided as well, given the difficulty in meeting the high standard in establishing criminal liability.

(b) Inevitable Risks Accompanied by DPAs

From another side of the coin, there could be some unintended consequences with the use of DPAs.\textsuperscript{63} First, there will be a potential risk on shareholders if a company agrees to a substantial fine and costly compliance programmes in return for a DPA.\textsuperscript{64} Khanna observed that sometimes directors have little incentive to object to corporate criminal liability.\textsuperscript{65} Even in contravention of their fiduciary duty to promote the success of company, they may be inclined to prefer significant pecuniary penalties to avoidance of other sanctions, including prosecution of themselves.\textsuperscript{66} Judge Kaplan held that: “DPAs allow companies to avoid prosecution by paying a fine instead of forcing culpable individuals to ‘pay the price’ for their criminal offences.”\textsuperscript{67} Despite the seminal doctrine of separate legal entity, it is individuals who commit crime for which a company is always responsible. The lack of individual prosecution creates a risk of insufficient deterrence, enforcement agencies need to ensure the adequacy of prosecution to attenuate the risks.\textsuperscript{68} Although the U.S. recently introduced the Ending Too Big to Jail Act to address the problem of executives not being held criminally liable for their offences, it remains to be seen whether the Act can show its teeth and bring those culpable individuals to accountability.\textsuperscript{69}

\textsuperscript{59} David Weiss, ‘The Foreign Corrupt Practices Act, SEC Disgorgement of Profits and the Evolving International Bribery Regime: Weighing Proportionality, Retribution and Deterrence’ (2009) 30 (2) Michigan Journal of International Law 471, 514 at 482
\textsuperscript{60} Wulf Kaal and Timothy Lacine, ‘The Effect of Differed and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013’ (2013) 70 (1) The Business Lawyer 61, 120
\textsuperscript{61} SEC, ‘SEC Charges Siemens AG for Engaging in Worldwide Bribery’ SEC Press Release, (15 December 2008) <http://www.sec.gov/news/press/2008/2008-294.htm>; SEC, ‘SEC Charges KBR and Halliburton for FCPA Violations’ SEC Press Release, (11 February 2009) <http://www.sec.gov/news/press/2008/2008-294.htm>; SEC, ‘SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials’ SEC Press Release, (4 November 2010) <http://www.sec.gov/news/press/2010/2010-214.htm>
\textsuperscript{62} Jacqueline Bonneau, ‘Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement’ (2011) 47 (2) Columbia Journal of Transnational Law 365, 410 at 407
\textsuperscript{63} Gordon Bourjaily, ‘DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions’ (2015) 52 (2) Harvard Journal on Legislation 543, 569
\textsuperscript{64} Joseph Warin and Andrew Boutros, ‘Deferred Prosecution Agreements: A View from the Trenches and A Proposal for Reform’ (2007) 93 Virginia Law Review in Brief 121, 134
\textsuperscript{65} Vikramaditya Khanna ‘Corporate Criminal Liability: What purpose does it serve?’ (1996) 109 (7) Harvard Law Review 1477, 1534 at1533
\textsuperscript{66} UK Companies Act (CA 2006) s172 (1); Brian Lewis and Steven Woodward, ‘Corporate Criminal Liability’ (2014) 51 (4) American Criminal Law Review 923, 962
\textsuperscript{67} United States v. U.S. Bancorp, No. 18-cr-150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9
\textsuperscript{68} Sharon Oded, ‘Coughing up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption’ (2017) 35 Yale Law & Policy Review 49, 86
\textsuperscript{69} The Act was introduced on 14 March 2018 (115th Congress, 2017–2019); Tal Axelrod, ‘Warren Introduces Legislation Making It Easier to Jail Top Executives’ The Hill (3 April 2019)
Second, there is no guarantee that self-reporting will lead to non-prosecution. Neither will there be a guarantee for a DPA since the UK law entails more rigorous judicial oversight than its U.S. counterpart. The U.S. DoJ revised FCPA Corporate Enforcement Policy that furthers the uncertainty. Even so, this uncertainty should not be overread but interpreted dialectically, given substantial challenges SFO faces due to the high threshold for establishing corporate criminal liability. As such, neither DoJ nor SFO guarantees a DPA based on self-reporting itself, which forms only part of the requirements that potentially qualifies for the credit. Plausibly, preserving prosecution is essential to ensuring the exercise of justice. Whether to self-report has wide-reaching implications, and a company in question need to balance the risks and potential benefits on a global basis.

Third, an MNC likely exposes itself to being potentially sued in multiple jurisdictions because of its self-incriminating admissions disclosed publicly in a DPA. In principle, any DPAs must be made public so as to ensure transparency in the UK. Some prosecutors insist that a firm agree not to dispute the facts and matters contained in the DPA as a prerequisite of the settlement. This request departs away from a policy of “Neither Admit Nor Deny” widely adopted by the DoJ and SEC. A common concern is documents disclosed to an enforcement authorities in which a company admits to bribery could prejudice potential litigation. A convicted entity may thus be subject to a follow-up civil action. This holds particularly true to those MNCs with global presence. They could face prosecution in other jurisdictions, notably in the U.S. where the doctrine of double jeopardy is more limited than in the UK. Plaintiffs can make use of the admissions in support of their claims, because the statement of

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70 SFO, ‘Corporate Self-Reporting’ (October 2012) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>;
71 Stephen Pollard, ‘Deferred Prosecution Agreements: A Practical Guide’ (24 February 2014) <https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/wilmerhale-dpaguide-a4-final.pdf>;
72 DoJ, ‘FCPA Corporate Enforcement Policy’ (November 2017; updated March 2019) <https://www.justice.gov/criminal-fraud/file/838416/download>;
73 U.S. DoJ, ‘Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act’ (29 November 2017) <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>;
74 Ministry of Justice, ‘Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations’ CP(R)18/2012 (23 October 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236000/8463.pdf>;
75 Brandon Garret, ‘The Public Interest in Corporate Settlements’ (2017) 58 (5) Boston College Law Review 1483, 1543;
76 Priyah Kaul, ‘Admit or Deny: A Call for Reform of the SEC’s "Neither-Admit-Nor-Deny" Policy’ (2015) 48 (2) University of Michigan Journal of Law Reform 535, 564;
77 Andrew Boutros and Markus Funk, ‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World’ (2012) University of Chicago Legal Forum 259, 298.
78 Peter Reilly, ‘Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure under the Foreign Corrupt Practices Act’ (2015) 67 (5) Florida Law Review 1683, 1733;
79 Daniel Principato, ‘Defining the “Sovereign” in Dual Sovereignty: Does the Protection Against Double Jeopardy Bar Successive Prosecutions in National and International Courts?’ (2014) 47 Cornell International Law Journal 767, 785.
facts are not binging in any other legal proceeding. Unless a double-jeopardy scenario is to be avoided, incentives for MNCs’ self-disclosure will be considerably compromised. This makes it more difficult for the entity to nurture culture to assist regulators in detecting and sanctioning the bribery, and even confess voluntarily to bribery.

3. Enhance Credibility in Forming DPAs: Credible Threats against Both Principals and Agents

The DPAs’ ultimate efficacy will be determined by the level of companies’ willingness to engage and prosecutors effective use of the enforcement tool. The latter has immense leverage during the negotiation of a DPA, because a criminal indictment has devastating consequences, including debarment, not to mention a drop in a company’s stock price. DPAs are unlikely to be an effective tool to combat bribery unless there is creditable threat of prosecution. Empty threats without effective sanctions carries little weight. Companies will not be deterred by threat of prosecution as long as corporate fines remain trivial and the challenges of convicting an individual are substantial. The system will have to solve the credibility problem to induce an adequate deterrent regime.

The law governing corporate enforcement remains generally inefficient, which justifies the induction of corporate policing. Companies are potential enforcers because they can intervene to help enforcement agencies investigate crime and convict individual wrongdoers. The DPAs help to reduce bribery, only to the extent that a company is able to credibly threaten to undertake certain compliance measures, including sanctions against its rogue employees. The enhanced disciplinary measures are thereby indispensable to improve internal controls. In terms of efficacy of enforcement, it must be ensured that the individuals tempted to commit bribery expect to be punished. In theory, the resultant credible

80 SEC, ‘Deferred Prosecution Agreement with Tenaris’ (May 2011) <http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>
81 SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 30
82 Jennifer Arlen, ‘Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements’ (2016) 8 (1) Journal of Legal Analysis 191, 234
83 Edward B. Diskant, ‘Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure’ (2008) 118 (1) Yale Law Journal 126, 176; Andrew Weissmann, ‘A New Approach to Corporate Criminal Liability’ (2007) 44 (4) American Criminal Law Review 1319, 1342 at 1321
84 Jennifer Arlen, ‘The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.’ (NYU Law and Economics Research Paper No. 19-29, 15 August 2019)
85 ‘Developments in the Law-Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanction’ (1979) 92 (6) Harvard Law Review 1227, 1375 at 1368
86 Jennifer Arlen and Reiner Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes’ (1997) 72 (4) New York University Law Review 687, 779 at 777
87 Jennifer Arlen and Marcel Kahan, ‘Corporate Governance Regulation through Non-Prosecution’ (2016) 84 University of Chicago Law Review 323, 387
88 John Braithwaite, ‘Enforced Self-Regulation: A New Strategy for Corporate Crime Control’ (1982) 80 (7) Michigan Law Review 1466, 1507
89 Jennifer Arlen and Reifer Kraakman, ‘Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes’ (1997) 72 (4) New York University Law Review 687, 779 at 722
90 Cecily Rose, International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems (Oxford, Oxford University Press, 2015) Chapter II
threat of criminal liability spurs corporate efforts to prevent bribery,91 steering those companies in question to turn to a DPA. This hypothesis has been well proved in US v Anderson,92 given the consequences of the decision by Arthur Andersen to reject the offer of a DPA in 2002.93 The Supreme Court unanimously reversed a trial court conviction that had been upheld by the Fifth Circuit Court of Appeals though.94 This case does not necessarily suggest that the existing DPA system can address the issue properly. Due to the high threshold for establishing corporate criminal liability, it remains to be seen whether companies will consider DPAs a worthy alternative to the threat of litigation.95 Vigorous enforcement and stringent penalties would help to achieve such goals between principals and agents, as well as prosecutors and corporations.96 Instituting DPAs into the UK not only provides SFO and DPP an option of avoiding adverse results, but also considerably changes the way in which companies evaluate their strategic approaches upon the discovery of bribery. It is imperative for MNCs to take robust precautions to guard against bribery undertaken on their behalf, and to ensure that their anti-bribery programmes are in place adequately.

B. Judicial Supervision of DPAs

DPAs have become a mainstay of the U.S. enforcement authorities’ arsenal. The Securities Exchange Commission (SEC) and DoJ expanded the use of the tool within the enforcement architecture and regularly reach binding settlement.97 Ideally, DPAs should yield a result that is consistent with the goals including deterrence, remediation and punishment.98 The UK’s early judicial involvement differs substantially from that of the U.S. model. It is worth looking into the U.S.’ experiences in terms of pros and cons about judicial oversight and ascertaining whether the divergence would affect the DPAs’ viability in the UK.

1. The Unsettled Issue of the Judicial Review of DPAs in the US

The insufficient judicial oversight has caused substantial concerns as to the appropriateness of DPAs in the U.S.99 A critical challenge arises, given that the parties’ agreement to

91 ‘Corporate Crime: Regulating Corporate Behaviour through Criminal Sanctions Developments in the Law’ (1979) 92 (6) Harvard Law Review 1227, 1375 at 1244
92 Samuel Buell, ‘Potentially Perverse Effects of Corporate Civil Liability’ in Anthony Barkow and Rachel Barkow (eds.), Prosecutors in The Boardroom: Using Criminal Law to Regulate Corporate Conduct (New York, New York University Press, 2011) 87-109
93 Benjamin Greenblum, ‘What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements’ (2005) 105 Columbia Law Review 1863, 1875; Andrew Weissmann, ‘A New Approach to Corporate Criminal Liability’ (2007) 44 (4) American Criminal Law Review 1319, 1342 at 1321
94 Arthur Andersen LLP v. U.S. 544 U.S. 696 (2005)
95 SFO, Deferred Prosecution Agreements Code of Practice Crime and Courts Act 2013 (11 February 2014) §1.1
96 James Anderson and Ivan Waggoner, ‘The Changing Role of Criminal Law in Controlling Corporate Behaviour’ (RAND Corporation, 2014) <http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR412/RAND_RR412.pdf>
97 Ben Allen, ‘Deferred Prosecution Agreements-A New Weapon in the Anti-Fraud and Corruption Armoury?’ (2014) 66 (5) Governance Directions 285, 287
98 John Gallo and Daniel Greenfield, ‘The Corporate Criminal Defendant's Illusory Right to Trial: A Proposal for Reform’ (2014) 28 (2) Notre Dame Journal of Law, Ethics and Public Policy 525, 547
99 Wulf Kaal and Timothy Lacine, ‘The Effect of Differed and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013’ (2013) 70 (1) The Business Lawyer 61, 120
proceeding with a DPA is entered outside the court’s purview. The process of DPAs seems
to handicap the ability of the judiciary for substantial involvement in the referral process.
The alleged firm has increasingly entered into DPAs and has settled outside of court rather
than punitively being prosecuted against guilty parties in the judicial system. A growing
number of judges have been increasingly concerned about the issues of transparency and
accountability. Greenblum highlights the difficulties in judicial involvement at the
negotiation stage: ‘...even after a deferral proposal is filed with the court for the judge’s
approval, no judge would have a substantive basis for altering its proposed terms given the
lack of formal adversarial dispute between the parties.’ The analysis of DPAs in the U.S.
demonstrates that the process is arbitrary, unpredictable and inconsistent. There should
be greater judicial involvement in the entire process of DPAs and a firm commitment to
transparency. As Silvergate said: “cases generally are settled rather than tried before a
judge, thus the government’s view of the statute has been untested in the courts.”
This raises another inquiry upon whether some companies are too big to prosecute. It is alleged
that the prolific use of DPAs has created a prosecution free zone for large banks on the ground
that prosecuting large banks has the potential to destabilise the economy. There is even a
perception that power is shifting away from the judiciary to the hands of the DoJ. Upon
this reasoning, DPAs should proceed by waiver of indictment, confirmed in open court, and
the filing of criminal information. It seems that DPAs have virtually led ‘to a deplorable
culture of cooperation’. These concerns have prompted further consideration of the
judiciary’s role in the DPA process that:

100 David Weiss, ‘The Foreign Corrupt Practices Act, SEC Disgorgement of Profits and the Evolving International
Bribery Regime: Weighing Proportionality, Retribution and Deterrence’ (2009) 30 (2) Michigan Journal of
International Law 471, 514
101 Joseph Warin and Andrew Boutros, ‘Deferred Prosecution Agreements: A View from the Trenches and A
Proposal for Reform’ (2007) 93 Virginia Law Review in Brief 121, 134
102 Mary Miller, ‘More Than Just a Potted Plant: A Court’s Authority to Review Deferred Prosecution Agreements
Under the Speedy Trial Act and Under Its Inherent Supervisory Power’ (2016) 115 (1) Michigan Law Review
135, 170
103 Court Golumbic and Albert Lichy, ‘The ‘Too Big to Jail’ Effect and the Impact on the Justice Department’s
Corporate Charging Policy’ (2014) 65 (5) Hastings Law Journal 1293, 1344
104 Benjamin Greenblum, ‘What Happens to A Prosecution Deferred? Judicial Oversight of Corporate Deferred
Prosecution Agreements’ (2005) 105 (6) Columbia Law Review 1863,1904 at 1898
105 David Weiss, ‘The Foreign Corrupt Practices Act, SEC Disgorgement of Profits and the Evolving International
Bribery Regime: Weighing Proportionality, Retribution and Deterrence’ (2009) 30 (2) Michigan Journal of
International Law 471, 514 at 473
106 Ben Allen, ‘Deferred Prosecution Agreements-A New Weapon in the Anti-Fraud and Corruption Armoury?’
(2014) 66 (5) Governance Directions 285, 287
107 Beverley Earle and Anita Cava, ‘Examining the JPMorgan “Princeling” Settlement: Insight into Current
Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement’ (2018) 17 (2) Washington University
Global Studies Law Review 365, 410
108 Brandon Garrett, ‘Structural Reform Prosecution’ (2007) 93 (4) Virginia Law Review 853, 957
109 Julie O’Sullivan, ‘How Prosecutors Apply the Federal Prosecutions of Corporations Charging Policy in the
Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanctions’ (2014)
51 American Criminal Law Review 29, 56
110 Shinjini Chatterjee, ‘Dangerous Liaisons: Criminalization of “Relationship Hires” Under the Foreign Corrupt
Practices Act’ (2015) 163 University of Pennsylvania Law Review 1771, 1804
111 Stuart Deming, Anti-Bribery Laws in Common Law Jurisdictions (Oxford, Oxford University Press, 2014) 241;
Caelah Nelson ‘Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for
Increased Oversight and Ethical Reform’ (2014) 27 Georgetown Journal of Legal Ethics 723, 764
112 Preet Bharara, ‘Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on
Corporate Defendants’ (2007) 44 (1) American Criminal Law Review 53, 114
“the effect of DPAs has created the ‘New Regulators’ as the DoJ has fashioned for itself a new role of ‘focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity’s criminal liability.’”

Arguably, DoJ may transgress the bounds of lawfulness as to warrant judicial intervention to protect the integrity of the court. Vega was concerned that DPAs may ignore the judicial opinion, that is, whether a court would agree with the agreement reached between the regulator and a defendant. The role of judge appears to rubber-stamp the settlement, without inquiring into the legal basis for the DPA including whether it would tailor the offence more accurately. It constitutes a challenge of deploying a precision instrument to resolve allegations of corporate bribery.

Few statutes set forth with precision the judiciary’s role with regard to DPAs. Steinzor argued that:

“once prosecutors and a corporate defendant put a DPA before the court, they have irreversibly injected the court’s supervisory authority into the process, effectively conceding that the court may approve or reject the agreement.”

Federal Rule of Criminal Procedure 7 requires that felony charges be brought against a defendant by a grand jury indictment. The protocol typically necessitates some judicial involvement in the DPA process, at least in accepting the waiver of indictment. A substantive gatekeeper role may be assumed under both Rule 11 of the Federal Rules of Criminal Procedure and the US Sentencing Guidelines, despite the latter does not do not provide clear authority for the court to approve or reject DPAs. In view of an argument that the agreements should be filed in court and subject to its oversight, a commentator remarked that:

“the role of the judge is not only a neutral adjudicator defending corporate offenders vulnerable to collateral consequences, but also a fiduciary for constituencies

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113 Peter Spivack and Sujit Raman, ‘Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements’ (2008) 45 (2) American Criminal Law Review 150, 193 at161
114 United States v. HSBC Bank USA, N.A., No. 12-CR-763 slip op. at 11 (EDNY July 1, 2013)
115 Matt Vega, ‘The Sarbanes Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees’ (2009) 46 (2) Harvard Journal on Legislation 425, 501 at 453
116 Erik Paulsen ‘Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements’ (2007) 82 (5) New York University Law Review 1434, 1469 at 1466
117 Sara George, Alan Ward and Richard McGarry, ‘Deferred Prosecution Agreements - in Jeopardy of Falling Short?’ (2014) 15 (2) Business Law International 115, 122
118 James Copland, ‘The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements’ (14 May 2012) <http://www.manhattan-institute.org/html/cjr_14.htm>
119 Rena Steinzor, Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction (Cambridge, Cambridge University Press, 2014) 253-273
120 Michael Patrick Wilt, ‘Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecutions’ (2016) 43 (1) American Journal of Criminal Law 61, 104
121 Federal Rules of Criminal Procedure 11(b)(1)– (3); Brandon Garrett, ‘Structural Reform Prosecution’ (2007) 93 Virginia Law Review 853, 919 at 906
122 Court Columbic and Albert Lichy, ‘The ‘Too Big to Jail’ Effect and the Impact on the Justice Department’s Corporate Charging Policy’ (2014) 65 (5) Hastings Law Journal 1293, 1344
123 Stuart Deming, Anti-Bribery Laws in Common Law Jurisdictions (Oxford, Oxford University Press, 2014) 241; Caelah Nelson ‘Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform’ (2014) 27 (3) Georgetown Journal of Legal Ethics 723, 764
The parties are under pressure to subject their DPA to the legitimate exercise of the court’s authority. Consistent with increased judicial supervision of SEC settlements, courts appear to be overseeing decisions to reach DPAs. In November 2011, Judge Rakoff rejected a $285 million settlement between the SEC and Citicorp, and held that it was neither reasonable, nor fair, nor adequate, nor in the public interest. After all, the judiciary has an indispensable role to play in examining DPAs to ensure they are in the interests of justice. In U.S. v HSBC, Judge Gleeson invoked the federal court’s traditional supervisory authority and held that the court should use the supervisory power to protect the integrity of judicial proceedings. This was echoed by Wilt that: “there shall be public scrutiny of the process, the public will know what wrongdoing has taken place and the sanctions for it, including any penalty that has been paid.” It remains to be seen whether the tightened judicial control would override the transparency and accountability concerns that have proliferated in the U.S.

2. More Prominent Judicial Oversight under the DAPs in the UK

The UK Crime and Courts Act 2013 (CCA 2013) received Royal Assent on 23 April 2013, of which the DPA is addressed in Schedule 17 to assist prosecutors in combating corporate criminal offences. As a part of English law for the first time, CCA 2013 allows enforcement agencies to employ DPAs to resolve criminal allegations against corporations. It represents a milestone in antibribery, since courts, legislators and prosecutors have long exhibited scepticism about the extent to which the UK should transplant the U.S.-style enforcement tool. The Fraud, Bribery and Money Laundering Offences Definitive Guideline provided for the first time a framework for the sentencing of corporate offenders in the UK. The
Guideline was issued to facilitate the application of DPAs with financial penalties taken into consideration. It is worth examining whether the earlier judicial involvement can be well justified in order for DPAs to work effectively in the UK.

MNCs consider the BA 2010 the toughest anti-bribery law in the world. An entity will be subject to criminal liability if an associated person commits bribery on its behalf, whereby the entity has failed to maintain adequate procedures in place. This approach once again reflects the UK’s conventional jurisprudential philosophy that ex ante efforts are given considerably high weight, compared with the procedural control and ex post resolution. Under BA 2010, prosecutors do not have to demonstrate mens rea on the part of the company. Potential penalties include unlimited fines, and even debarment from public procurement contract, and individuals could face up to 10 years in prison. Differing from their U.S. counterparts, UK prosecutors must seek out judicial approval to commence initial negotiations. A settlement would not be entered into, were it not in the public interest. The public-interest test simply requires the prosecutor to ensure that the public interest would not be abused by a DPA in lieu of prosecution. The rationale is based on whether DPAs are in the interest of justice and whether the proposed terms are fair, reasonable and proportionate to the offence. The judicial authority make their discretions upon rigorous evaluation. This implies that the self-disclosure of bribery will no longer predispose the SFO to civil remedies. According to Lord Justice Thomas:

“it would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.”

In formalising a DPA, a preliminary private hearing is required to be held before a judge. The final hearing will be held in open court and the final agreement will be published. If the
judge plays the role of the fiduciary, it should ensure that the use of DPAs are not to be abused.  

3. DAPs: A Comparative Perspective

The court plays a more prominent supervisory role under the UK DPA regime than in the U.S. equivalent. There is substantive involvement of the judiciary at an initial stage, while the judiciary in the U.S. plays a limited role upon the final draft of DPAs. There seems to be a clear divergence between the judicial attitudes towards DPAs. In scope, the U.S. DoJ has substantial latitude in the types of crimes DPAs may resolve, whereas Schedule 17 limits UK DPAs to mostly economic crimes. The DPA law allows the UK judiciary to play its role in an earlier stage while its U.S. counterparts tend to get involved relatively on an ad hoc basis. In view of the procedural control, the UK statutory regime and DPA Code set forth a more formalised process and provide clearer roadmap for the implementation. The DoJ has discretion to determine whether there is a breach of DPAs, while the Crown Court takes this role under Schedule 17 with such determinations to be made on the basis of a balance of probabilities. The SFO encourages compliance, which labels a twofold approach enforcement. This is consistent with UK’s long-standing focus on ex ante internal governance through fostering ethical corporate behaviour. In the U.S., sophisticated court and litigation systems are primarily relied upon, which is in line with its long-standing ex post resolution. Furthermore, the vicarious liability sets the threshold for prosecuting corporations at a lower level than in the UK. Corporations in the U.S. are more inclined to cooperate with enforcement authorities so as to avoid potential prosecution. As such, it is not appropriate for DPAs, at least in their current mode, to be simply transplanted into the UK judicial system.

149 Benjamin Greenblum, ‘What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements’ (2005) 105 (6) Columbia Law Review 1863, 1904 at 1901
150 Federico Mazzacuva, ‘Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice’ (2014) 78 (3) The Journal of Criminal Law 249, 262
151 Jonathan Fisher and Marine Blottiaux, et al., ‘The Global Financial Crisis: The Case for a Stronger Criminal Response’ (2013) 7 (3) Law and Financial Markets Review 159, 166
152 Joseph Warin, ‘2013 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements’ Harvard Law School Forum on Corporate Governance and Financial Regulation (24 July 2013)
153 Crime and Courts Act 2013, Schedule 17 Deferred Prosecution Agreements §9 (1), (2)
154 Charlie Monteith, ‘The Bribery Act 2010: Part 3: Enforcement’ (2011) 2 Criminal Law Review 111, 121 at 115
155 Celia Wells, ‘Enforcing anti bribery laws against transnational corporations – a UK perspective’ in Peter Hardi, Paul Heywood, Davide Torsello (eds.) Debates of Corruption and Integrity: Perspectives from Europe and the US. (Palgrave Macmillan, 2015) 59-80
156 Jennifer Arlen, ‘Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements’ (2016) 8 (1) Journal of Legal Analysis 191, 234
157 Ministry of Justice, Deferred Prosecution Agreements- Response to Consultation CP(R)18/2012 (23 October 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236000/8463.pdf>
C. Level the International Playing Field: Is a single global settlement viable?

MNCs face an increasing risk of multiple sanctions across jurisdictions arising from the same conduct,\(^{158}\) which makes it enormously challenging for them to reach a global settlement.\(^{159}\) Companies in question may find that they can no longer rely on the defence of ‘neither admit nor deny’ for reduced penalties.\(^{160}\) The case of Siemens serves as a typical example whereby it has suffered significant financial and reputational damage from prosecutions in both Germany and the U.S.\(^{161}\) Ideally, MNCs would be in a better position to resolve their issues through a single global settlement with all relevant regulators.\(^{162}\) The adoption of DPAs makes it feasible for the SFO to discuss global resolutions with their foreign counterparts. In principle, defendants can seek to enter into joint settlements with both the UK and the U.S. authorities, which model helps to create a roadmap for a global settlement.\(^{163}\)

1. Cross-Jurisdictional Settlements

If a global settlement through DPAs could be agreed this would potentially be conducive to facilitating negotiations between jurisdictions. MNCs are likely subject to multiple anti-bribery sanctions that are inconsistent sometimes.\(^{164}\) For instance, an ultimate resolution of a case will have to be approved by both the U.S. and UK judicial and enforcement agencies. As discussed earlier, the SFO will not be able to participate in global settlements unless there is a DPA approved by the court.\(^{165}\)

(a) R v Innospec

In 2010, the UK and the U.S. pursued criminal cases against Innospec Inc., a Delaware company, and its British subsidiary, Innospec Ltd.\(^{166}\) The SFO’s case was developed resulting from a referral by the DoJ to the SFO, and both settlements were entered into on the same

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\(^{158}\) Rashna Bhojwani, ‘Deterring Global Bribery: Where Public and Private Enforcement Collide’ (2012) 112 (1) Columbia Law Review 66, 111  
^{159}\) Jay Holtmeier, ‘Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities’ (2015) 84 Fordham Law review 493, 523  
^{160}\) Samuel Buell, ‘Potentially Perverse Effects of Corporate Civil Liability’ in Anthony Barkow and Rachel Barkow (eds.), Prosecutors in The Boardroom: Using Criminal Law to Regulate Corporate Conduct (New York, NYU Press, 2011) 87-109  
^{161}\) SEC, ‘SEC Charges Siemens AG for Engaging in Worldwide Bribery’ (15 December 2008) <http://www.sec.gov/news/press/2008/2008-294.htm>; DoJ, ‘Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines-Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion’ (15 December 2008) <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>  
^{162}\) Brandon Garrett, ‘Globalized Corporate Prosecutions’ (2011) 97 (8) Virginia Law Review 1775, 1875  
^{163}\) Tom Stocker and Rhona Keith, ‘DPAs: Cross-Border Confusion?’ The Journal (17 June 13) <http://www.journalonline.co.uk/Magazine/58-6/1012706.aspx>  
^{164}\) Frederick Davis, ‘International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe’ (2016) 31 (1) American University International Law Review 57, 101  
^{165}\) Abiola Makinwa and Tina Søreide, ‘Structured Settlements for Corruption Offences towards Global Standards?’ (Paris, OECD, December 2018) <https://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf>  
^{166}\) R v Innospec Limited [2010] Ew Misc 7 (EWCC); United States v. Innospec Inc., No. 1:10-cr-00061 (D.D.C. Mar. 18, 2010)
The DoJ prosecuted Innospec Inc. for bribery taking place in Iraq, so did the SFO relating to Indonesia. The DoJ entered into a DPA with Innospec and the SFO attempted to enter a plea agreement to settle charges for the company’s overseas bribery. Innospec represented that it could only afford to pay $40.2 million, and finally $14.1 million was paid to the DoJ, $11.2 million to the SEC, and $2.2 million to the Office of Foreign Assets Control (OFAC). In addition, it agreed to pay the SFO $12.7 million, of which $6 million was paid as a civil penalty. The legal basis of the settlement between Innospec and the SFO has been challenged. Lord Justice Thomas nearly rejected the settlement for lack of judicial oversight on its terms and then held that:

“[i]t will rarely be appropriate for criminal conduct by a company to be dealt with any means of a civil recovery order... agreements to set a criminal penalty prior to a court hearing were not permissible under the laws.”

In the furtherance of his position, he continued that the court has a duty to “rigorously scrutinise in open court in the interests of transparency and good governance based on a plea to see whether it reflects the public interest.”

The case of Innospec highlights the difficulties arising from different opinions between the SFO as ‘regulator’ and the courts as ‘judicature’. The SFO’s approach of fostering self-disclosure faces considerable challenges. There is little incentive to self-report bribery due largely to the high risk that the court may not accept a settlement agreed with the SFO. If the judiciary did not agree to the proposed arrangement with the SFO, the alleged entity could place itself in a rather disadvantaged position because of somewhat of an admission of

167 Richard Alderman, B20 Task Force on Improving Transparency and Anticorruption: Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context (8 January 2014) <http://www.ethic-intelligence.com/wp-content/uploads/2014_B20_report.pdf> 17-18

168 Andrew Boutros and Markus Funk, ‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in A Shrinking World’ (2012) The University of Chicago Legal Forum 259, 298

169 Earnest & Yung, ‘UK Bribery Digest Fraud Investigation & Dispute Services’ (2012) 1 <https://www.ey.com/Publication/vwLUAssets/UK_Bribery_DigestEdition1_January2012/$FILE/EY_UK_Bribery_DigestEdition1_Jan2012.pdf> 16

170 Lord Justice Thomas’s Innospec Sentencing Remarks, §38 <http://www.judiciary.gov.uk/Resource/ICO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>

171 Lord Justice Thomas’s Innospec Sentencing Remarks §§ 26-27; Timothy Daniel, Alan Bacarese and John Hatchard, Corruption and Misuse of Public Office (Oxford, Oxford University Press, 2011) 222-225

172 Jeremy Horder and Peter Aldridge, Modern Bribery Law: Comparative Perspectives (Cambridge, Cambridge University Press, 2013) 219-225

173 Federico Mazzacuva, ‘Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice’ (2014) 78 (3) The Journal of Criminal Law 249, 262

174 Lord Justice Thomas’s Innospec Sentencing Remarks, §38

175 Lord Justice Thomas’s Innospec Sentencing Remarks §§ 26-27; Timothy Daniel, Alan Bacarese and John Hatchard, Corruption and Misuse of Public Office (Oxford, Oxford University Press, 2011) 222-225

176 Jeremy Horder and Peter Aldridge, Modern Bribery Law: Comparative Perspectives (Cambridge, Cambridge University Press, 2013) 219-225

177 Federico Mazzacuva, ‘Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice’ (2014) 78 (3) The Journal of Criminal Law 249, 262
It is the first case where a global settlement has been sought in respect of concurrent criminal proceedings by the two primary jurisdictions. The fact that the conduct encompassed in each arrangement differed from the other undermines deeper collaboration between the two enforcement authorities. The resolution also paves the way for exploring how to coordinate the application of the double jeopardy doctrine, which will be examined in the following part. Thomas LJ’s Sentencing Remarks reflect the divergences between the two jurisdictions. It indicates that the judiciary in the U.S. is more inclined to accept such pleas than its UK counterpart. Innospec demonstrates differing ways in which it has linked courts in separate jurisdictions. The judicial roles in global settlements need to be refined in order for DPAs to be more viable. It remains uncertain how global settlements could be achieved given that a DPA in the UK does not offer a guarantee against prosecution in another jurisdiction. There clearly needs to be a stronger international consensus in this regard.

(b) ICBC Standard Bank plc

Despite the challenges, MNCs in question are expected to cooperate with the SFO at an early stage. Under the terms of the DPA, the charges against ICBC Standard was suspended for three years. The terms of the DPA were ratified at a public hearing on 30 November 2015 before Lord Justice Leveson, under which ICBC Standard agreed to pay US$32 million. On the same day, the SEC imposed a penalty of US$4.2 million on the bank in a separate DPA. The bank’s extensive cooperation was credited with having led the SFO and the court to approve the DPA, including the prompt self-disclosure of its own internal investigation. This is the first case in which the SFO has showed teeth against an entity for violating Section 7 under BA 2010. In terms of internal governance, the use of DPAs incentivises ethical conduct, and the bona fide cooperation will likely convince an enforcement authority to

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179 Lee Dunst, Michael Diamant and Teresa Kung, ‘Hot off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act’ (2011) 12 (3) Business Law International 257, 278
180 Andrew Boutros and Markus Funk, ‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World’ (2012) University of Chicago Legal Forum 259, 298
181 F. Joseph Warin, M. Kendall Day, et al., ‘Gibson Dunn Offers Update on Corporate Non-Prosecution and Deferred Prosecution Agreements’ The CLS Blue Sky Blog (27 July 2018)
182 Nicholas Lord, ‘Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany’ (2014) 14 (1) Criminology & Criminal Justice 100, 120; Carl Pacini, ‘The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions’ (2012) 17 (2) Fordham Journal of Corporate and Financial Law 545, 589
183 Michael Yangming Xiao, ‘Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime’ (2013) 23 Cornell Journal of law and Public Policy 233, 253
184 Nicholas Lord, ‘Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement’ (2014) 14 (1) Criminology & Criminal Justice 100, 120
185 Andrew Boutros, ‘Another Bite at the Apple: Transnational Crimes Face Repeat Punishment’ (2013) 39 (1) Litigation 43, 46
186 Serious Fraud Office v ICBC Standard Bank plc (Case No: U20150854, 30 November 2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf>
187 SEC, ‘Standard Bank to Pay $4.2 Million to Settle SEC Charges’ (Washington D.C., 30 November 2015) <https://www.sec.gov/news/pressrelease/2015-268.html>
188 Serious Fraud Office v ICBC Standard Bank plc (Case No: U20150854, 30 November 2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf> §27
189 Serious Fraud Office, ‘SFO Agrees First UK DPA with Standard Bank’ (30 November 2015) <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>
address the offence in lieu of criminal prosecution.\textsuperscript{190} Given the extraterritorial nature of BA 2010, the case has far-reaching impact on companies which face exposure to liability for bribery by their associated persons extraterritorially.\textsuperscript{191}

\textit{(c) GSK & Rolls-Royce}

DPAs are designed to be a tool that seeks to achieve the goals whilst being transparent, clear and consistent.\textsuperscript{192} GlaxoSmithKline (GSK) paid the U.S. SEC $20 million to settle FCPA violations without admitting or denying the SEC’s findings on 30 September 2016.\textsuperscript{193} In January 2017, Rolls-Royce paid £497.25 million and entered into a DPA with the SFO to settle allegations of wrongdoing.\textsuperscript{194} The SFO dropped investigations into Rolls-Royce and GSK on 22 February 2019,\textsuperscript{195} which raises criticism as to whether the interests of justice have been served. The SFO’s decision casts doubt about the viability of DPAs and the effectiveness of its investigatory powers. It raises a pertinent question about the purpose of DPAs, which undermines considerably the credible threats against both those powerful MNCs and their top executives. Given the SFO’s low prosecution rate, MNCs’ incentive to self-report will be compromised.\textsuperscript{196} The SFO’s drop of its investigations potentially has significant implications for how those powerful MNCs crimes will be prosecuted in the UK, which may also trigger criticisms over the integrity of the DPA process. One has legitimate concerns as to whether the phenomenon of “too big to prosecute” exists in the UK’s anti-bribery campaign.

\section*{2. The Doctrine of Double Jeopardy and Deferred Prosecution Agreements}

The DPA, in theory, is likely to result in follow-on investigation by other regulators as well civil lawsuits by some involved stakeholders.\textsuperscript{197} Bribery allegations often trigger concurrent proceedings in multiple jurisdictions based upon one single occurrence, which could cause a potential clash between DPAs and the risk of double jeopardy.\textsuperscript{198} One argument is that

\begin{flushleft}
\textsuperscript{190} Michael Yangming Xiao, ‘Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime’ (2013) 23 Cornell Journal of law and Public Policy 233, 253
\textsuperscript{191} Lauren Ann Ross, ‘Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act’ (2012) 62 Duke Law Journal 445, 485
\textsuperscript{192} UK Ministry of Justice (MoJ), ‘Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements’ (Consultation Paper CP9/2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf>
\textsuperscript{193} SEC, ‘GlaxoSmithKline Pays $20 Million Penalty to Settle FCPA Violations’ (Administrative Proceeding File No. 3-17606, 30 September 2016) <https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf>
\textsuperscript{194} SFO, ‘SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC’ (17 January 2017) <https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/>
\textsuperscript{195} SFO, ‘SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals’ (22 February 2019) <https://www.sfo.gov.uk/2019/02/22/sfo-closes-glashostmkline-investigation-and-investigation-into-rolls-royce-individuals/>
\textsuperscript{196} Tom Baker, ‘DPAs in Spotlight as SFO Ends Long-Running Rolls-Royce and GSK Investigations’ Legal Business (22 February 2019)
\textsuperscript{197} Andrew T. Bulovsky, ‘Promoting Predictability in Business: Solutions for Overlapping Liability in International AntiCorruption Enforcement’ (2019) 40 (3) Michigan Journal of International Law 549, 578
\textsuperscript{198} Ophélia Claude, ‘Deferred Prosecution Agreements and the Risk of Double Jeopardy in Cross-Border Investigations’ (22 October 2015) <http://www.aoinvestigationsinsight.com/deferred-prosecution-agreements-and-the-risk-of-double-jeopardy-in-cross-border-investigations/>
integrity of the judicial system could be furthered through duplicative punishments.\(^{199}\) In both theory and real world, there is little solid evidence to support the approach. It remains unclear as to whether multiple penalties serve the interests of justice. On the contrary, there have been comprehensive work exploring how to proportionately and harmoniously address duplicative and multiple prosecutions upon the same unlawful conduct. The prohibition of double jeopardy bars repeated prosecutions for the same conduct that originates from the doctrine of *res judicata*.\(^{200}\) With regard to a cross-border bribery prosecution, it remains a conundrum to protect the entity’ rights not to be trialled twice for the same offence.\(^{201}\) The risk of facing multiple prosecution creates a disincentive for companies to self-disclose potential bribery to enforcement agencies.\(^{202}\) In this vein, the expansion of corporate offence has increased the theoretical complexity of applying the double jeopardy protection.\(^{203}\)

A French court applied the doctrine of double jeopardy attempting to address the interaction of DPAs between jurisdictions.\(^{204}\) The case concerned an allegation of bribery relating to the United Nation’s Iraqi Oil for Food programme (OFF).\(^{205}\) On 18 June 2015, a criminal court in Paris acquitted 14 companies on charges of active bribery in the same context.\(^{206}\) Four French companies have entered into DPAs with the U.S. Department of Justice (DoJ), under which the entities admitted to making ‘kickback’ payments to the Iraqi state dealing with the OFF.\(^{207}\) Initially, the French enforcement authorities proposed to prosecute them on the basis of the same conduct. Afterwards, the Paris Criminal Court relied on the doctrine of double jeopardy enshrined in the International Covenant on Civil and Political Rights (ICCPR).\(^{208}\) The Court then ruled that DPAs entered into with the U.S. authorities relating to the same offence barred a criminal conviction in France on the basis of the *non bis in idem* principle.\(^{209}\) Procedurally, this decision broadens the scope of the rule against double jeopardy, given that a DPA is not a judgment concluding a trial hearing, but rather an agreement between enforcement authorities and the entities in question.\(^{210}\) Similarly, the UK SFO and the U.S. DoJ have actively collaborated on global settlements with MNCs. In April 2011, DePuy entered into a global

\(^{199}\) David Bryan Owsley, ‘Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study’ (2003) 81 (3) Washington University Law Review 765, 800

\(^{200}\) U.S. CONST. amend. V. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

\(^{201}\) Frederick Davis, ‘International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe’ (2016) 31 (1) American University International Law Review 57, 101

\(^{202}\) Rashna Bhojwani, ‘Deterring Global Bribery: Where Public and Private Enforcement Collide’ (2012) 112 (1) Columbia Law Review 66, 111

\(^{203}\) ‘Developments in the Law-Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanction’ (1979) 92 (6) Harvard Law Review 1227, 1235 at 1343

\(^{204}\) Frederick Davis, ‘International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe’ (2016) 31 (1) American University International Law Review 57, 101

\(^{205}\) ‘The United Nations Oil-for-food Program: Issues of Accountability and Transparency: Hearing before the Committee on International Relations, House of Representatives’ (108th Congress, 2nd Session, 28 April 2004)

\(^{206}\) Dylan Tokar, ‘French Court Rules that Double Jeopardy Protections Extend to U.S. DPAs’ *Global Investigations Review* (22 June 2015)

\(^{207}\) Sharon Otterman, ‘IRAQ: Oil for Food Scandal’ (28 October 2005)

\(^{208}\) ICCPR Article 14(7): “[N]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

\(^{209}\) Andrew Boutros and Markus Funk, ‘Carbon Copy’ Prosecutions: A Growing Anticorruption Phenomenon in A Shrinking World’ (2012) The University of Chicago Legal Forum 259, 298

\(^{210}\) Jennifer Arlen, ‘Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements’ (2016) 8 (1) Journal of Legal Analysis 191, 234
settlement agreement which included a DPA with the DoJ and a civil recovery order with the SFO. The company had pleaded guilty to bribery offences in the U.S., which deprived virtually of the SFO of its legal basis on which the agency can rely to prosecute the same misconduct. Applying the principle of double jeopardy, it determined to withdraw a prosecution in the UK. The rationale lies in a fact that a DPA has the same legal character as a formally-concluded prosecution and the SFO’s investigation was based on the same facts. The doctrine of double jeopardy in the U.S. is more limited than that in the UK, that is, it would not preclude a U.S. prosecution had a DPA been obtained in the UK. In practice, however, it is likely that the SFO and DoJ are allowed to enter into separate DPAs based on distinct facts, with each settlement concentrating on a different jurisdiction.

3. Global Collaboration

Every relevant jurisdiction ought to avoid disproportionate enforcement of laws by multiple enforcement agencies in accordance with principle of equity. Otherwise, MNCs would be deprived of certainties with their proceedings likely left with inconsistencies. Although the OECD Convention requests the signatory nations to coordinate the concurrent proceedings, the non-legally binding provision renders an enormous gap during its implementation. One of the substantial challenges is that some foreign sovereigns do not recognise the double jeopardy doctrine for cross-jurisdictional settlements. Some jurisdictions afford no double jeopardy protection regardless of whether a defendant has already been prosecuted by a foreign state. A failure to achieve deep coordination will result inevitably in breaching the double jeopardy doctrine. As such, anti-bribery enforcement authorities should arguably seek to collaborate more effectively on cross-border cases. Nevertheless, there is no viable answer to an inquiry about how an MNC can be protected from prosecution by multiple jurisdictions. It is imperative that the challenge be dealt with at an international level where efficient coordination can be ensured and asymmetry of

211 United States v. DePuy, Inc., Case No. 11-cr-099 (D.D.C., April 8, 2011) <https://www.justice.gov/criminal/fraud/fcpa/cases/depuy.../04-08-11depuy-dpa.pdf>; Serious Fraud Office (SFO), DePuy International Limited Ordered to Pay £4.829 million in Civil Recovery Order (8 April 2011)
212 Jay Holtmeier, ‘Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities’ (2015) 84 Fordham Law review 493, 523
213 Jacinta Anyango Oduor, Francisca M. U. Fernando, et al., Left out of the Bargain Settlements in Foreign Bribery Cases and Implications for Asset Recovery (World Bank Publications, 2013) 101-120
214 Kenneth Coffin, ‘Double Take: Evaluating Double Jeopardy Reform’ (2010) 85 (2) Notre Dame Law Review 771, 808
215 Sara George, Alan Ward and Richard McGarry, ‘Deferred Prosecution Agreements in Jeopardy of Falling Short?’ (2014) 15 (2) Business Law International 115, 122
216 OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019) <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf>
217 Carissa Byrne Hessick and F. Andrew Hessick, ‘Double Jeopardy as a Limit on Punishment’ (2011) 97 (1) Cornell Law Review 45, 86
218 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Article 4 (3). “When more than one Party has jurisdiction over an alleged offence…the Parties shall…consult with a view to determining the most appropriate jurisdiction for prosecution.”
219 Anthony Colangelo, ‘Colonel Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory’ (2009) 86 (4) Washington University Law Review 769, 857
220 Adam Adler, ‘Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem’ (2014) 124 (2) Yale Law Journal 448, 483; Christopher Matthew, ‘Double Jeopardy Could Bind SFO in Potential Glaxo Prosecution’ Wall Street Journal (5 September 2013)
information can be mitigated. The government should coordinate with foreign jurisdictions seeking to resolve a case where an MNC faces duplicative or even multiple investigations for the same offence.

A multinational entering into a DPA in the context of a cross-border investigation expects a coordinated global settlement within a reasonably short period. Thus, the firm will benefit from minimising negative publicity and potential adverse impact on its stock price. Preventing unduly double jeopardy would therefore result more likely in efficient resolution and consistency.

D. The Role of Corporate Compliance Programmes under DPAs

DPAs have the potential for companies to improve their compliance programmes, which also enables involved parties to avoid the uncertainties that come with lengthy investigations. An effective compliance programme is a cornerstone in a modern governance and legal framework. DPAs enhance a system of incentives through encouraging companies to cooperate with enforcement agencies externally and improve compliance mechanisms internally. As a requisite condition of DPAs, the internal compliance must be based on a rigorous assessment of information, rather than influenced by conflicts of interest. Notably, enforcement authorities often use imposed independent monitors to improve compliance quality, which helps to attenuate unintended dire consequences.

1. Two Tales of Compliance Programmes

It is argued that DPAs can entail more efficacy and potentially facilitate compliance to tackle bribery. Given the tool’s flexible use on an ad-hoc basis, MNCs benefit greatly from an

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221 Jeremy Horder and Peter Alldridge, Modern Bribery Law: Comparative Perspectives (Cambridge, Cambridge University Press, 2013) 219-225
222 U.S. DoJ, Remarks of Deputy Attorney General Rod Rosenstein, “Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute” (9 May 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>
223 Jay Holtmeier, ‘Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities’ (2015) 84 Fordham Law review 493, 523
224 UK Ministry of Justice (MoJ), ‘A New Enforcement Tool to Deal with Economic Crime by Commercial Organisations: Deferred Prosecution Agreements’ (10 July 2012) <https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsia.pdf>
225 Stuart Deming, The Foreign Corrupt Practices Act and the New International Norms (Illinois, American Bar Association, 2nd ed. 2011) 79
226 Wulf Kaal and Timothy Lacine, ‘The Effect of Differed and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013’ (2013) 70 (1) The Business Lawyer 61, 120
227 SFO, Deferred Prosecution Agreements Code of Practice Crime and Courts Act 2013 (11 February 2014) <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>
228 Gabriel Markof, ‘Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century’ (2013) 15 (3) University of Pennsvila University Journal of Business Law 797, 842
229 Mike Koehler, ‘The Facade of FCPA Enforcement’ (2010) 41 (4) Georgetown Journal of International Law 907, 1010
effective compliance programme.\textsuperscript{230} They receive credit in DPAs for their ethical behaviour and internal control.\textsuperscript{231} The enforcement policy is to reward the entities for self-disclosure and genuine cooperation during enforcement agencies’ investigation.\textsuperscript{232} As the FCPA Guide articulates, DoJ and the SEC consider the merits of a company’s FCPA compliance programme when determining whether a DPA should be reached.\textsuperscript{233} Robust compliance measures can help to prevent serious offence from arising \textit{ex ante} and mitigate the damage in case of occurrence \textit{ex post}.\textsuperscript{234}

Tough as it is, putting adequate procedures in place constitutes an affirmative defence under BA 2010.\textsuperscript{235} In turn, the preventive measures alleviate the heavy financial burden placed on the SFO to undertake costly investigations. As Alderman said, the SFO’s role seems to be shifting from prosecutor to regulator as it has developed a twofold approach to enforcement.\textsuperscript{236} Companies can receive reasonable credit for self-disclosure. In the case of \textit{Mabey and Johnson Ltd},\textsuperscript{237} the UK courts reached an American-style plea bargaining settlement, which demonstrates that the variable, such as self-reporting, compliance building and the use of monitors, can be rooted in a UK framework as well.\textsuperscript{238} The factors characterise squarely the key features of a DPA, and some approaches mirror the U.S. Sentencing Guidelines’ definition of an effective compliance programme.\textsuperscript{239} Koehler provided further insights that: “the compliance undertakings required pursuant to a DPA are virtually identical in every enforcement action and have evolved into a compliance template.” \textsuperscript{240} It is noteworthy that a corporate compliance policy which satisfies the FCPA may not necessarily be sufficient for those criteria under Section 7 of BA 2010.\textsuperscript{241} Arguing whether DPAs can genuinely improve internal governance, Krawiec was concerned that:

\begin{itemize}
  \item \textsuperscript{230} Maurice Stucke, ‘In Search of Effective Ethics & Compliance Programs’ (2014) 39 (4) The Journal of Corporation Law 769, 832
  \item \textsuperscript{231} Serena Hamann, ‘Effective Corporate Compliance: A Holistic Approach for the SEC and the DoJ’ (2019) 94 (2) Washington Law Review 851, 886
  \item \textsuperscript{232} SEC and DoJ, \textit{A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act} (14 November 2012) 55-60
  \item \textsuperscript{233} SEC and DoJ, \textit{A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act} (14 November 2012) 56
  \item \textsuperscript{234} Lynn Paine, ‘Managing for Organizational Integrity’ \textit{Harvard Business Review} (March-April 1994) <https://hbr.org/1994/03/managing-for-organizational-integrity>; Mike Koehler, ‘Revisiting a Foreign Corrupt Practices Act Compliance Defence’ (2012) Wisconsin Law Review 609, 659
  \item \textsuperscript{235} BA 2010 s7 (2)
  \item \textsuperscript{236} Richard Alderman (Director), \textit{Speech}, (Serious Fraud Office, 23 June 2010)
  \item \textsuperscript{237} \textit{Rv Mabey and Johnson Ltd} (Crown Court at Southwark, 2009)
  \item \textsuperscript{238} \textit{Regina v. Mabey and Johnson Ltd.}, No. T2009 7513 [2009] Southwark Crown Court; Serious Fraud Office, Mabey & Johnson Ltd Sentencing (25 September 2009), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnsonltd-sentencing-.aspx>; Joseph Warin, Charles Falconer and Michael Diamant, ‘The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption’ (2010) 46 (1) Texas International Law Journal 1, 72; David Leigh and Rob Evans, ‘British Firm Mabey and Johnson Convicted of Bribing Foreign Officials’ \textit{The Guardian} (25 September 2009)
  \item \textsuperscript{239} The U.S. Federal Sentencing Guidelines, 18 U.S.C.A. §8B2.1
  \item \textsuperscript{240} Mike Koehler, ‘Revisiting a Foreign Corrupt Practices Act Compliance Defense’ (2012) Wisconsin Law Review 609, 659
  \item \textsuperscript{241} Ministry of Justice, ‘The Bribery Act 2010 Guidance’ (March 2011) <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>: “(i) Proportionate Procedures; (ii) Top Level Commitment; (iii) Risk Assessment; (iv) Due Diligence; (v) Communication; and (vi) Monitoring and Review.”
\end{itemize}
“the prosecutorial focus on governance will simply lead corporations to adopt best practices in name only, akin to how companies go through the motions of compliance without promoting legal obedience in fact.”242

As such, a strong framework needs to be built for further guidance on compliance.243 In exercising their discretion, enforcement authorities normally consider such factors as the nature of the offense, voluntary disclosure, compliance programme and its effectiveness and the remedial efforts.244 The DPA’s Code of Practice underscores the need for effective internal compliance as the most crucial part during the negotiation of a settlement.245 A more sophisticated governance regime is expected along with efficient oversight of the monitor as well.246

DPAs often involve appointing an independent monitor within an entity.247 As an oversight mechanism, the device of the monitorship has theoretical appeal to assure compliance with the agreed terms and conditions of DPAs.248 Garrett sees this as useful as part of a package to underpin the DPA regime:

“The overall approach requires comprehensive compliance programmes, including independent monitors, detailed injunctive changes of policy and practice, training programs, auditing, data collection and cooperation with the DoJ.”249

The objective to the usage of monitors is not merely ensuring that the law will not be violated, but enhancing the internal compliance ex ante for the sake of prevention.250 Otherwise, violations could go undetected.251 Prosecutors regard monitorships as an integratory element in ensuring efficacy of DPA.252

It is however not without a doubt how to realistically ensure monitors’ independence from the entity in which it is embedded for years, while still maintaining an objective approach with the enforcement authorities.253

242 Kimberly Krawiec, ‘Cosmetic Compliance and the Failure of Negotiated Governance’ (2003) 81 (2) Washington University Law Quarterly 487, 544
243 Ben Morgan, ‘Compliance and Cooperation’ (Serious Fraud Office, 20 May 2015) <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/ben-morgan-compliance-and-cooperation.aspx>
244 SFO, ‘Deferred Prosecution Agreements Code of Practice Crime and Courts Act 2013’ (11 February 2014) https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf
245 SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 56-67
246 SFO, ‘Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013’ (11 February 2014) §§7.11 & 7.22
247 SFO, Deferred Prosecution Agreements: New Guidance for Prosecutors (14 February 2014) <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>
248 Vikramaditya Khanna and Timothy Dickinson, ‘The Corporate Monitor: The New Corporate Czar?’ (2007) 105 (8) Michigan Law Review 1713, 1755
249 Brandon Garrett, ‘Structural Reform Prosecution’ (2007) 93 (4) Virginia Law Review 853, 957
250 Cristie Ford and David Hess, ‘Can Corporate Monitorships Improve Corporate Compliance?’ (2009) 34 (3) The Journal of Corporation Law 679, 737
251 Lawrence Cunningham, ‘Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform’ (2014) 66 (1) Florida Law Review 1, 86
252 Anthony Barkow and Rachel Barkow, Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (New York, NYU Press, 2011) 226-248
253 Stuart Deming, Anti-Bribery Laws in Common Law Jurisdictions (Oxford, OUP, 2014) 241; Caelah Nelson ‘Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform’ (2014) 27 (3) Georgetown Journal of Legal Ethics 723, 764
2. Foster the Compliance Culture

There is a culture of compliance being bred with the use of DPAs.\footnote{254} Presumed as a preliminary step to judicial proceedings, a strong internal governance regime is helpful to deal with the liability issue on an ad hoc basis.\footnote{255} A well-designed DPA has the potential to entail a positive change in the compliance culture by promoting companies to address bribery proactively.\footnote{256} As Breuer said:

“DPAs have had a truly transformative effect on corporate culture across the globe, resulting in ‘unequivocally far greater accountability for corporate wrongdoing—and a sea change in corporate compliance efforts’”.\footnote{257}

In order to achieve the strategy, it is imperative for an MNC to have sophisticated compliance measures in place. In view of the procedural control, it is similarly significant to introduce periodical evaluation of the implementation. If necessary, some back-up schemes and associated adjustment alternatives should be established in advance. The DPA regime can be fine-tuned to achieve future deterrence goals through rewarding cooperation and attenuating damages.\footnote{258} Companies are encouraged to engage in improving ethical behaviour as a routine. It is equally essential that companies should be incentivised to self-report potential violations, provide feasible remedial measures and undertake adequate governance to prevent repeated bribery.

Conclusion

DPAs have been designed to allow prosecutors and the court to address bribery more effectively. The enforcement tool is regularly used to mitigate collateral consequences while promoting accountability, deterrence and remediation. Moreover, DPAs serve a sensible valve in response to an aggressive prosecutorial regime and save precious judicial resources. Embodying flexibility and pragmatism into law, DPAs potentially incentivise companies to self-report wrongful conduct and cooperate bona fide with enforcement authorities. The transplanted- mechanism into the UK, in principle, enables companies to engage with the SFO at an early stage to achieve a better settlement. More significantly, those companies in question should take proactive steps to remediate the concern, address deeply-rooted causes and avoid potential repeats. Through the alternative tool to prosecution, SFO integrates itself more effectively into global campaign against corruption. Uncertainty remains however about the extent to which the DPA system will change the enforcement landscape. Given that SFO does not ultimately control the outcome of a DPA negotiation, the resultant uncertainty makes it a paramount challenge for MNCs to enter into global settlements. It takes time to

\footnote{254} Peter Spivack and Sujit Raman, ‘Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements’ (2008) 45 (2) American Criminal Law Review 150, 193 at 161
\footnote{255} Richard Gruner, ‘Preventative Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities’ in Henry Pontell and Richard Gruner (eds.) International Handbook of White-Collar and Corporate Crime (Illinois, Springer Science and Business Media, 2007) 279-306 at 287
\footnote{256} Lisa Kern Griffin, ‘Inside-Out Enforcement’ in Anthony Barkow and Rachael Barkow (eds.) Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (New York University Press, 2011) 110-131
\footnote{257} Lanny Breuer, ‘Speech at the New York City Bar Association’ (13 September 2012) <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>
\footnote{258} SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 56-60
see whether the UK version of DPAs will likewise prove effective in tackling bribery. In view of SFO’s recent contentious conclusion of the investigations of cases of GSK and Rolls-Royce, the viability of DPAs has been cast further into doubt. It is too early to say that DPAs will alter fundamentally the future landscape of the enforcement regime for antibribery, which impact will be viable but only incrementally.