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Justice for whom? The need for a principled approach to Deferred Prosecution Agreements in England and Wales

Susan Hawley, Colin King and Nicholas Lord

ABSTRACT: Deferred Prosecution Agreements (DPAs) were introduced in England and Wales in 2014 and five such Agreements have been negotiated to date. Yet, DPAs have not been without controversy. There have been particular concerns relating to the lack of prosecutions brought against individuals; the necessity of self-reporting (and discounted penalties even absent a self-report); as well as the dearth of prosecutions against corporates who have not engaged with the DPA regime. Notwithstanding such concerns, however, DPAs evidently have strong support from parliament, law enforcement and the judiciary. Against that backdrop, this chapter examines experiences to date in England and Wales. The chapter analyses the underlying and purpose of the DPA regime; the approach in each of the Agreements negotiated to date; and what a ‘principled’ DPA regime might look like.

KEYWORDS: deferred prosecution agreements (DPAs); negotiation; individual prosecutions; self-reporting; discounted penalties; corporate criminal liability

In 2014, the UK government introduced Deferred Prosecution Agreements (DPAs) for England and Wales (E+W) as a way to tackle economic crime and build confidence in the justice system. Five years on from their introduction, five such agreements have been negotiated with the leading anti-fraud and anti-corruption agency, the Serious Fraud Office (SFO). However, the use of such agreements has not been uncontroversial and the regime is now at a cross-roads.

The lack of any successful prosecution of individuals for the underlying activity for which DPAs were granted has led to serious criticism. Additionally, the negotiation and approval of a DPA absent a self-report of wrongdoing (albeit with extensive cooperation with the SFO) has raised real questions about whether the regime can meet one of its primary purposes - to increase enforcement actions for economic crime by encouraging corporates to self-report. Finally, the lack of enforcement results outside of the DPA regime, including the dropping of an investigation into GSK, the failure to bring charges in several long-running bribery probes, and the collapse of a financial crisis related fraud prosecution against Barclays bank (which

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1 DPAs only apply in England and Wales under the Crime and Courts Act 2013, s.61. An OECD evaluation recommended that Scotland should adopt a scheme comparable to that in the 2013 Act, since Scotland does not currently have the legal basis for Deferred Prosecution Agreements, see Implementing the OECD Anti-Bribery Convention. Phase 4 Report: United Kingdom (OECD 2017), p.59.

2 Barney Thompson, SFO abandons cases as new chief tackles backlog, Financial Times, January 22, 2019.
had refused to cooperate with the SFO), has raised further challenges to the efficacy and functioning of the DPA regime.

Serious questions are now being raised about whether the DPA regime can be effective in a context where corporates may face better outcomes in court rather than through cooperation, or by refusing cooperation with an investigation and thereby making a prosecution virtually impossible. Questions are also being raised about whether corporates should be able to enter a DPA where culpability cannot be successfully pinned for the wrongdoing on any individuals. White-collar defence lawyers are asking whether corporates will be willing to self-report, or whether they will be ‘asking themselves, what is the true price of cooperation and is it worth it?’ Others have called for ‘urgent reform’ of the DPA system, including by ensuring that individuals should not be named in DPA agreements, and arguing that DPAs are unfair to individuals.

On the other hand, the regime evidently has strong support from law enforcement, parliament and the judiciary. The Director of the SFO, Lisa Osofsky, declared in November 2018 that: ‘DPAs are a way of holding companies to account without punishing innocent employees, and are an important tool in changing corporate culture for the better.’ In March 2019, a House of Lords Select Committee supported this view, declaring DPAs to be an ‘excellent way of handling corporate bribery’, although emphasising that incentives to encourage corporates to self-report should not be further lowered and that culpable individuals must face prosecution. In July 2019, in approving the most recent DPA, a senior judge stated ‘there may be cynicism in some quarters about the process by which a corporate entity can take advantage of a DPA. This cynicism is not well-founded.’ The DPA regime is clearly here to stay in E+W. However, given the concerns and questions raised by the five DPAs so far, now is a good time to reflect upon how the regime has operated over the past five years, to review what lessons have been learnt, and to explore the need for a principled approach to DPAs.

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3 Jane Croft and Jonathan Eley, Tesco fraud trial collapse puts deferred prosecution deals in the dock, Financial Times, January 23, 2019.
4 BBC News, Qatar charges against Barclays dismissed, May 21, 2018.
6 Francesca Titus, The true price of a DPA with the SFO, Economia, February 27, 2019.
9 Richard Sallybanks, Deferred Prosecution Agreements Are Unfair to Individuals, LAW360, February 19, 2019.
10 SFO, UK’s first Deferred Prosecution Agreement, between the SFO and Standard Bank, successfully ends (November 30, 2018).
13 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.47.

This chapter starts by considering the underlying purpose and rationale of the regime, in particular exploring the instrumental and symbolic aspects of DPAs as a sanction for corporate crime within a context whereby historically corporate prosecutions have been rare. The chapter then goes on to give a brief overview of the five DPAs granted in the UK so far. In light of these Agreements, we then consider what a ‘principled’ DPA regime ought to look like in terms of what its core purpose and intent should be and how the form and content of DPAs might achieve those goals.

Purpose and Rationale of the UK DPA regime

This section considers criminological theories on corporate punishment before looking at the specific policy rationales for the introduction of DPAs in E+W.

Criminological theories of corporate punishment

Nation-states do not criminalise behaviours purely for instrumental reasons to control behaviour more effectively, but also on the basis that they are morally wrong and deserve public sanction. In these terms, punishment constitutes an expressive institution that upholds the moral order, serving emotive, communicative and normative purposes to ensure societal indignation is appeased and societal cohesion is maintained when criminal behaviours are committed. Correspondingly, punishment may serve to reduce future crimes and can incorporate aspects of deterrence, incapacitation and/or rehabilitation as the ‘means to the end’ of crime reduction. But given the moral significance of the criminal law, as might also be expected, retribution for past harms can feature in the logic of punishment, recognising offenders as responsible moral agents and ensuring their ‘just deserts’. We may also punish in order to ensure restoration for past crimes, enabling harms to be repaired and relationships between key parties to be restored. Such penological philosophies have largely been developed in relation to natural persons convicted of common law crimes, raising questions over whether similar ideals can be applied to corporate offenders.

With corporate crimes, such as transnational corporate bribery or corporate accounting frauds that are our focus here, there is scope to punish both the individuals, who engage in the actual criminal behaviours for the benefit of their corporations, and the corporates, that provide the means, setting, rationale and opportunity for corporate deviance. Indeed, there is a long history in the UK and elsewhere of corporations being implicated in serious criminal, unlawful and harmful behaviours with extensive analysis of how the corporation should be held to account in the academic literature. Corporations and their structures, environments, policies and procedures facilitate criminal, deviant and transgressive behaviours, both

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15 Emile Durkheim, The Division of Labour in Society, (Steven Lukes, ed, Macmillan International 2013).
internally by their employees and externally by others (e.g. clients, associated partners), across ‘glocalised’ spaces and over extended periods of time. These behaviours include an array of crimes that generally do not represent only one-off exceptional acts of criminality, but often involve repeat offending.  

However, while the nature and organisation of (transnational) corporate criminality has evolved into the 21st Century, a major challenge remains in terms of the ability of the state to prosecute implicated businesses: ‘the criminal law has never quite adapted to the rise of modern business corporations some two centuries ago and is still somewhat at a loss in coping with complex multinationals with dispersed subsidiaries in diverse jurisdictions within the contemporary global and post-Fordist economy’. It is perhaps unsurprising, therefore, that criminal law models preoccupied with the control of individual guilt and liability are ‘doomed to fail’ in contemporary, dynamic corporate economies. For instance, there is little evidence supporting the contention that the criminal offences of natural persons, such as actual acts of bribery or fraud, can be adequately attributed to corporations, thus leading to corporate offending being accommodated by the state.  

In the UK there have been cases whereby pragmatic and practical reasons (e.g. obtaining evidence from overseas authorities, locating the ‘controlling mind’ of the corporate in line with the identification principle) and ideological and normative reasons (e.g. political protection of economic interests, preferences to negotiate with corporations rather than contest cases in the courts) have been presented for not criminally prosecuting those corporations implicated. This has left a contemporary legacy predominantly characterised by the non-prosecution of corporations including varying means of ‘negotiating justice’ for substantive criminal behaviours within, or by, organisations.  

Yet, corporations exist as distinct legal personalities, meaning they are attributed the same rights and responsibilities as those afforded to natural persons. This legal status enables them to be prosecuted for the same offences as natural persons, despite there being no possibility for imprisonment. Consequently, as independent legal personalities, a corporation has responsibilities, such as for its individuals to bear accountability, or for it to be liable for causing events that cause social and economic harm, and both the personality and its responsibilities are shaped by its corporate culture. We can think of culture as the autonomous elements beyond individual actors, characterised by the underlying

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21 Nicholas Lord, Regulating corporate bribery in international business (2014).
23 Celia Wells, Corporate crime: opening the eyes of the sentry, 30(3) LEGAL STUDIES. 370, 382-383 (2010).
The key point is that the ‘corporate person’ is in many ways distinct from its individuals and so the corporate itself can bear responsibility and liability. That said, individuals can be complicit in, and accessories to, the offences of corporations, and vice versa, rendering the criminal liability of corporations and individuals not mutually exclusive. However, there is a risk that the creation of the corporate personality can dehumanise and depersonalise the corporation from its individuals, creating scope for ‘structured irresponsibility’. In this sense, a ‘firm’s institutional context and culture shape an environment that encourages, colludes or is culpably blind to law-breaking’.

Competing ideologies exist over the most appropriate strategy for dealing with corporate crimes. For instance, the 1980s and 1990s saw academic debates regarding the role of criminal prosecution as either a tool of last resort or a core necessity of enforcement and regulation, elsewhere referred to as models of compliance in contrast to models of deterrence. Those in favour of regulation and compliance advocated the use of negotiation and persuasion to encourage corporates to maintain standards and comply with the law, with self-regulation and private remedies being the preference. In contrast, the deterrence model favoured more punitive, public justice responses characterised by the pursuit of criminal prosecution and proportionate punishments.

Strategies of persuasion and negotiation can be effective due to the inherent complexity of corporate crimes, and the knowledge and power obstacles facing nation-states when they seek to detect, investigate and influence corporate misconduct. But the low prosecution rates associated with this logic reduce the likelihood of deterrence whilst close, and sometimes non-transparent, relationships between the regulators and the regulated raise

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33 Levels of prosecution only make sense alongside an understanding of the extent and scope of corporate crimes in absolute terms in order to inform the proportion of corporate crimes that are prosecuted but there are no valid data on prevalence. However, even known cases of corporate crime rarely result in criminal prosecution (see for example Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014))
concerns of capture of state authorities as well as the potential framing of corporate crimes as ‘technical violations’, rather than inherently ‘bad’ and harmful behaviours.\(^{34}\)

In practice, state authorities, such as the SFO, aim to implement a mixture of persuasion and prosecution (with varying ‘success’), reflecting theories of ‘responsive regulation’ and knowing when to punish and when to persuade.\(^{35}\) We see the lines between regulatory and criminal procedures and practices becoming blurred in this area,\(^{36}\) in particular due to the ideological (e.g. protection of UK business) and normative (not viewing white-collar and corporate offenders as ‘criminals’), but also practical (e.g. evidential challenges) and pragmatic (e.g. inadequate legal/procedural frameworks for corporate criminal liability) obstacles to pursuing criminal prosecution.\(^{37}\) For some, this default position of non-prosecution reflects a form of accommodating corporate financial crimes,\(^{38}\) while for others it exposes neoliberal hypocrisies of capitalist societies’ crime control ideologies.\(^{39}\) These enforcement tensions are clearly at play with the use of DPAs that are underpinned by techniques of negotiation albeit with the threat of criminal prosecution lying in the background.

**The specific policy rationales for introducing DPAs in England and Wales**

DPAs were introduced in E+W in response to heavy criticism in 2012 from the OECD Working Group on Bribery about the SFO’s use of civil rather than criminal law to deal with foreign bribery.\(^{40}\) Since 2008, the SFO had, albeit with a few notable exceptions,\(^{41}\) been using ‘consent civil recovery orders’ as its primary enforcement tool for dealing with foreign bribery cases. These orders involved an agreement between the SFO and the corporate as to the order’s amount and terms, which were then put before a judge, with no hearing, and no opportunity for the judge to assess the factual basis for the order to input into what the corporate should pay.\(^{42}\) The Working Group on Bribery’s lead examiners were left ‘extremely concerned that many key details about the SFO’s civil settlements of foreign bribery cases remain private.’\(^{43}\)

37 Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (2014)
41 SFO Press Release, ‘Mabey and Johnson Ltd sentencing’ (September 25 2009); R v Innospec Limited, Sentencing Remarks, Crown Court at Southwark, March 26, 2010, Thomas LJ.
42 For detailed consideration of the use of such civil recovery orders in this context, see Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery orders and Deferred Prosecution Agreements* (2018) ch.3.

It went on to say that the SFO’s settlement process was ‘opaque, lacks accountability and thus fails to instil public and judicial confidence.’ It also encouraged the UK to ‘pursue legislative and other efforts’ to introduce plea negotiations, Deferred Prosecution Agreements and plea agreements.

Alongside criticism from the OECD, there had also been strong criticism from a senior judge, Lord Justice Thomas in the Innospec foreign bribery case, of prosecutors negotiating penalties with corporate offenders and pursuing civil recovery orders. Thomas LJ upheld ‘the constitutional principle that, save in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary.’ He went onto say that:

‘Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. … It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. 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.’

The announcement by the government, in October 2012, of its intention to introduce DPAs, coupled with a new Director taking over at the SFO in July 2012 who signalled his intent to reaffirm the SFO’s role as a prosecutor, put an end to the SFO’s use of civil recovery orders to tackle bribery. But it is against the background of strong criticism both by the judiciary and by the OECD of the use of civil rather than criminal law to enforce the OECD Convention that DPAs were introduced.

When the government first consulted on introducing DPAs, it stated that their purpose was to ‘overcome many of the current difficulties associated with prosecuting commercial organisations.’ The new tool was designed to:

be effective in tackling economic crime and maintaining confidence in the justice system of England and Wales; have swifter, more efficient and cost effective processes; produce proportionate and effective penalties for wrongdoing; provide flexibility and innovation in outcomes, such as restitution for victims, protection of

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46 R v Innospec Limited, Sentencing Remarks, Crown Court at Southwark, March 26, 2010, Thomas LJ, para.27.
48 Ministry of Justice, New tool to fight economic crime (October 23, 2012).
49 The powers do, however, remain open to the SFO.
50 The introduction of DPAs was also heavily influenced by the US regime, with some calling this the ‘Americanization’ of British justice. See Joanna Dimmock, Jonathan Pickworth & Tom Hickey, Deferred Prosecution Agreements 5 years on – the Americanization of UK corporate crime enforcement, White and Case, May 10, 2019).
51 Ministry of Justice, Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements (Cm 8348) (May 2012), para.14.
There are aspects of retribution (e.g. proportionate penalties for wrongdoing), restoration (e.g. providing restitution) and rehabilitation (e.g. compliance changes) included in this rationale, but the underlying intent appears more concerned with a need to produce certainty and speed of enforcement action on practical and pragmatic grounds (i.e. to be seen to be doing something about these crimes), rather than an evidence based assessment of what would result in crime reduction.\textsuperscript{53}

DPAs are therefore located within the criminal law framework in E+W and this is significant for purposes of moral retribution and perceived social fairness. The DPA as a criminal law tool is symbolic and (potentially) a deterrent (though empirical data here is lacking), given the threat of criminal prosecution remains throughout the DPA term. This threat enables the state to motivate corporates to cooperate and comply, before and during the DPA (although the cases below suggest this threat is being undermined). Thus, the DPA regime communicates to the wider public that corporate financial crimes are being actively resolved, even if they are not being prosecuted. In these terms, DPAs permit the SFO to reaffirm its prosecutorial purpose but achieve ‘justice’ (albeit defined differently in relation to corporate offenders) through negotiation, persuasion and compliance.

Overview of DPAs so far
We now provide a brief overview of the five DPAs to date in E+W.

Standard Bank DPA
The first DPA in November 2015, involving Standard Bank,\textsuperscript{54} concerned a corrupt payment,\textsuperscript{55} made by a former sister company of Standard Bank (Stanbic Bank Tanzania) in an attempt to win a contract from the government of Tanzania. The corporate self-reported the payment, and the results of an internal investigation were handed over to the SFO. The SFO was satisfied that the public interest would be met by a DPA, which was subsequently approved by the courts. The DPA terms involved compensation of US$6m plus interest of US$1,046,196.58; disgorgement of profit of US$8.4m; payment of a financial penalty of US$16.8m; and payment of costs incurred by the SFO (£330,000).\textsuperscript{56} It was also explicitly made clear that no tax reduction would be sought in relation to these payments. Furthermore, Standard Bank agreed to full and continued cooperation with the SFO and agreed to commission an independent review by PricewaterhouseCoopers LLP of its anti-bribery

\textsuperscript{52} Ibid, para 30.
\textsuperscript{53} Though see Kevin Davis, 'The Limits of Evidence-Based Regulation: The Case of Anti-Bribery Law' (unpublished draft) for scepticism about evidence based and comparative assessments.
\textsuperscript{54} SFO, Press Release - SFO agrees first UK DPA with Standard Bank (November 30, 2015).
\textsuperscript{55} Bribery Act 2010, s.7 (failure to prevent bribery).
\textsuperscript{56} The exchange rate on the day in question was US1 = £0.6646439742.
compliance procedures, with any recommendations to be implemented. In November 2018, the Standard bank DPA ended, with the SFO confirming that the corporate had fully complied with the terms. No UK individuals were prosecuted in relation to the offending outlined in the DPA. The trials of individuals in Tanzania including the official who received the bribe and the former head of Investment Banking at Stanbic is ongoing at the time of writing.

This DPA was described by the then-SFO Director as a ‘landmark’ agreement, which would ‘serve as a template for future agreements’. In his judgement Leveson P noted the key factors that had enabled him to decide that the DPA was in the interests of justice:

Of particular significance was the promptness of the self-report, the fully disclosed internal investigation and cooperation of Standard Bank. Finally, also relevant were the agreement for an independent review of anti-corruption policies and the fact that Standard Bank is now differently owned, a majority shareholding having been acquired by ICBC.

In this first agreement, Leveson P followed the provision for calculating a financial penalty laid out in the Crime and Courts Act, namely that it must be broadly comparable to a fine that would have been imposed if the corporate had been convicted following a guilty plea. Taking account of Sentencing Council Guidelines, Leveson P concluded that the appropriate penalty would be 300% of the total fee which would be reduced by one-third to reflect the earliest admission of responsibility.

The DPA was also notable for how it managed potential liabilities in other jurisdictions. While Tanzanian authorities did not object to this DPA, in the US the DOJ indicated that it would drop its investigation as the matter was resolved in the UK while the SEC accepted a civil money penalty of $4.2 million on the same day as the DPA was approved in E+W.

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58 SFO, UK’s first Deferred Prosecution Agreement, between the SFO and Standard Bank, successfully ends, November 30, 2018.
61 The Crime and Courts Act 2013, Sched.17, para.7 and 8 specifically require the court to consider whether the DPA is in the interests of justice and whether the terms are fair, reasonable and proportionate. Further guidance is set out in SFO/CPS, Deferred Prosecution Agreements Code of Practice (2014), para 9.4 and para.10.3.
65 SFO v Standard Bank plc (now known as ICBC Standard Bank plc), Southwark Crown Court, Case No: U20150854, November 30, 2015, para.16.
66 SFO v Standard Bank plc (now known as ICBC Standard Bank plc), Southwark Crown Court, Case No: U20150854, November 30, 2015, para.18.
Sarclad Ltd DPA

The second UK DPA was approved in July 2016 with Sarclad Ltd.69 The allegation in this instance related to the offer and/or payment of bribes70 to secure contracts to supply its products in foreign jurisdictions between June 2004 and June 2012. The issue came to light after the corporate’s parent company (Heico Companies LLC) implemented a global compliance programme, which resulted in concerns being raised with Sarclad. An internal investigation was subsequently undertaken, and a self-report made to the SFO. The DPA involved financial orders of £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. The SFO agreed not to seek costs. Here too it was explicitly made clear that no tax reduction would be sought in relation to these payments. The company also agreed to full and continued cooperation and to provide a report addressing all third-party intermediary transactions as well as the implementation and yearly evaluation of anti-bribery compliance procedures and controls for the duration of the DPA.71

In considering the interests of justice, Leveson P again considered the seriousness of the offence: in this instance, while there was no doubt as to the seriousness of the systematic bribery, it was pointed out that the majority of bribes were instigated by agents who were not under pressure from Sarclad. He continued: ‘Of particular importance, reflecting a core purpose of the creation of DPAs to incentivise the exposure and self-reporting of corporate wrongdoing, was the promptness of the self-report, the fully disclosed internal investigation and co-operation of Sarclad.’72 He also focused on the implementation of new training programmes, policies and procedures; the role of the parent company; and economic considerations.73

The terms of this DPA are noteworthy as it was the first DPA that introduced a new approach to calculating discount from that outlined in the Crime and Courts Act 2013. The court recognised that Sarclad had limited means and ability to pay. The total gross profit from the implicated contracts was £6,553,085. Applying a harm multiplier figure of 250% (which was lower than expected), the starting point for a financial penalty would be almost £16.4m. Leveson P then applied a discount of 50%, reducing this figure to £8.2m. This increased discount is significant, as it was intended ‘to encourage others to conduct themselves as Sarclad has when confronting criminality’.74

Even with the 50% discount, a figure of £8.2m was said to be beyond the means of the corporate. Economic considerations thus weigh heavily on the approval of this Agreement:

69 The DPA was initially reported as being between the SFO and an unnamed SME ‘XYZ Ltd’ due to ongoing legal proceedings against individuals. Those proceedings were concluded in July 2019, and reporting restrictions subsequently lifted: see Neil Blundell & Max Hobbs, The subject of the UK’s second DPA is revealed, Macfarlanes LLP, July 18, 2019.
70 Specifically, conspiracy to corrupt and to bribe and failure to prevent bribery under the Criminal Law Act 1977, s.1 and the Bribery Act 2010, s.7, respectively.
72 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.16.
73 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.17-18.
74 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.23.

‘the interests of justice did not require Sarclad to be pursued into insolvency. Thus, Sarclad’s means and the impact of any financial penalty on Sarclad’s staff, service users, customers and the local economy are all significant factors.’75

As was noted by the then-SFO Director, ‘[t]he decision as to whether to force a company into insolvency must be balanced with the level and nature of co-operation and this case provides a clear example to corporates.’76

The role of the parent company is another noteworthy aspect of this DPA. Heico had received £6m in dividends from Sarclad since acquiring it in 2000, and was regarded as ‘an innocent parent company’.77 Notwithstanding that it was under no contractual nor legal obligation to contribute to a financial penalty imposed upon a subsidiary, Heico had offered to provide necessary financial support in the event that a DPA was to be agreed.78

The identity of Sarclad remained redacted until July 2019, due to ongoing related legal proceedings against individuals. Such temporary anonymity pending resolution of individual prosecutions is a way of managing the protection of individual rights, ensuring that individual prosecutions are not tainted by pre-trial adverse publicity. At the criminal trial, three former employees of Sarclad were acquitted by the jury.79 Significantly, though, the unredacted DPA specifically identifies these individuals as being ‘involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions.’80 Following the earlier collapse of the criminal trials related to the Tesco DPA (in December 2018 and January 2019, discussed below), this is the second instance where a prosecution was unsuccessfully brought related to allegations in a DPA. As the solicitor for one of the acquitted former Sarclad employees stated,

‘Post Tesco, this verdict now fundamentally brings into question the DPA process and order of proceedings, where the DPA process has proceeded with the prosecution of individuals after the company has completed its DPA which is contrary to the identification principle that a company’s liability is based on the acts of its officers and directors.’81

One final feature of the Sarclad DPA is the issue of privilege material. Prior to the criminal trial, the individuals concerned sought a judicial review of the SFO’s decision not to pursue disclosure of full notes from first interviews with employees from the company’s internal investigation following the corporate’s assertion of privilege (notwithstanding that the SFO disagreed with the stance that the notes were privileged). While the application for judicial

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75 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.24.
77 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.21.
78 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.21.
80 SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.6.
review was ultimately unsuccessful, the court was critical of the SFO’s failure to pursue this material. While in a subsequent landmark case, ENRC, the Court of Appeal upheld that legal privilege can apply to internal investigations (prior to self-reporting) the court noted that had it been asked to approve a DPA in that case ‘the company’s failure to make good on its promises to be full and frank would undoubtedly have counted against it,’ suggesting that waiver of legal privilege may still form a central plan of what prosecutors are likely to consider full cooperation in order for a company to be eligible for a DPA. Indeed, in April 2019, SFO Director Lisa Osofsky stated that waiving privilege over internal investigative material will be a strong indicator of cooperation and a factor to be considered when considering whether or not to enter into DPA negotiations. She also stated that such cooperation will influence whether a DPA resolution is in the public interest. The SFO is expected to shortly issue guidance in this regard.

Rolls Royce DPA

The third DPA was announced in January 2017, concerning 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. This DPA was entered with Rolls Royce PLC and Rolls Royce Energy Systems Inc. This Agreement included a financial settlement of £497.25m (comprising of a disgorgement of profit of £258,170,000 plus a financial penalty of £239,082,645 in addition to £12,960,754 prosecution costs) with the SFO. Again no tax reduction was to be sought in relation to these payments. The DPA spans a 5-year term and also involves an agreement to cooperate with and assist the SFO with the prosecution of individual company actors as well as the implementation of a compliance programme that is to be supervised by Lord Gold. This DPA has proved to be controversial for a number of reasons, including whether it was actually in the interests of justice.

Given that the conduct in question involved serious criminality and there were a number of aggravating factors, resolution by a DPA ‘raises some serious questions about the DPA regime and the willingness and ability of the prosecuting authorities to prosecute what was clearly an egregious, sustained, and global pattern of wrongdoing ingrained in the very culture

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82 On the grounds that the appropriate forum for the matter to be resolved was the Crown Court.
83 R (AL) v SFO [2018] EWHC 856, para.95 and 124.
84 ‘Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority.’ Director of the SFO v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006, para.116.
85 Director of the SFO v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006, para.117.
89 Rolls-Royce also reached agreements with the US Department of Justice and Brazil’s Ministério Público Federal. These agreements result in the payment of US$169,917,710 and $25,579,645, respectively, to the US and Brazilian authorities. SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, para.69.
90 These aggravating factors are set out by Leveson P at para.35 of his final judgment.
of the company and involving senior former executives."\(^91\) In his judgment, Leveson P identified ‘strong countervailing considerations’\(^92\) that were said to justify a DPA in this instance, namely: 1. the extent of cooperation by the corporate (notwithstanding the lack of a self-report); 2. settlements with foreign enforcement agencies (specifically in the US and Brazil); 3. compliance steps implemented by the corporate after the offending; 4. changes of culture and personnel within the corporate; 5. the consequences of criminal conviction – for the corporate itself and for third parties; 6. from the SFO’s perspective, a DPA would avoid significant expenditure of time and resources in pursuing a criminal prosecution; and 7. also from the SFO’s perspective, a settlement in this instance would incentivise corporates to self-report.

Leveson P accepted that despite ‘egregious criminality over decades, involving countries around the work, making truly vast corrupt payments’,

> Rolls-Royce is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures. Its full co-operation and willingness to expose every potential criminal act that it uncovers and the work being done on compliance and creating that culture goes a long way to address the obvious concerns as to the past.\(^93\)

A number of criticisms may be made against this resolution. First, given the seriousness of the allegations in question it is arguable that a criminal prosecution ought to have been preferred over a DPA. Many of the countervailing factors identified above (eg cooperation; compliance procedures; change of culture/ personnel) could have been reflected at the sentencing stage, rather than allowing the corporate to sidestep criminal prosecution entirely. Moreover, the purposes of procurement debarment rules are circumvented by DPAs.\(^94\) The concern is that the DPA sends a message to larger corporates that they can avoid prosecution by paying a financial penalty due to difficulties faced by the SFO in prosecuting such corporates. Not only are larger corporates thus treated different to individuals, they are also treated different to smaller corporates.

A second criticism is that a DPA was entered into notwithstanding that the corporate did not self-report; instead the SFO investigation was triggered by a whistleblower. In this instance, Leveson P was persuaded to treat the extensive cooperation of the corporate as akin to a self-report. Furthermore, he was persuaded to apply a discount to the penalty as if the corporate

\(^{\text{91}}\) Susan Hawley, A Failure of Nerve: the SFO’s Settlement with Rolls Royce, Corruption Watch, (19 January 2017).
\(^{\text{92}}\) SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, para.35.
\(^{\text{94}}\) For wider consideration of negotiated settlements and debarment, see Sope Williams-Elegbe, The Implications of Negotiated Settlements on Debarment in Public Procurement: A Preliminary Inquiry (this volume).
had self-reported with Rolls Royce receiving a full 50% discount. This approach undermines a core aspect of the DPA regime, namely incentivising corporates to self-report. The discount in the Rolls Royce DPA can be contrasted with (i) that in the US (where a 25% discount was applied) and (ii) the approach in Sarclad (where the corporate self-reported at a very early stage and the increased discount was said to reflect additional mitigation). Henceforth, corporates might well decide not to self-report if they can still negotiate a DPA, and benefit from the maximum discount through full cooperation, if they are detected.

Third, even with the discount, the total financial penalty was substantial. However, the DPA allowed for the payment to be made in instalments. While the SFO agreed to the request, it is suggested that this approach is particularly generous to the corporate and undermines the deterrent value of DPAs. Indeed, DPA financial penalties might well come to be regarded as a cost of doing business.

Fourth, it is problematic that the SFO agreed not to investigate or prosecute Rolls Royce for additional misconduct pre-dating the DPA and arising from investigations into Airbus and Unaoil – an undertaking not given by the US. Such a blanket agreement not to investigate or prosecute is problematic inasmuch as it gives the public perception of blanket immunity for any further bribery that ought to have been disclosed by Rolls Royce as part of genuine cooperation.

A final criticism was the lack of individuals prosecuted. This was seen as a key indicator by civil society groups of whether the Rolls Royce DPA had delivered justice. However, in February 2019 the SFO announced: ‘Following further investigation, a detailed review of the available evidence and an assessment of the public interest, there will be no prosecution of individuals associated with the company.’ A key question this raises is whether if the cooperation of the corporate were indeed so full and extensive, why was there insufficient evidence to support individual prosecutions.

Tesco Stores Ltd DPA

In April 2017, the SFO confirmed that it had entered into a DPA with Tesco Stores Ltd. The DPA included a financial penalty of £128,992,522, plus £3m costs. Separately, the FCA

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100 SFO, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals, February 22, 2019.
101 SFO Press Release, SFO agrees Deferred Prosecution with Tesco (April 10, 2017). A regulatory announcement had already been issued by Tesco Plc stating that a DPA had been agreed in principle,
required a compensation scheme to be established whereby Tesco Plc and Tesco Stores Ltd agreed to pay £84.4m. Pursuant to a court order, reporting restrictions were put in place pending resolution of criminal proceedings against former executives of Tesco. The trial of two of these individuals was stopped by the judge in December 2018 on the grounds that there was no case to answer, and in January 2019 the SFO offered no evidence against the third individual and he was formally acquitted. Subsequently, the reporting restrictions were lifted on January 23, 2019. Unlike the first three DPAs, this Agreement related to false accounting.

In the Tesco case, as in the Rolls Royce case, a number of factors pointed in the direction of criminal prosecution, namely 1. the harm caused to the integrity of the market and damage to confidence in how the market operates; 2. the corporate, through senior management, played a leading role in organised and planned misconduct, and pressurised others to be involved; 3. the accounts had been overstated over a number of years (albeit the indictment was confined to one set of results); 4. the corporate culture placed pressure on accounting and finance to reach set targets, including through illegitimate methods; and 5. senior managers failed to report the activities and concealed it from external auditors.

Leveson P then outlined the countervailing factors against prosecution: 1. the ‘unreserved and enduring co-operation’ of the corporate, including the speed with which it acted 2. four senior employees were dismissed and others were suspended; 3. changes in the leadership of both Tesco Plc and Tesco Stores Ltd; 4. the remedial measures taken to address the identified failings; 5. the (disproportionate) consequences of a criminal conviction – for the corporate and also innocent third parties; 6. the efficient use of public resources; and 7. the importance of encouraging and incentivising self-reporting of wrongdoing by other corporates in similar situations.

Leveson P concluded that: ‘without in any sense minimising the conduct revealed by this investigation, I am entirely satisfied that the balance in this case comes down firmly on the side of concluding that it is in the overall interests of justice to conclude a DPA in this case.’

The terms of the Agreement last for three years; Tesco Stores Ltd are required to cooperate with the SFO and other agencies in all matters related to the conduct in question; payment of a financial penalty of £128,992,522; payment of costs incurred by the SFO (£3m); and commissioning external auditors to review and report on specific aspects of business, and to then implement any recommendations. Again, no tax reduction was to be sought in relation to the financial penalty nor costs. The terms of the Tesco DPA differ from that of the Rolls

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102 SFO v Tesco Stores Ltd, Southwark Crown Court, Case No: U20170287, April 10, 2017, para.79.
103 BBC News, Tesco directors acquitted in fraud trial, December 6, 2018.
104 BBC News, Former Tesco director Carl Rogberg has been acquitted of fraud, January 23, 2019.
105 Theft Act 1968, s.17.
107 SFO v Tesco Stores Ltd, Southwark Crown Court, Case No: U20170287, April 10, 2017, para.50.
The DPA also provides for cooperation of Tesco Stores Ltd (and procurement of full and honest cooperation of Tesco Plc) in relation to any investigation and prosecution of individuals related to the conduct in question. Leveson P specifically stated that: ‘As Tesco Stores will ordinarily be the main repository of material relevant to the prosecution of individuals, both in terms of evidence and disclosure, it is obviously fair, reasonable and proportionate that it is required to assist in the pursuit of any investigation or prosecution.’

This type of provision is likely to be explicitly set out in any future DPAs, and possibly also dealing with any potential issues of privilege, in the wake of difficulties arising out of the XYZ DPA.

There were obstacles in determining an appropriate financial penalty: the Sentencing Guidelines do not provide for a harm figure for a false accounting offence and there is no specific gain or loss caused in such an offence (in contrast to bribery offences, as with the previous DPAs). Notwithstanding such obstacles, the court devised an overall harm figure of £85.995m.

The circumstances of the case fell within the category of high culpability, so a multiplier of 300% was deemed appropriate. Following the approach in Sarclad, a discount of 50% was applied, and the financial penalty was calculated on this basis.

The court was impressed by the corporate reforms implemented by the corporate, including the role of an external auditor (Deloitte LLP), and concluded: ‘Because of these aspects of the DPA, it has not been considered necessary to require the appointment of a monitor.’

Serco Geografix Ltd DPA

The fifth DPA is the first since Lisa Osofsky was appointed Director of the SFO. It is also the first Agreement approved by a judge other than Leveson P. Serco Geografix Ltd (SGL) is a dormant company, whose principal business had been to service two contracts held by its parent company (Serco Ltd (SL)) with the UK government. The SFO opened an investigation in October 2013 into allegations that Serco had been billing the UK government for services not provided. Following an internal investigation by the company as a response to the SFO’s investigation, the corporate discovered emails purportedly showing manipulation of accounting records which it then reported to the SFO in November 2013. In July 2019, Davis

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109 SFO v Tesco Stores Ltd, Southwark Crown Court, Case No: U20170287, April 10, 2017, para.73. The corporate is also required to procure the same assistance from Tesco Plc.
110 The calculations of this amount are set out at para.84 of the judgment.
111 This multiplier took account of both aggravating and mitigating factors.
112 These are set out in paras.96 et seq of the judgment.
J issued a declaration that a DPA is in the interests of justice and that the terms of the Agreement are fair, reasonable and proportionate.\footnote{SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.10.}

The SFO suggested that a DPA would be in the public interest, notwithstanding that this was a substantial fraud carried on over many months; it reflected ingrained business practices within the corporate; and the conduct had a serious impact upon the integrity of government contracts with the private sector.\footnote{SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.22.} The SFO argued that these factors were outweighed by: the prompt and detailed reporting by Serco Group PLC and its subsidiaries; substantial cooperation with the investigation; the lack of any history of similar conduct either on the part of Serco Group PLC or its subsidiaries; the age of the conduct and remedial measures taken subsequent to the self-report; and the disproportionate consequences that might result from criminal conviction of SGL.\footnote{SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.23.} There was significant emphasis on the ‘very substantial cooperation’ by the corporate (including access to email accounts of current and former employees; some waiver of privilege; and disclosure of material).\footnote{SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.24.} Serco Group PLC’s change of management, various internal and external reviews and audits, and establishment of a continuing corporate renewal programme were also considered important. Serco had already entered a separate settlement with the Ministry of Justice in 2013, paying £70 million to the Ministry for the same conduct.\footnote{As confirmed in a letter from a government official.}

The issue of proportionality, however, troubled the judge: ‘If the effective consequence of approval of the proposed DPA were to be that SGL could continue to supply services to government departments whereas the company would not be able to do so in the event of a conviction, I doubt whether I would give approval.’\footnote{HM Government, Taxpayer compensated for overcharging as cross-government contracts review concludes, Press Release (December 19, 2013). Alongside the £68.5m settlement announced in 2013, a further £1.5m was paid in October 2015: SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.21.} The judge did not want to engage in a quasi-political decision in this regard. Here, though, as the corporate had ‘self-cleaned’ so that it could continue acting as a supplier to government,\footnote{As confirmed in a letter from a government official.} the judge approved the Agreement.\footnote{As confirmed in a letter from a government official.}

The Agreement is for three years and includes payment of a financial penalty (£19.2million – which includes a 50% discount), payment of the SFO’s costs (£3.7million), improvements to ethics and compliance policies and procedures, and continuing cooperation with the SFO and other investigative agencies.\footnote{In a separate settlement, Deloitte was fined and reprimanded for its audit of SGL: see Julia Kollewe, Deloitte fined E4.2m over Serco tagging scandal, The Guardian (July 4, 2019).} While the agreement was made with a dormant company, SGL, Davis J noted that:
The reality is that the Agreement extends to Serco Group PLC and its subsidiaries, with Serco Group PLC assuming responsibility for the financial penalty and the SFO’s costs. It also undertook to implement specified ethics and compliance procedures, mirroring those imposed on SGL by the DPA. These obligations by the parent company were considered by Davis J to be:

‘an important development in the use of DPAs. The nature of modern corporate structures means that it may be problematic to show that a controlling mind of the parent company was involved in the criminality carried out by a subsidiary company even where the benefit of the criminality tended to accrue to the parent company. Yet it will be the parent company which necessarily must engage in any compliance programme and cooperate with law enforcement agencies.’

As such, it has been suggested that this Agreement ‘represents a significant milestone in the use of DPAs in the UK and the involvement of parent companies can be expected to be a recurring feature.’ Davis J meanwhile reiterated the importance of DPAs, and the fact that they will only be available to corporates that show:

‘the clearest possible demonstration of integrity ... once the criminal activity has become apparent. This will require early self-reporting to the authorities, full cooperation with the investigation, a willingness to learn lessons and an acceptance of an appropriate penalty. The willingness to learn lessons must be shown via real, substantial and continuing remedial measures. All of that has been demonstrated by Serco Group PLC in this case.’

Alongside this DPA, the SFO is still considering whether to bring prosecutions against individuals. As such, the statement of facts has not been published, due to potential risk of prejudice to any such prosecutions. The judge also issued an order prohibiting identification of any individual referred to in the application for the DPA. The judge made it clear in his judgement that ‘The evidence demonstrates that individuals within SGL who can properly be described as directing minds of the company were party to the scheme.’

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123 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.40.
124 This undertaking is provided for in an ‘Attachment A’ attached to the judgment.
125 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.41.
126 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.42.
128 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.47.
129 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.44. A decision whether or not to charge individuals is scheduled to be made by mid-December 2019.
130 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.45.
131 SFO v Serco Geografix Ltd, Southwark Crown Court, Case No: U20190413, July 4, 2019, para.18.
However, it is worth emphasising that similar sentiments had been expressed in Sarclad and Tesco and, as noted earlier, prosecutions against individuals were unsuccessful in those cases.

The Serco judgment further widened the approach to self-reporting. The SFO was already investigating separate allegations against the corporate; as part of its own internal investigation, the corporate subsequently discovered further wrongdoing which it then reported to the SFO. Thus, the provision of substantially new material indicating potential criminality to a prosecutor by a corporate after an investigation has been opened into separate allegations has been classed as a self-report. This DPA also raises significant questions as to whether the DPA regime is being used as a substitute for corporate liability reform, given the inability of the SFO to engage in a DPA with the parent company because of the UK’s ‘controlling mind’ test. Finally, it remains to be seen what action will be taken against individuals involved in criminal wrongdoing (a charging decision is expected by mid-December 2019). This DPA will be a key test of whether the SFO has been able to learn from past cases in order to build a successful case against individuals for wrongdoing established in a DPA.

Towards a principled approach to DPAs in England and Wales

This section will look at some of the reasons why the DPA regime may not have been as effective as some would have expected over the past five years, before going on to look at what principles should influence their development in the future.

Obstacles to success

There was strong support for the introduction of DPAs, with 86% of respondents to the government’s consultation agreeing with the government’s statement that DPAs could help improve the way the UK dealt with economic crime and result in more cases coming to justice. However, DPAs have not been used as frequently or as intensively in E+W as might have been imagined upon their introduction. One of the key architects of the DPA regime, Lord Garnier, recently told a Parliamentary Committee that he had expected 8-10 DPAs a year which would have significantly increased enforcement outcomes for economic crime. Currently, the rate of their use in E+W is on average one per year. By comparison the US uses

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132 ‘Sarclad, through a small but important group of its employees and agents, was involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions.’ SFO v Sarclad Ltd, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.6.

133 ‘The investigation of Tesco Stores has revealed serious evidence of what amounts to a serious breach of criminal law, and without reaching any conclusion... implicates senior management’. SFO v Tesco Stores Ltd, Southwark Crown Court, Case No: U20170287, April 10 2017, para 16.

134 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 (Cm 8463) (October 2012), para.18.

22-40 DPAs a year for corporate offenders\textsuperscript{136} and in France, where the corporate settlement regime was only introduced in 2016, there have been 6 settlements, averaging 2 a year.

There are several factors which may have impeded the widespread use of DPAs in E+W. The first is that the DPA regime contains potentially contradictory goals and has to navigate contested views on the purpose of DPAs. The second is that when the government introduced DPAs, it did not at the same time review what other reforms would be needed to the criminal justice system to make the DPA regime work effectively.

**Contradictory goals**

The government stated that, by introducing DPAs, it wanted to ‘incentivise self-reporting, and secure reparations for victims, whilst ensuring harsh penalties are paid.’\textsuperscript{137} The question that this did not address is what benefit corporates will perceive in self-reporting if they are likely to face harsh penalties as a result. While some corporates will want to ‘do the right thing’ and see the benefit of a swift and certain outcome, others may well take a ‘sit tight and see’ approach, weighing up the likelihood of detection and of a successful prosecution against the risks of self-reporting.

This fundamental tension in the DPA regime of imposing significant penalties on corporates that have come forward with information about their own wrongdoing is regularly highlighted by those who defend and represent corporates.\textsuperscript{138} The argument they often make is that penalties need to be lower to incentivise self-reporting. In contrast, civil society groups and some commentators express concerns that DPAs reflect a ‘softer’ option and essentially enable corporates to buy their way out of criminal prosecution.\textsuperscript{139} Prosecutors are therefore often having to navigate different pressures in applying the DPA regime.

Additionally, the DPA regime’s stated goal, oft-repeated by SFO Directors, is to penalise corporates without impacting innocent employees and shareholders. This militates against imposing too harsh a penalty. What might be a ‘proportionate’ fine to protect shareholders and employees, or a ‘reasonable’ fine to incentivise self-reporting may not, however, be an ‘effective’ fine in terms of deterring future misconduct by the same company or by the corporate world more generally. This raises two important questions: if DPAs become the default means of enforcing laws against corporate criminality predicated on a discounted financial penalty range to reflect impact on employees and shareholders, can real deterrence against corporate crime be achieved? And secondly, does the consideration of proportionality at the heart of the DPA regime stray into prohibited consideration of the ‘national economic

\textsuperscript{136} Gibson Dunn, ‘2018 Year End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements’, January 10, 2019.
\textsuperscript{137} 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 (Cm 8463) (October 2012), para 9.
\textsuperscript{138} James Thomas, UK DPAs turn five, Global Investigations Review March 5, 2019.
Synergy with the wider criminal justice system

The government put the DPA regime in place without addressing some of the other factors that are critical to why the DPA regime in the US works, notably having a strong corporate criminal liability regime. While the DPA regime applies to economic crime, the ‘failure to prevent’ offence which enables corporates to be held criminally liable where they fail to have the right procedures in place to prevent a crime, only applies to two offences, namely failure to prevent bribery and failure to prevent facilitation of tax evasion.

It is perhaps not surprising that of the five DPAs agreed so far, three of them have been for Bribery Act related, and specifically ‘failure to prevent’ (Section 7), offending. The absence of a wider, effective corporate criminal liability regime which covers other economic crime offending for which DPAs can be agreed, specifically fraud, false accounting and money laundering, reduces the ability of prosecutors to bring successful prosecutions against corporates that do not self-report such offending. The carrot-and-stick dynamic inherent in negotiated settlements, whereby a ‘carrot’ (in the form of a DPA) is offered by authorities, but this is backed up by the threat of the ‘stick’ (criminal prosecution) where corporates do not self-report or cooperate, is thus undermined by the difficulties of establishing corporate criminal liability in these cases. The ability of prosecutors to use the ultimate stick of prosecution is clearly central to the success of the DPA regime. As the Criminal Bar Association contended in the DPA consultation, ‘it is clear that any non-prosecuting measures such as DPAs, with self-reporting at their heart, are only as effective as the willingness and capacity of the State to prosecute complex crime where necessary.’ This view was reiterated recently by one lawyer quoted in the press as saying: ‘sooner or later [the SFO’s] got to send the message with a big individual conviction. Without that, companies may not be so willing to roll over – and then they might say ‘prove it.”

However, the SFO has found that a willingness to prosecute complex economic crime in itself is not enough. As recent cases show, the SFO has been willing to prosecute but convictions have not easy to achieve. The unsuccessful prosecutions of corporates and senior executives in the Barclays, Tesco and Sarclad cases suggests that either a) the law is inadequate; b) the SFO is not as effective as a prosecutor as it needs to be, whether due to lack of resourcing or

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141 The list of offences that can have a DPA offered to it are at Part 2 of Schedule 17 of the Crime and Courts Act 2013.
142 Bribery Act, s.7.
143 Criminal Finances Act 2017, Part 3.
144 See, for example, Ministry of Justice, Corporate Liability for Economic Crime, Call for Evidence. Cm 9370 (January 2017).
145 Criminal Bar Association response to DPA consultation, obtained under Freedom of Information Act by Corruption Watch.
146 Alan Tovey, Serious Fraud Office in the spotlight again under new boss, The Telegraph, March 5, 2019.
accumulated experience; c) the courts struggle with economic crime cases pointing to the need for specialised economic crime judges;\textsuperscript{147} d) there was insufficient evidence to justify a conviction; or e) possibly a mixture of all of these.

As pointed out elsewhere in this volume, corporates are unlikely to investigate, self-report and cooperate unless they are faced with the likelihood of much higher costs and sanctions if they fail to self-report or cooperate.\textsuperscript{148} Current experiences of corruption trials in the UK courts illustrate several other key issues where the wider justice system, in effect, provides greater leniency for a corporate that proceeds to trial and is convicted compared to a corporates that self-reports and negotiates a DPA. This reduces incentives for corporates to self-report, thereby undermining the DPA regime. First, the lack of court sentencing powers to impose corporate remedial orders on convicted companies is problematic. While a corporate agreeing a DPA may have a corporate monitor imposed upon it, this is highly unlikely if it is convicted. Although prosecutors could use Serious Crime Prevention Orders,\textsuperscript{149} in practice these will rarely be used as they require prosecutors to prove that a corporate is at risk of reoffending – something that is exceptionally hard to prove.

Second, the imposition of reporting restrictions and the difficulty reporters face in accessing court documentation in the UK means that a corporate getting a DPA may get considerably more press attention and publicity than a corporate convicted following a contested trial.\textsuperscript{150} The reputational aspect of corporate punishment is significant. The denunciatory effect of such punishment is removed if relevant stakeholders, including the public and corporate community, remain ignorant to the conviction and/or sanction.\textsuperscript{151}

Finally, courts in England and Wales have generally not given enough consideration to the ‘deterrence trap’\textsuperscript{152} – the fact that the amount of fine needed to deter criminal activity far outstrips the ability of corporates to pay. While fines arguably need to be significant in order to achieve a real deterrent effect and rebalance the legacy of impunity for corporate criminal activity, prosecutors and courts have repeatedly shown themselves reluctant to impose sanctions that would materially impact upon the functioning of a business.\textsuperscript{153} As we discuss below, in the DPA context, unless the courts in E+W can show that they are likely to impose sentences on corporates upon conviction far higher than those agreed through DPAs, the incentives on corporates to self-report in order to get a DPA are diminished.

\textsuperscript{148} Jennifer Arlen, \textit{The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S} (this volume).
\textsuperscript{149} Serious Crime Act 2007, Part 1.
\textsuperscript{150} Rahul Rose, \textit{Veil of Secrecy: Is the fight against corruption being undermined by a lack of open justice?} (Sue Hawley, ed, Corruption Watch, 2018).
\textsuperscript{151} James Gobert & Maurice Punch, \textit{Rethinking Corporate Crime} 236 (2003).
\textsuperscript{153} R v Innospec Limited, Sentencing Remarks, Crown Court at Southwark, March 26, 2010, Thomas LJ.
Looking forward for the DPA regime in England and Wales

In order to provide effective deterrence against corporate crime, DPAs need to provide, symbolically and instrumentally, for punishment, public confidence, prevention and rehabilitation. Within E+W, DPAs also need to meet the government’s stated goals for the criminal justice system outlined in 2014 which are: to reduce crime; to reduce re-offending; to punish offenders; to protect the public; to provide victims with reparation; to increase public confidence; and, to ensure the system is fair and just.¹⁵⁴

Given the centrality of DPAs in negotiating a resolution to criminal allegations, this chapter next takes a step back to ask important questions as to what a ‘principled’ DPA regime should look like, not least: how should they be designed to ensure that corporate economic crime is punished and deterred in a way that is both effective and engenders public confidence, as well as providing a pragmatic approach to achieving swifter, and more cost effective criminal justice outcomes?

Financial penalties under the DPA regime

The Crime and Courts Act 2013 specifically states that ‘the amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea.’¹⁵⁵ This was reiterated in the DPA Code of Practice drawn up by the prosecuting bodies, the SFO and CPS.¹⁵⁶ In line with Lord Thomas’ judgement in Innspec, this was clearly designed to avoid overbroad exercise of discretion by prosecutors and what might be perceived as ‘cosy deals’. To complement the introduction of the DPA regime, the Sentencing Council issued a Definitive Guideline in October 2014 on Fraud, Bribery and Money Laundering offences, including for corporate offending.¹⁵⁷ Any reduction for a guilty plea under this Guideline is to be done in line with Section 144 of the Criminal Justice Act and the Guilty Plea guideline,¹⁵⁸ which establish that the maximum reduction of a fine for a guilty plea should be one third.

Notwithstanding this, as we have noted earlier, the second DPA introduced provision for a 50% discount (in contrast to a one-third discount in the first DPA). Leveson P’s reasons were as follows:

*given that the admissions are far in advance of the first reasonable opportunity having been charged and brought before the court, that discount can be increased as representing additional mitigation. In the circumstances, a discount of 50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality.*¹⁵⁹

¹⁵⁸ Sentencing Council, Reduction in Sentence for a Guilty Plea: Definitive Guideline (June 2017).
¹⁵⁹ SFO v XYZ Ltd, Preliminary Judgement (July 2017) para 57.
This increased discount has been used in each subsequent Agreement, despite the fact that it represents a departure from what Parliament approved in the legislation introducing DPAs. This discount mirrors the US Department of Justice’s Corporate Enforcement Pilot Programme that offered a similar reduction for companies that self-report. However, in E+W the discount has been applied equally to corporates that do not self-report but only cooperate with the SFO, as in the Rolls Royce case. This raises concerns that this discount affords preferential treatment to corporate wrongdoers.

In its recent report, the House of Lords Bribery Act Committee noted that the court is able to consider cooperation under the Sentencing Guidelines as mitigation beyond any reduction made for the equivalent to a guilty plea. However, it also observed that the reluctance of those who expressed reservations about the introduction of DPAs during the passing of the Crime and Courts Act ‘would have been greater and widely shared had [they] known that a one-third discount, far from being a maximum, might come to be treated as a starting point from which greater discounts might be calculated.’

Given that DPAs ought to punish and engender public confidence, as well as incentivise self-reporting, there is an inherent tension within the DPA regime. Arlen suggests, for example, that enforcement authorities must pre-commit to settlement with corporates that do self-report (or fully cooperate and remediate). Our view, however, is that there can be no such guarantee of a negotiated settlement simply by virtue of a self-report. We do, however, agree with views that a corporate that does not self-report should receive harsher penalties. In light of such debates, it is important to ask, then: how should penalties be calibrated and how can these different factors be weighed against each other? In particular, should the stipulation under the Sentencing Guidelines for corporate economic offences that ‘the fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law’, be given greater or as much weight than consideration of the potential impact on employees?

If the purpose of a DPA is to provide deterrence and to punish offenders, then penalties need to remain high enough to have ‘real economic impact.’ Given the importance of encouraging corporates to come forward and volunteer evidence of their own wrongdoing, particularly given the asymmetries of information between the prosecutor and the corporate, then

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160 Nicholas Werle, Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence and Judicial Review 128(5) Yale Law Journal, 1366 (2019).
161 SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc, Southwark Crown Court, Case No: U20170036, January 17, 2017, para 123
164 Jennifer Arlen, The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S (this volume).
providing for clear and principled reductions in penalty for those who self-report and cooperate is also a rational crime-reduction strategy. However, it could undermine confidence in the fairness of the justice system if corporates were to be offered ever lower penalties to incentivise self-reporting of wrong-doing. DPAs would then become more geared towards providing speedy outcomes than providing real deterrence and it could result in a sense that foreign bribery was in effect being de-criminalised. Therefore, any reduction in penalties for self-reporting and cooperation needs to be clear and principled with reductions for self-reports being higher than those for mere cooperation on its own.

The House of Lords Bribery Act Committee concurred with such an approach, stating that it ‘was not persuaded’ by arguments that penalties need to lowered below a 50% reduction in fine, given the advantages that corporates receive under a DPA from not facing a conviction.166 It concluded that: the Sentencing Guidelines need amending to make sure that they do apply to DPAs and that the highest discount should only be available to companies that have both self-reported and given full cooperation.167 The Committee also expressly rejected the introduction of non-prosecution agreements stating they would not ‘add anything of value’ to the DPA regime.168

The real issue is that, for DPAs to work in a manner that encourages corporates to self-report, it must be clear that they will face prosecution and conviction if they do not self-report and cooperate and that the courts will be willing and able to impose significantly higher penalties than those imposed on corporates that do self-report and cooperate. Serious attention also needs to be given as to whether the judicial trend - both in DPAs and in convictions - to allow generous payback timescales169 for companies serves the interests of justice. Indeed, such an approach is not used in other jurisdictions such as the US and Brazil.170 It is significant, and a positive development in our view, that the two most recent DPAs did specify that payment was required within 30 days.

The relationship between individual accountability and DPAs

One of the big concerns about maintaining public confidence in DPAs is whether they could come to be seen as a means for corporatons to buy their way out of a prosecution171 or could come to represent just a ‘cost of doing business’ for companies.172 Following US experience,
Judge Rakoff at Law Review Symposium: fines not enough to deter

particularly since the financial crisis of 2008, there has been considerable focus on holding to account senior level individuals as a way to counter this charge. Judge Rakoff, for instance, has stated that ‘prosecuting high-level individuals is the best deterrent’. Werle makes a similar point, saying that ‘to deter criminality by [Too Big To Jail] firms, prosecutorial strategy should credibly threaten culpable managers with monetary and non-monetary penalties’. While individual liability is essential, it is not a substitute for corporate liability, as we have elaborated earlier, because on its own it neither requires nor necessarily engenders corporate reform. As Gobert and Punch put it: “[w]orkers are expendable, and even the most highly respected directors can be replaced, even if not so easily. If a company’s ethos is such that it is prepared to tolerate illegality that is profitable, the conviction of the company’s directors, officers, managers and employees may have little impact on the approach it takes to its business”. Nonetheless, individual liability is, we contend, an essential complement to corporate liability.

The issue arises as to which individuals are prosecuted. A significant risk is that lower level employees and managers may be ‘scape-goated’ by a company in the quest to achieve individual liability. Most commentators concur that it is senior level management where culpability needs to be identified. However, such culpability is not always so easy to uncover. Paper trails disappear the higher up the firm a prosecutor goes and what Buell calls the ‘responsibility gap’ emerges. A failure to act or supervise at a senior level moreover may not necessarily give rise to criminal liability. Unless individuals are made criminally liable – for example, some advocate in favour of holding individuals liable for failure to prevent wrongdoing or as accessories to criminality - it is not clear how easily this situation can be addressed.

Some critics have argued that the use of DPAs in itself effectively shields individuals – particularly senior level individuals - from prosecution. For example, one study examined DPAs and NPAs used against financial institutions between 2001-2014, and found that individuals – mainly low-level employees - were prosecuted in only a little over a third of cases. Another study concluded that, between 2008-2015, in the context of FCPA enforcement, only 9% of the 42 DPAs or NPAs used to resolve FCPA violations resulted in enough to deter corporate crime’, (12 October 2018) available at https://www.law.umn.edu/news/2018-10-12-judge-rakoff-law-review-symposium-fines-not-enough-deter-corporate-crime


175 Nicholas Werle, Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigation, Deterrence and Judicial Review, 128(5) Yale Law Journal. 1366 (2019)


178 Ibid.

179 And of Non-Prosecution Agreements in the US.


criminal charges against individuals. In contrast, 75% of cases where the corporate was either criminally indicted or entered a guilty plea did result in such charges. Werle argues that it may be the way that investigations into corporates under DPAs are structured (namely, with strong reliance on corporate internal investigations for evidence and shortened investigations that do not have to compile evidence to the standard needed for a conviction) that is to blame.

In response to the criticism about lack of senior level accountability, the US DOJ Yates Memo sought to require corporates to hand over evidence of individual wrongdoing, in order to qualify for cooperation credit. More recently this was amended to require evidence in relation to individuals who authorised or were responsible for wrongdoing. However, it is not clear how successful this has been. Since the Yates memo was released in December 2015, 83% of FCPA corporate enforcement actions (again the vast majority being DPAs and NPAs) have lacked any individual prosecutions.

In E+W, meanwhile, none of the DPAs so far have resulted in successful prosecutions. In two instances, no prosecutions were brought (Rolls Royce and Standard Bank); in one instance charges were brought against former senior executives but the case was ultimately dismissed by the trial judge (Tesco), in another the individuals were acquitted by the jury (Sarclad) and in the final DPA the criminal investigation is at the time of writing ongoing (Serco).

As the reaction to the announcement that no charges would be pursued against individuals in the Rolls Royce case shows, individual accountability is critical to public confidence in DPAs in E+W. As the House of Lords Bribery Act Committee put it: ‘we share the strongly held views of our witnesses that the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted’. Ensuring that DPAs entail some level of senior executive accountability, even where criminal prosecutions cannot be achieved, is essential. This can be done in certain ways:

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188 It is also worth noting that the one guilty plea under s.7 of the Bribery Act did not result in any individuals being prosecuted.
1. By ensuring that the DPA regime makes clear that a DPA will only be given, or a reduction in penalty afforded, where corporates genuinely provide prosecutors with evidence that enables them to bring prosecutions against (senior) individuals (although individual prosecutions are not always successful). The House of Lords Bribery Act Committee recommended that ‘the cooperation expected of a company must include all available evidence which might implicate any individuals’;\(^{191}\) and

2. By ensuring that, where criminal prosecution of individuals is not possible, other civil and regulatory measures, such as disqualification from management position or disgorgement of personal benefit, are automatically considered and where possible taken.

Nonetheless, looking at ways to ensure individual accountability does not necessarily address some of the concerns about how an individual’s rights can be protected when a corporate enters into a DPA. The issue of whether DPAs can provide fair process to individuals emerged with the Standard Bank DPA, when the Statement of Facts named an employee in the Bank’s Tanzanian subsidiary as having engaged in bribery. As legal commentators argued at the time, the fact that individuals could be named who have not been subject to a trial caused potential unfairness.\(^{192}\) In the Tesco case, individuals were subject to a trial, however legal commentators have criticised the potential injustice that while the case against individuals was dismissed by a court, the DPA published shortly after named those same individuals as having engaged in criminal behaviour.\(^{193}\)

There is no doubt that there needs to be a more standardised way of weighing individual prosecutions and transparency in DPAs and that real debate needs to be had about the ideal way forward. In the meantime, calls for individuals not to be named in DPAs remain contentious. There have also been call for DPAs be made available to individuals in corporate economic crime cases to overcome such issues – calls that some, including the former General Counsel of the SFO, have suggested would create a ‘two-tier criminal justice system’ with white collar criminals being given special status before the law.\(^{194}\) One possible way forward here might be for enforcement agencies to ensure that any individual wrongdoing is fully investigated and individual guilt established before the announcement of a DPA.\(^{195}\) Once the guilt of the controlling mind has been established, it is clear that the corporation could realistically face prosecution as the identification test has been met. Of course, though, the reverse also applies: if individuals are not successfully prosecuted, then it can be expected that corporates would be much less likely to enter into a DPA.

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\(^{194}\) Kinglsey Napley, DPAs: good deals or two-tier system? – Alun Milford quoted in the Times, June 20, 2019.

Rehabilitation and Recidivism

DPAs should also address the need for rehabilitation and preventing re-offending. This could be achieved by ensuring that corporates have robust independent corporate monitorships imposed as part of the terms, and that the results of these monitorships are reported upon in public at the end of the term of the DPA. So far, the DPA regime has been weak on imposing independent monitorships. In the Sarclad case, the company’s chief compliance officer was required to provide an annual report on the company’s internal compliance review.\textsuperscript{196} In Rolls Royce, the corporate was allowed to retain the existing external compliance advisor appointed before it entered into a DPA despite the fact that this raises some questions about their full independence. Furthermore, there is no mechanism for ensuring that information is made public at the end of a DPA about the success and results of remedial measures and compliance reform.

Ensuring that a corporate’s policies, practices and cultures are reformed to promote pro-social behaviours is clearly both desirable and necessary. Addressing the underlying values and norms can prevent future criminal behaviour and while the ‘tone from the top’ is fundamental to this, the ‘tone from the middle’ is also essential as relationships between middle managers and ‘ordinary employees’ are arguably more significant.\textsuperscript{197}

However, the success of such structural reform is one of the contentious issues in the US, as recidivism among corporate offenders offered a DPA has occurred on several occasions, including for foreign bribery offences.\textsuperscript{198} As a result, in 2017, the US DOJ announced that its leniency policy under its Corporate Enforcement Policy would only provide a one-time credit for corporates.\textsuperscript{199} In E+W, this issue was addressed at the outset, with the DPA Code of Practice requiring prosecutors and the court to consider whether there has been a history of similar conduct.\textsuperscript{200} However, as the first DPA showed, ‘similar conduct’ can be construed very narrowly,\textsuperscript{201} with previous conduct that was not directly connected to the alleged criminality at the heart of the DPA discounted.


\textsuperscript{200} SFO/CPS, Deferred Prosecution Agreements Code of Practice (2014), para 2.8.1.i.

\textsuperscript{201} Corruption Watch, The UK’s First Deferred Prosecution Agreement: Good news for the SFO but worrying news for Tanzania and the fight against Bribery, December 2015.
Repeat use of DPAs with corporates that have engaged in repeat criminality undermines confidence in their use as a tool for deterrence and raises serious questions about the effectiveness of previously imposed rehabilitation measures. Oded has argued that rather than excluding companies from consideration for future DPAs, enforcement authorities should develop ‘gradually escalating enforcement responses’ to recidivist companies.202 This proposal does not, however, address the issue of whether such an approach ensures that the justice system is perceived as fair. Repeat offending is penalised heavily in most justice systems. Furthermore, it seems unlikely that just increasing fines on recidivist companies would necessarily achieve real deterrence. Recidivist companies would, we suggest, need exceptional circumstances to be eligible for a DPA. However, for recidivism to be effectively deterred, the risk of losing public contracts or licences as a result of a conviction, as Sope Williams-Elegbe explores in her chapter,203 needs to be more than theoretical, and a genuine threat.

Conclusion

DPAs are a new tool in E+W and there are still teething issues in how they are being implemented. Some of these issues relate to confusion about the underlying purpose they serve. While there are ongoing debates and controversies as to whether DPAs are indeed an appropriate response to corporate criminality,204 in this chapter we have adopted a more pragmatic approach to what DPAs ought to do – given that they appear here to stay. We argue that DPAs must effectively punish corporates, imposing fines which have ‘real economic impact’. We also argue that individual liability is essential to the efficacy of DPAs, and that where criminal prosecutions cannot be achieved of senior level executives, there must be other means of ensuring that those who were in charge of the corporation at the time of wrongdoing face some form of penalty. Additionally, we argue that DPAs must allow for rehabilitation and reform of the corporate actor by imposing significant independent monitorships of corporate governance. Ultimately, we contend, in the context of E+W, the DPA regime will only work effectively when those who do not self-report or cooperate face a strong chance of being detected and face significantly higher penalties upon conviction in the courts than corporates that receive a DPA. This is something the government has yet to properly address.

203 Sope Williams-Elegbe, The Implications of Negotiated Settlements on Debarment in Public Procurement: A Preliminary Inquiry (this volume).