Impunity for Sale

Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?

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Abstract: Deferred Prosecution Agreements (DPAs) have emerged as a contentious legal instrument, as they allow corporations to negotiate their way out of criminal liability without facing the full weight of a trial. This paper aims to explore the inherent benefits of DPAs – such as the potential for corporate reform, cooperation with law enforcement, preservation of jobs, and economic stability – while highlighting the criticisms, including concerns about accountability, transparency, and the perception of impunity. This article argues that, when appropriately structured and administered, DPAs provide benefits that significantly outweigh their drawbacks, as they offer a practical and flexible solution for addressing corporate wrongdoing where traditional criminal prosecution may be impossible or excessively burdensome. Nevertheless, their current limitations call for legislative amendments aiming at achieving a fairer and more comprehensive legal framework. These changes should address issues such as ensuring transparency in DPA negotiations, establishing clear criteria for DPA eligibility, and enhancing judicial oversight.

Keywords: Deferred Prosecution Agreements; Negotiated Justice; Law Enforcement Cooperation; Impunity Concerns; Legislative amendments.

1. *Introduction*

A Deferred Prosecution Agreement (DPA) is a negotiated settlement between a prosecuting authority and a corporation. The aim of this tool is to hold off prosecuting a corporate offender charged with allegations of wrongdoing under the condition that the company agrees to certain terms and conditions, such as implementing reforms, paying fines, or cooperating in an investigation.

DPAs represent an example of 'negotiated justice', not unlike the plea-bargaining mechanism present in several jurisdictions: in exchange for an early guilty plea, individuals can enjoy a wide array of incentives, such as a lighter sentence or a reduction in the charge[1].

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Following the same logic, settlements in response to corporate wrongdoing – such as Civil Recovery Orders (CROs) and DPAs – allow for negotiation of the trial for legal persons, with a peculiar difference: whereas with plea bargains the defendant pleads guilty to the offense, receiving a definitive criminal sentence, this is not the case with DPAs or CROs, as companies entering such agreements either temporarily avoid criminal conviction, or divert the trial from criminal to civil or administrative[2].

In the last decades, the employment of these innovative legal mechanisms at the intersection of corporate law and criminal justice has surged as a tool in resolving legal challenges faced by legal persons. However, as corporations increasingly opt for DPAs, questions arise in relation to their implications for corporate accountability: indeed, corporations may potentially negotiate their way out of liability, allowing them to escape the consequences of their misconduct.

The aim of this article is to understand whether the positive aspects of this form of 'negotiated justice' outweigh the negative ones, in particular the possibility for corporations to escape a criminal conviction through the payment of a fine. In fact, the promise of a quick and negotiable agreement with the prosecution in lieu of a lengthy criminal trial represents an important incentive for corporations to self-report, repent, and cooperate. However, it is often seen by the general public as a way for corporations to buy their way out of a trial, as the fine allows them to turn a new leaf and receive blanket immunity for their past behavior[3].

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[1] Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* at 13 (Palgrave Pivot 2018).

[2] Gennaro F. Vito and Deborah G. Wilson, *The American Juvenile Justice System* at 22 (Sage Publications 1985).

[3] Susan Hawley, Colin King, and Nicholas Lord, *Justice for Whom? The Need for a Principled Approach to Deferred Prosecution Agreements in England and Wales*, in Tina

DPAs and other instruments that allow for 'negotiated justice' can be abused by corporations to 'wipe the slate clean' from their past crimes and keep doing business as usual. Nevertheless, the view represented in this article is that – if implemented correctly and within set boundaries to avoid exploitation – they present features that benefit not only the company, but also public prosecutors, the state, and society as a whole. Examples of such positive aspects are: better distribution of resources, as a potentially multiple-years-long trial is avoided; higher influx of funds as a result of company wrongdoing, due to the fines agreed upon usually being much higher than the criminal penalties resulting from a trial; incentives for the company to cooperate in the subsequent investigations; creation of a 'culture of compliance', as companies generally show abidance to a long-term compliance program to prevent further violations in the future[4].

2. *Legal Framework of Deferred Prosecution Agreements*

Søreide & Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* at 325 (Edward Elgar 2020).

[4] Juliette Jabkhiro, *McDonald's agrees to pay $1.3 bln to settle French tax dispute* (Reuters 2022), available at https://www.reuters.com/business/french-prosecutor-proposes-mcdonalds-pay-1245-bln-euros-settle-tax-dispute-2022-06-16/ (last visited May 2, 2024). A concrete example showing the positive aspects of DPAs is offered by American fast food giant McDonald's, which in 2022 paid more than 1.2 billion euros to avoid a legal investigation over tax evasion accusations. The sum paid amounted to more than two times the amount of tax McDonald's had avoided, resulting in a net gain for the French State; at the same time, McDonald's managed to avoid a lengthy and unpredictable legal case. Another successful employment of negotiated settlements for corporate wrongdoing is represented by French airline Airbus, which in 2020 agreed to pay more than $3.9 billion in penalties to resolve foreign bribery charges with authorities in France, the United States, and the United Kingdom; see also U.S. Department of Justice Office of Public Affairs, *Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case* (January 31, 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (last visited May 2, 2024).

In the past, when corporations came under scrutiny for potential criminal wrongdoing, they confronted a binary set of outcomes: they would be either formally charged with criminal offenses, or they would face no charges at all. From the late 1990s onward, federal prosecutors acquired an additional option at their disposal, namely the ability to engage with companies through a legal mechanism known as 'Deferred Prosecution Agreement', thereby introducing a middle-ground approach to resolving such matters[5].

2.1. *Definition and Historical Evolution*

To properly delve into the subject at hand, it is crucial to begin by understanding the concept of 'deferred prosecution' and establishing a clear definition of DPAs. Within the framework of deferred prosecution, a prosecutor who has acquired an indictment against an alleged criminal chooses to defer the commencement of formal legal proceedings. This choice is contingent upon verification of whether the individual, or entity, subject to the indictment, acknowledges their wrongdoing and undertakes the commitment to a program of rehabilitation or remediation[6].

Initially, the practice primarily involved the use of Non-Prosecution Agreements (NPAs). Subsequently, it became apparent that these were ineffective in achieving their intended purposes; thus, DPAs were introduced. Indeed, these are agreements in which a prosecutor defers the initiation of proceedings on the condition that the (alleged) offender acknowledges the wrongdoing, commits to remedial or rehabilitative measures, and adheres to the prescribed obligations[7]. Should these conditions be fulfilled within a

[5] John Gibeaut, *A Matter of Opinion: Speakers Debate Whether Deferred Prosecution Agreements Help Corporations*, 92 American Bar Association Journal, 58 (2006).

[6] Vanessa Blum, *Justice Deferred*, Legal Times 1 (2005).

[7] See, for example, UK Serious Fraud Office (SFO), *Deferred Prosecution Agreements*, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ (last visited

predetermined time frame, the prosecutor may opt to dismiss the charges, effectively granting exemption from criminal prosecution to the accused party. Conversely, in the event of a breach of the agreement's terms, the prosecutor maintains the prerogative to initiate legal action predicated on the original allegations, often leveraging the admissions made by the individual or entity during the course of DPA negotiations[8].

DPAs have a historical trajectory that traces back to the late 19th century in the United States. Early forms of deferred prosecution (also referred to as 'pretrial diversion') were developed primarily for cases involving juvenile and drug offenders[9]. This approach aimed to provide a chance for rehabilitation and reduce the burden on the criminal justice system, especially for first-time offenders. The formal endorsement of DPAs by the Judicial Conference of the United States occurred in 1947, and their prevalence experienced a substantial upsurge during the 1960s[10]. The legal foundation granting the federal government the power to partake in such agreements is rooted in the Speedy Trial Act of 1974, precisely delineated within Section 18 U.S.C. and 3161(h)(2), which refers to instances in which "prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct"[11].

May 2, 2024) (a UK DPA is defined as "[...] an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organization meets certain specified conditions").

[8] Blum, *Justice Deferred* at 1 (cited in note 6).

[9] Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Columbia Law Review 1863, 1864 (2005).

[10] Nick Werle, *Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigating, Deterrence, and Judicial Review*, 128 Yale Law Journal 1366, 1408 (2019).

[11] Speedy Trial Act, 18 U.S.C. §3161(h)(2) (1974).

During the 1990s, there was a notable shift in the utilization of DPAs within the legal landscape: rather than primarily employing DPAs for the resolution of minor infractions committed by natural persons, prosecutors increasingly turned to this mechanism to address complex and substantial cases of corporate misconduct[12]. Indeed, a DPA facilitates the negotiation of a resolution between prosecutors and corporate defendants, encompassing an acknowledgment of wrongdoing, a commitment to instigate reforms, and the provision of a financial penalty[13].

2.2. Ratio *of DPAs: Strategic Tools in Law Enforcement*

The underlying justification for the utilization of DPAs resides in the endeavor to strike an equilibrium between accountability and expediency within the framework of a legal system, with a specific focus on instances encompassing corporate misconduct. The US Department of Justice describes DPAs as "an important middle ground between declining prosecution and obtaining the conviction of a corporation"[14]. In this context, it is remarkable that the adoption

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[12] Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecution*, 2015 BYU Law Review 307, 315 (2015). See also Court E. Golumbic and Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 Hastings Law Journal 1293, 1303 (2014) (the authors report that the initial noteworthy instance of employing a DPA within the sphere of corporate criminal conduct occurred in 1992, when the Southern District of New York negotiated one with Prudential Securities. This marked a significant turning point in the application of DPAs, as it signaled their introduction to address corporate wrongdoing).

[13] Megan J. Parker and Mary Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime*, 30 Journal of Financial Crime 940, 942 (2022).

[14] United States Department of Justice, *Justice Manual* ss. 9–28.200 (2018), available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations (last visited May 2, 2024). See also, Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 944 (cited in note 13) (the authors affirm that DPAs offer prosecutors a crucial alternative

of DPAs has proliferated to such an extent within the United States that approximately 80% of all instances involving corporate bribery are presently channeled through this mechanism for resolution[15].

There are numerous advantages associated with DPAs for individuals and corporate entities. First and foremost, deferred prosecution makes it possible to "avoid the stigma associated with formal processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction to the stigma"[16]. In fact, when an individual or a corporation is subject to a criminal accusation and faces the prospect of a trial, the repercussions extend beyond legal penalties. The societal stigma attached to corporate misconduct can have far-reaching consequences, affecting the company's reputation, shareholder trust, employee morale, and even its ability to secure contracts and partnerships.

Furthermore, DPAs grant prosecutors the authority to compel corporate entities involved in illegal practices to undergo significant transformations[17]. These can encompass: the implementation of structural changes, which may involve restructuring management, enhancing corporate governance, or implementing new oversight mechanisms to prevent future misconduct; adherence to ethical guidelines, in order to ensure that the company operates with integrity and in compliance with the law; and the establishment of internal monitoring mechanisms, that include appointing compliance

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between resource-intensive criminal trials and releasing a corporation due to insufficient evidence. Consequently, DPAs enhance prosecutors' ability to hold corporations accountable for wrongdoing).

[15] Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC Davis Law Review, 69 (2015).

[16] Vito and Wilson, *The American Juvenile Justice System* at 22 (cited in note 2).

[17] Melissa L. Rorie, *The Handbook of White-Collar Crime* at 286 (Wiley Blackwell 2020 [2019]).

officers or internal monitors responsible for overseeing the adherence by the corporation to the terms of the agreement[18].

Additionally, prosecutors can impose obligations related to reporting, enhancements to corporate compliance programs, and policies, as well as a range of remedial measures, including substantial monetary penalties[19]. In particular, on the one hand, the reporting requirements involve the regular provision of information to prosecutors about the company's compliance efforts, and on the other, the remedial measures serve as both a sanction for past misconduct and a deterrent against future wrongdoing. Finally, prosecutors have the option to appoint an independent monitor who oversees and assesses the corporation's activities for the duration of the agreement[20].

For what concerns the deterrent impact of DPAs, it is proposed that they serve as effective deterrents because they enable prosecutors to seek remedies that extend beyond what could be achieved in a corporate trial[21]. Indeed, while corporate trials primarily focus on legal culpability and penalties, DPAs emphasize proactive measures, structural reforms, ethical standards, ongoing reporting, and restitution to victims. These remedies aim to address the root causes of misconduct, prevent future violations, and promote a culture of compliance within the corporation.

Moreover, it has also been observed that corporations find DPAs attractive because they offer a comprehensive and relatively rapid resolution to allegations of misconduct[22]. Importantly, DPAs

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[18] See *Ibid*.

[19] 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,* 155 Michigan Law Review, 135 (2016).

[20] See *Id*., at 141.

[21] Cindy R. Alexander and Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 American Criminal Law Review 537, 555 (2015).

[22] DPAs generally expedite the resolution process in contrast to prolonged criminal trials. This expeditiousness holds particular significance for corporations, as it

allow companies to avoid the potentially severe consequences of criminal liability, such as the revocation of licenses or the debarment from government contracts, which can have long-lasting and detrimental effects on a company's operations, reputation, and financial stability[23]. On the contrary, by opting for a DPA, corporations can continue their operations without significant disruption, and this is essential for maintaining employee livelihoods, business relationships, and overall economic solidity.

Finally, corporate settlements – specifically in the form of DPAs – are increasingly recognized as a crucial mechanism for addressing corruption cases. As an illustrative example, Article 37 of the United Nations Convention against Corruption (UNCAC)[24] establishes the potential to incentivize individuals involved in corrupt activities to furnish pertinent information to competent authorities for investigative and evidentiary purposes, in exchange for mitigated penalties of a less severe nature[25]. In this context, utilizing DPAs in the fight against corruption presents several expected benefits: in particular, they offer opportunities to advance corporate governance reform by mandating the inclusion of anti-fraud, anti-bribery, and anti-corruption training programs as integral conditions of the agreement and incentivize companies to voluntarily disclose

permits them to promptly conclude the legal matter and redirect their attention towards their core operations.

[23] Ben Allen, *Deferred Prosecution Agreements – A New Weapon in the Anti-Fraud and Corruption Armoury?*, 66 Governance Directions, 285 (2014).

[24] Art. 37, para. 1-2, United Nations Convention against Corruption (UNCAC) 31 October 2003.

[25] Robert R. Strang, *Plea Bargaining, Cooperation Agreements and Immunity Orders*, in 155th International Training Course Visiting Experts' Papers, Resource Material series No. 92, United Nations Asia and Far East Institute 30, 33 (2014).

instances of wrongdoing and actively cooperate with law enforcement authorities[26].

2.3. *The OECD's Push for Deferred Prosecution*

In 1989, the Organisation for Economic Co-operation and Development (OECD) established an *ad hoc* Working Group with the specific mandate of examining the laws related to the practice of bribing foreign officials among its member countries[27]. Subsequently, the efforts of this Working Group resulted in the formulation of the Recommendation on Combating Bribery in International Business Transactions, which gained ministerial-level approval from the OECD Council in 1994. This comprehensive Recommendation strongly encouraged member states to adopt and enforce "effective measures to detect, prevent and combat bribery of foreign public officials in international business"[28]. Thereafter, the OECD officially endorsed and ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which became effective in February 1999[29]. This Convention seeks to redress

[26] Roberto Martinez B. Kukutschka and Marie Chêne, *Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption* (Transparency International, October 13, 2017) available at https://knowledgehub.transparency.org/helpdesk/deferred-prosecution-agreements-plea-bargaining-immunity-programmes-and-corruption (last visited May 2, 2024).

[27] Dan Hough, *Tackling Corruption: The International Dimension*, in Dan Hough, *Analysing Corruption* at 112 (Agenda Publishing 2017).

[28] OECD, *Information Sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2, available at https://www.oecd.org/gov/ethics/2406452.pdf (last visited May 2, 2024).

[29] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* 15 February 15, 1999, available at https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-booklet.pdf (last visited May 2, 2024).

the detrimental consequences of corruption, which hinder economic development, distort fair competition, and erode public trust[30].

Nevertheless, the OECD Convention did not address matters related to negotiation and non-trial resolutions. Consequently, in 2009 the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. This Recommendation furnished comprehensive and meticulous guidelines – along with precise measures – aimed at preventing and detecting instances of bribery; it emphasized the importance of corporate liability, safeguarded whistleblowers, and facilitated the restitution of gains acquired through corrupt practices[31].

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[30] Johann G. Lambsdorff, *An Empirical Investigation of Bribery in International Trade*, 10 European Journal of Development Research 40, 44 (1998). See also, Alvaro Cuervo-Cazurra, *Corruption in International Business*, 51 Journal of World Business, 35 (2016) (according to the author, countries characterized by higher levels of corruption tend to experience various adverse effects, including diminished economic growth, reduced investment, decreased effectiveness of public policies, and lower levels of foreign investment).

[31] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* Working Group on Bribery in International Business Transactions (2009), available at https://web-archive.oecd.org/2019-05-10/111174-OECD-Anti-Bribery-Recommendation-ENG.pdf (last visited May 2, 2024) (in particular, Annex II – titled "Good practice guidance on internal controls, ethics, and compliance" – explains: "This Good Practice Guidance - hereinafter "Guidance" - is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programs or measures for preventing and detecting the bribery of foreign public officials in their international business transactions - hereinafter "foreign bribery" -, and to business organizations and professional associations, which play an essential role in assisting companies in these efforts. It recognizes that such programs or measures should be interconnected with a company's overall compliance framework to be effective. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programs or measures for preventing and detecting foreign bribery"). See also Mark Pieth, *The 2009 Recommendation of the OECD on Combating Bribery: Bringing Public Sector and Private Sector Initiatives Together*, in Nicoletta Parisi,

In 2018, as the OECD Working Group on Bribery began the preparation for reviewing its 2009 Recommendation, one of the identified areas for additional attention was the development of fundamental guidelines aimed at standardizing the worldwide utilization of negotiated settlements, commonly referred to as 'non-trial resolutions', within the 44 member states of the Group[32]. The objective of this effort was to create a set of principles that would facilitate a more uniform and coherent approach to deferred prosecution resolutions across these member states. Such standardization was seen as essential to enhance transparency, fairness, and effectiveness in dealing with cases of bribery and corruption on an international scale.

More recently, in 2021, the OECD made amendments to its 2009 Recommendation, incorporating new sections pertaining to critical subjects that have emerged, or that have undergone substantial development within the sphere of anti-corruption efforts. Of notable importance is the inclusion of a new section titled "Non-Trial Resolution"[33]: in paragraph XVIII, it is recommended that member states take measures to guarantee that non-trial resolutions employed for cases related to offenses under the OECD Anti-Bribery Convention adhere to the principles of due process, transparency, and accountability[34]. Specifically, member countries are required to adopt clear procedures and set transparent criteria for utilizing non-trial resolutions, to provide accessible information on the benefits of their usage, and to ensure that they result in clear, effective, proportionate, and dissuasive sanctions for foreign bribery cases.

Marinella Fumagalli Meraviglia, Andrea Santini and Dino G. Rinoldi (eds), *Scritti in Onore di Ugo Draetta* at 531-532 (Editoriale Scientifica 2011).

[32] Drago Kos, *Foreword*, in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* at xii, xiii (Edward Elgar 2020).

[33] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* at 10 (cited in note 31).

[34] See *Ibid.*

To conclude, the OECD's 2021 amendments highlight a well-defined emphasis on promoting deferred prosecution through transparent and accountable non-trial resolutions to combat bribery and corruption.

2.4. *Comparative Exploration of the Subject*

The comparative analysis of legislation related to DPAs inevitably commences from the United States, where this approach was first introduced. Indeed, as discussed above, this instrument received formal approval in 1947, with the legal basis established in the Speedy Trial Act of 1974, Section 18 U.S.C. and 3161(h)(2)[35]. Although the initial iterations of DPAs were tailored for juvenile and drug-related cases, a notable shift occurred in the 1990s, with prosecutors progressively employing this mechanism to address instances of corporate misconduct[36]. After gaining steam within the American legal system, this innovative procedural mechanism was transposed and assimilated into the legal frameworks of numerous jurisdictions across the global spectrum.

In the United Kingdom, the Government disclosed its intention to implement DPAs in October 2012, formally establishing them within the framework of the Crime and Courts Act 2013[37], which obtained royal assent in April 2013. This introduction was seen as a significant advancement in combating serious economic crimes and, in this context, the Deferred Prosecution Agreements Code of Practice laid out clear guidelines for negotiating DPAs, including establishing fair, reasonable, and proportionate terms for the agreements[38]. The

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[35] 18 USC § 3161 (h)(2).

[36] David Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Maryland Law Review 1295, 1303 (2013).

[37] Crime and Courts Act, s. 45 (2013) repealed by S.I. 2014/258, art. 2(a).

[38] Allen, *Deferred Prosecution Agreements* at 285 (cited in note 23) (the author explains that the terms for the DPA typically encompass financial penalties, requirements for future compliance, and efforts to provide redress to victims when feasible).

UK judiciary plays a substantial role in the DPA process, requiring judicial approval at key stages, such as evaluating negotiation progress and final agreement terms. On the one hand, a corporation can only be invited to negotiate a DPA if the prosecutor believes it would serve the public interest; on the other, the prosecutor has the ultimate discretion in determining whether to engage in negotiations and whether to extend a DPA offer to the company at the end of these discussions[39].

While certain similarities exist between the DPA frameworks in the US and the UK, such as the fundamental requirement of cooperation for DPA approval in both jurisdictions, a significant difference stands out. The discrepancy pertains to the extent of judicial oversight in the two countries' DPAs[40]. Specifically, the United States features a comparatively limited level of judicial scrutiny over the terms of DPAs, meaning that a judge does not need to approve the final DPA and that the judicial review often focuses on whether the agreement is within the bounds of legality and fairness, without delving deeply into the specific terms or conditions of the agreement. Conversely, in the United Kingdom, a judge can assess whether the DPA terms are 'fair, reasonable, and proportionate'[41].

Stemming from their inception in the United States, DPAs have been introduced in Singapore by way of the Criminal Justice Reform

[39] King and Lord, *Negotiated Justice and Corporate Crime* at 68-70 (cited in note 1).

[40] Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared*, 8 Journal of International and Comparative Law 283, 284-285 (2021).

[41] Serious Fraud Office, Deferred Prosecution Agreements Code of Practice para 7.2 (February 2, 2014) available at https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (last visited May 2, 2024).

Act of 2018, under Part VIIA[42]. Singapore's approach to DPA approval closely mirrors that of the UK: in both jurisdictions, the process entails presenting evidence to the court that demonstrates the DPAs' alignment with the overarching principle of serving the 'interests of justice'. Additionally, they both demand a thorough evaluation to ensure that the terms of the DPAs are not only legally sound, but also characterized by being 'fair, reasonable, and proportionate' before they can attain approval[43]. Moreover, DPAs in Singapore were crafted with a specific focus on addressing economic crimes committed by corporate bodies, partnerships, or unincorporated associations.

Canada and Australia also drew inspiration from the UK system in shaping their own legal frameworks. In Canada, the Government introduced legislation to establish a DPA system on 27 March 2018[44], marking a significant shift in its approach to prosecuting economic crime: this new instrument incorporates a certain level of judicial oversight, aligning it more closely with the deferred prosecution models seen in the UK, as opposed to the US system[45]. In particular, the Canadian court's role encompasses a

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[42] Eunice Chua and Benedict Chan, *Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?*, 16 International Commentary on Evidence 1, 1-2 (2019).

[43] Criminal Justice Reform Act, Bill No. 14 (2018), at sec. 149F (the "Court approval of DPA" section establishes that "(1) When the Public Prosecutor and the subject have agreed on the terms of a DPA, the Public Prosecutor must apply by criminal motion to the High Court for a declaration (called in this section the relevant declaration) that (a) the DPA is in the interests of justice; and (b) the terms of the DPA are fair, reasonable and proportionate").

[44] Budget Implementation Act, Bill C-74, No. 1 (2018), at sec. 404 (the legislation formed an integral component of the amendments made to the Criminal Code and was encompassed within the omnibus budget legislation. More specifically, the modifications to the Criminal Code were located in Division 20 of Part Six of the budget bill).

[45] Norm Keith and Justine Reisler, *The New Canadian DPA Regime: An International Comparative Analysis*, 67 Criminal Law Quarterly 306, 333 (2019) (in the words of the authors, "Canada has implemented a regime with a degree of judicial oversight,

thorough evaluation of the terms within the agreement to prevent any undue leniency or excessive harshness, avoiding any potential misuse of the mechanism. Australia is also likely to introduce UK-inspired DPAs, which would allow for the resolution of criminal proceedings between the Commonwealth Director of Public Prosecutions and corporate entities[46]. The key aspiration is that DPAs will serve as a means to reduce the inherent risks and costs associated with criminal investigations and legal proceedings, while also providing a more effective approach to addressing corporate misconduct[47].

France is another country where DPAs are recognized and employed regularly. In December 2016, the Sapin II Law – known as *Convention Judiciaire d'Intérêt Public* (CJIP) or Judicial Public Interest Agreements –authorized a French variant of DPAs and established the French Anticorruption Agency (AFA)[48]. Under the CJIP arrangements, the traditional adversarial relationship between prosecutors and companies, often characterized as 'prosecutors versus lawyers', is altered: negotiations in this context run in parallel - rather than conflicting - directions. The scope of CJIP is limited to specific offenses, including corruption involving both public and foreign officials, as well as offenses related to aggravated tax fraud and evasion[49]. Under such legislation, the control over the validity of these agreements rests with the President of the *Tribunal de Grande Instance*, who grants or denies validation following a public hearing,

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more in line with the deferred prosecution regimes in the United Kingdom and France, as opposed to the United States").

[46] Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 Sydney Law Review 187, 187-188 (2021).

[47] See *Id*., at 192-196.

[48] Keith and Reisler, *The New Canadian DPA Regime* at 330-331 (cited in note 45).

[49] French National Financial Prosecutor's Office, *Guidelines on the Implementation of the Convention Judiciaire d'Intérêt Public* Director of the French Anti-Corruption Agency (June 26, 2019), available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf (last visited May 2, 2024).

ensuring transparency[50]. If granted, the agreement is made public on the institutional websites of the Ministries of Justice and Economics. Conversely, prosecution proceedings are initiated if the court rejects the DPA, if the company withdraws from the agreement, or if the company fails to fulfill its obligations within the specified time frame.

Finally, several countries – such as Italy and Switzerland – currently lack legislative frameworks for DPAs. Notably, Italy's legislation concerning criminal corporate liability is relatively recent, as it was enacted just two decades ago with the Legislative Decree No. 231/2001[51]. Even if the framework presents a substantial incentive-based structure designed to encourage companies to swiftly restore their compliance with the law before the conclusion of legal proceedings against them, it does not provide for the possibility of entering into DPAs with the Public Prosecutor as a result of a company's cooperative behavior[52]. Similarly, Switzerland does not possess legal provisions that include the possibility of DPAs, notwithstanding the calls from legal scholars and practitioners asking for the introduction of such legislation.

3. *Critiques and Controversial Aspects*

[50] Stefania Giavazzi and Francesco Centonze, *Internal Investigations* at 89 (Giappichelli 2021).

[51] D. Lgs., 8 June 2001, No. 231.

[52] Andrea Puccio, *The Possibility to Enter into a Non-Prosecution Agreement in Case of Internal Investigation and Self-Reporting* (International Bar Association, September 1, 2022), available at https://www.ibanet.org/the-possibility-to-enter-into-a-non-prosecution-agreement-Italy (last visited May 2, 2024) (the author underlines how, in accordance with the stipulations found in Articles 12 and 17 of the Legislative Decree no. 231/2001, *post-factum* remedial actions (such as the adoption of a comprehensive compliance program designed to prevent further transgressions, the restitution of damages arising from the offense, and the willingness to allow for the seizure of unlawfully obtained profits) solely afford the company the opportunity to secure reduced fines in the event of conviction or to avert disqualifying sanctions).

While DPAs allow for a quick non-trial resolution of issues related to corporate criminal liability, constituting an alternative route that presents advantages for both corporations and governments, they also present several problematic aspects. Most of these are linked to the compatibility of such negotiation-based settlements with the basic principles and features of criminal law, such as the right to a fair trial, the theory of deterrence, and the public nature of criminal law[53].

3.1. *Violation of the Right to a Fair Trial and Violation of the Presumption of Innocence*

One of the fundamental principles that govern the criminal law systems of most jurisdictions is the right to a fair trial. This basic precept is enshrined in numerous national constitutions and international instruments alike[54], with several degrees of bindingness, reflecting its near-universal recognition by the international community, especially in matters of criminal law. The basic concept of the right to a fair trial prescribes that a defendant, including a corporate defendant, must be punished justly after the breach, and that the defendant's responsibility has been proven at

[53] Rob Evans and David Pegg, *Campaigners condemn closure of Rolls-Royce bribery inquiry* (The Guardian, February 22, 2019), available at https://www.theguardian.com/business/2019/feb/22/campaigners-condemn-closure-of-rolls-royce-bribery-inquiry (last visited May 2, 2024) (the article explains the criticism against the DPAs concluded by British engine manufacturer Rolls-Royce with authorities in the United Kingdom, the United States and Brazil at the end of a long-running global investigation to establish responsibility over the company's systematic bribery over three continents. Similar critiques were also moved against the DPO entered into by Swedish pharmaceutical giant GlaxoSmithKline and the United Kingdom).

[54] See, for example, Art. 10, Universal Declaration of Human Rights; Art. 14, 16, International Covenant on Civil and Political Rights; Art. 6, of the European Convention of Human Rights; Art. 47, EU Charter of Fundamental Rights; Art. 8, American Convention on Human Rights; and Art. 7, African Charter on Human and Peoples' Rights.

trial beyond reasonable doubt. However, these conditions are not fulfilled when a corporation concludes a DPA with the prosecution, agreeing to pay a fine and to have its own liberty of action restricted: in this case, a burden is imposed on the defendant without its guilt having been proven beyond reasonable doubt[55].

Moreover, the fact that DPAs allow prosecuting offices to exact punishment for corporations without having to actually demonstrate guilt at trial has given rise to the perception that such an instrument conflicts with the presumption of innocence, a second fundamental criminal law tenet deeply linked to the right to a fair trial. In fact, under a DPA, the offending company may be subject to burdens that are basically the corporate analog to restrictions of liberty in the case of a natural person, such as limits to its operations and surveillance by a government agent acting as a monitor, and are thus tantamount to some form of responsibility for the offense. Nevertheless, these 'pseudo-criminal' punishments are imposed on the corporate defendant without going through formal trial proceedings where the criminal guilt of the defendant can be established by the state beyond reasonable doubt from an initial baseline of presumed innocence[56].

3.2. *Weakening of the Deterrent Effect of Law*

A common criticism made against the use of DPAs in the context of criminal wrongdoing has to do with the 'theory of deterrence', the opinion according to which criminal penalties are aimed not only at punishing violators, but also at discouraging other people from committing similar offenses. This principle is an important foundation of the criminal justice system, as the fear of sanctions or punishment can convince would-be wrongdoers to

[55] Roger A. Shiner and Henry Ho, *Deferred Prosecution Agreements and the Presumption of Innocence*, 12 Criminal Law and Philosophy 707, 709 (2018).
[56] See *Ibid*.

refrain from committing criminal acts, thus decreasing overall crime[57].

In the context of corporate misconduct, critics argue that the use of DPAs by prosecution agencies effectively decreases the deterrent effect of criminal law. Such agreements allow companies to evaluate whether they can 'bear the risks' of legally questionable business practices, since they can easily cut a deal with the prosecution to defer the trial indefinitely. Thus, DPAs would amount to a sort of 'get-out-of-jail card' for the biggest corporations in the world[58], or of 'tax on corruption'[59], as businesses can use DPAs to their advantage by breaking the law in order to obtain important contracts and then avoid any prosecution in exchange for a fine. According to this vision, DPAs do not have the same deterrent effect as a criminal conviction or a traditional plea agreement, as they have the consequence of sheltering the offending corporation from third-party scrutiny and are accompanied by less adverse publicity than an admission of guilt[60].

However, others oppose this opinion, claiming that DPAs share the same punitive, deterrent, and rehabilitative effects as a guilty plea: by entering into such an agreement the company acknowledges wrongdoing, agrees to cooperate with investigations, pays a fine, and commits to improve its compliance program. If these conditions are not met, then the company has to face prosecution. Moreover, this instrument acts as a deterrent even though the company is allowed to avoid a criminal conviction and its costly consequences – such as

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[57] Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 Journal of Criminal Law and Criminology 765, 765-766 (2010).

[58] Miller, *More Than Just a Potted Plant* at 141 (cited in note 19).

[59] Simon St-Georges and Denis Saint-Martin, *The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules Against Business Corruption*, in Régis Bismuth, Jan Dunin-Wasowicz and Philip M. Nichols (eds), *The Transnationalization of Anti-Corruption Law* at 469, 479 (Routledge 2021).

[60] Alexander and Cohen, *The Evolution of Corporate Criminal Settlements* at 555-556 (cited in note 21).

loss of business licenses or debarment from government contracts –, because prosecutors are allowed to pursue remedies that go well beyond the scope of those achieved via criminal prosecution[61]. Indeed, the government may demand several forms of punishment as part of the contractual terms, which entail considerable burdens on the company entering the agreement: together with a sizeable fine, a DPA might require rigorous compliance programs, reforms and changes to the corporate board composition, tighter accounting and internal control measures, appointment of an outside monitor, self-investigation and self-reporting requirements, support for any ongoing judicial investigation, and prohibitions on operations in certain markets. Thus, such agreements are not necessarily more lenient than a guilty plea or a conviction, as corporations are on probation for the entire duration of the agreement and are subject to the sometimes-arbitrary conclusion that they have failed to comply with the agreement's terms, thus allowing the prosecution to initiate trial proceedings[62].

3.3. *Lack of Transparency, Consistency, and Judicial Review*

DPAs are often criticized for their perceived lack of transparency, as they tend to be privately negotiated behind closed doors[63], and are often concluded without disclosing the factors that led prosecuting agencies to grant one[64]. While the legislative framework of some countries requires publicity – as is the case in England and Wales, where the conclusion of a DPA requires the approval of a court following a public hearing and the publication of

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[61] See *Ibid*.

[62] Miller, *More Than Just a Potted Plant* at 141-142 (cited in note 19).

[63] Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement* at 64 (cited in note 15).

[64] Great Britain Ministry of Justice, *Consultation Paper CP9/2012: Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements*, 18 (May 2012).

the DPA and all relevant documents and information[65] – this is not always the case. As such, the opaqueness of the DPA process makes it difficult to know why a given reform was included in the terms or left on the table, or whether these reforms have actually yielded fruits, thus leaving the public in the dark regarding the harms, goals, and outcomes of an agreement[66].

Moreover, due to the fact that some countries – such as the United States – lack any form of written legal basis for the rules, conditions, and aims of DPAs, prosecutors tend to have excessive discretion in deciding whether to conclude such agreements and their contents[67]. As a consequence, DPAs end up being fully dependent on the single prosecutor that concludes one – who is not necessarily sufficiently well-equipped to mandate corporate reforms, effectively rehabilitate corrupt cultures, and appoint competent monitors –, leading to a diffused problem of consistency that, in turn, diminishes the predictability of the law. Similarly, a consistent preference for DPAs over traditional criminal trials does not allow for the generation of standards and precedents, which in Common Law countries are needed to prosecute similar cases and ensure a uniform application of the law. These factors contribute to fostering uncertainty and variability in the persecution of corporate wrongdoings[68].

In some jurisdictions, more notably the United States, the problems linked to the lack of transparency and consistency are further exacerbated by the minimal role reserved to courts over the

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[65] Crime and Courts Act, Sch. 17 para. 8 (2013).

[66] Miriam H. Baer, *Corporate Criminal Law Unbounded*, in Ronald F. Wright, Kay L. Levine and Russell M. Gold (eds), *The Oxford Handbook of Prosecutors and Prosecution* 475, 489 (OUP 2021).

[67] Great Britain Ministry of Justice, *Consultation Paper CP9/2012: Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations* at 18 (cited in note 64).

[68] Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 945-946 (cited in note 13).

justifications and contents of a DPA. This lack of judicial oversight gives rise to concerns over the inconsistency of the use of such instruments with the rule of law, as abuses of prosecutorial discretion inconsistent with established normative rules cannot be redressed by a judge[69]. In fact, the decision to defer is generally not subject to judicial review unless an applicable statute provides otherwise or a breach of contract occurs; furthermore, the decision of a prosecutor to terminate the agreement and proceed with the previously deferred criminal proceedings is not subject to judicial review[70]. This position has also been confirmed by several court decisions, such as in United States v. Fokker Services, where the D.C. Court of Appeals overturned the decision of the District Court of Columbia to reject a DPA due to its overly lenient negotiated terms, holding that DPAs are not subject to judicial review due to the separation between the executive and judicial powers[71].

3.4. *Evasion of Company Liability and Lack of Individual Accountability*

Another common critique has to do with the fear that companies might exploit DPAs to obtain immunity and redirect responsibility for their wrongdoings towards 'scapegoats'. Indeed, DPAs are often criticized for being nothing more than just 'window dressing', as they inadequately punish corporate defendants, allowing them to avoid criminal liability, and providing them with an instrument that shifts the blame towards their controlled companies or individuals linked to the company[72].

The misapplied use of subsidiaries to evade liability for the parent company is especially sought after by companies when the

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[69] King and Lord, *Negotiated Justice and Corporate Crime* at 75-76 (cited in note 1).
[70] See Greenblum, *What Happens to a Prosecution Deferred?* at 1869-1870 (cited in note 9) and Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 947-948 (cited in note 13).
[71] *United States v Fokker Services BV* 818 F.3d 733 (DDC 2016).
[72] Miller, *More Than Just a Potted Plant* at 141 (cited in note 19).

DPA contains exclusions or limitations to their operations and activities. In fact, the company might be incentivized to negotiate with the prosecutor and narrow the scope of application of the DPA to affect the activities of a subsidiary only; alternatively, the subsidiary may enter into a plea agreement on behalf of the holding company, thus allowing the latter to evade any restriction. The 2009 Pfizer case offers a notorious example of this practice[73]: in a press release, Pfizer Inc. announced it had pleaded guilty to resolve criminal and civil liability deriving from the illegal promotion of certain pharmaceutical products, but the guilty plea was actually made by a subsidiary, whereas Pfizer itself only entered a pretrial diversion agreement[74].

Individuals too – especially shareholders and employees – bear the risk of being 'turned in' for the company's wrongdoings in exchange for corporate impunity: as part of the cooperation with the prosecuting authority deriving from the conclusion of a DPA, companies are normally required to relinquish the attorney-client privilege attached to the internal investigations on suspected criminal conduct by the company's own employees, thus granting enforcement agencies access to privileged documents, interviews, and witness accounts[75]. As a consequence, employees are placed in an invidious position, since the government is allowed to gather evidence against them – including their statements to internal company investigators – without worrying about rights against self-incrimination and other constitutional guarantees[76]. In addition, they

[73] *Health Care Service Corporation v Pharmacia & Upjohn*, 05-CV-01699 CRB (D CAL 2012).

[74] Cindy R. Alexander and Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in Jennifer Arlen (ed), *Research Handbook on Corporate Crime and Financial Misdealing* 87, 137 (Edward Elgar 2018).

[75] Mitchell, Imwinkelried and Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege* at 284-285 (cited in note 40).

[76] Gibeaut, *A Matter of Opinion* at 58 (cited in note 5).

could even be charged with criminal offenses related to the conduct uncovered by an internal investigation[77].

Nevertheless, while charges have been brought against current or former employees in five out of the nine DPAs that have been concluded in England as of 2021, no conviction has ever been obtained against an individual[78]. This means that, ultimately, there is no corporate or individual accountability for the company's wrongdoing, as the company solves its liabilities by entering a DPA, and the subsequent investigations against the company's employees and shareholders only rarely result in them facing prosecution[79].

3.5. *Lack of reparation for damaged individuals*

Lastly, DPAs often fail to redress the damages suffered by individuals as a result of corporate wrongdoing, particularly in the context of bribes. In fact, while the statutes and guidelines regulating DPAs in some jurisdictions – such as the US and UK[80] – may contain clauses aimed at ensuring full compensation for the victims of corporate misconduct, it is not always clearly stated who the victims are and how their loss should be calculated.

Regulators normally identify the victim in the organization that the recipient of the bribe – the 'extorter' – represents and works for and equates the victim's loss to the financial gains obtained by the person who paid the bribe. However, regulators fail to address the loss sustained by the real victims of the bribe, meaning the honest competitors of the corporate bribe payer: in fact, they suffer the most as a result of the bribery, since their dishonest rival is preferred in the attribution of legal tenders. Nevertheless, they often receive little to

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[77] Mitchell, Imwinkelried and Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege* at 293 (cited in note 40).

[78] See *Ibid*.

[79] Parker and Dodge, *Negotiated Justice and Corporate Crime* at 946 (cited in note 13).

[80] Michael J. Comer and Timothy E. Stephens, *Bribery and Corruption: How to Be an Impeccable and Profitable Corporate Citizen* at 182 (Taylor & Francis 2016).

no compensation for their losses. The contentious matter that complicates the situation even more is that rival companies often fail to realize their victimhood status, as the contracts tainted by corruption are seldom available to the public domain until the bribe payment is uncovered and investigated[81].

Due to the undeniable difficulty in identifying the victims and calculating the losses, DPAs frequently admit the possibility to compensate victims indirectly, meaning through donations or other benefits to relevant non-profit organizations[82].

4. *New Solutions for Enhanced DPA Systems*

Amidst the dynamic landscape surrounding DPAs and the obstacles they entail, there is a growing recognition of the need for innovative solutions to enhance their effectiveness and fairness[83]. As a consequence, in refining DPAs, a suite of solutions tailored to address the intricate challenges inherent in the current systems may be desirable.

First and foremost, the development of specific criteria and guidelines for DPAs is needed: by accounting for the diverse spectrum of offenses and defendants, such criteria would ensure a more comprehensive approach to DPA negotiations. Factors such as the severity of the offense, the level of defendant cooperation, and the impact on victims and communities would be carefully considered, thereby fostering a more effective and equitable DPA process. In tandem with refined criteria, the introduction of an independent evaluation and oversight mechanism seems essential. This may entail the establishment of an autonomous DPA review board, comprising

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[81] See *Id.*, at 182-183.

[82] Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S. Public Law & Legal Theory Research Paper Series* at 18 (New York University School of Law 2019, Working Paper No. 19-30).

[83] Alexander and Cohen, *The Evolution of Corporate Criminal Settlements* at 545-553 (cited in note 21).

legal experts, ethicists, and also community representatives. The aim of such a proposed solution is to enhance public confidence in the integrity and fairness of DPAs[84].

Moreover, compliance monitoring mechanisms to ensure the effective enforcement of DPA terms may be included: it would be appropriate to appoint independent monitors to oversee DPA compliance, conduct audits and inspections, and impose sanctions for non-compliance. In this context, establishing a national authority or agency dedicated to this task could hold significant merit. In fact, such an entity would serve as a centralized body tasked with overseeing the implementation and adherence to DPA obligations – also across jurisdictions. Overall, this would represent a proactive step towards strengthening enforcement mechanisms and upholding the integrity of DPAs as a tool for promoting corporate accountability and societal welfare.

Finally, as a safeguard against potential abuses and to preserve the rule of law, it would be advisable to implement judicial review and approval mechanisms within the DPA framework in each jurisdiction that lacks them. This would involve judicial oversight of DPA negotiations, implementation, and modifications, hence ensuring alignment with legal principles and the overarching pursuit of justice[85].

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[84] Lanny A. Breuer, *Speech at the New York City Bar Association* (2012), available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html (last visited May 2, 2024) (if the public perceives DPAs as lenient or susceptible to manipulation, it undermines trust in the criminal justice system's ability to hold corporate offenders accountable. Moreover, public confidence in DPAs directly impacts their effectiveness as a deterrent against corporate misconduct: indeed, if DPAs are viewed as mere slaps on the wrist or as favoring powerful entities over the interests of justice, their deterrent effect diminishes).

[85] Gaetano Galluccio Mezio, *Diritto e procedura penale degli enti in U.S.A.* at 260-268 (CEDAM 2018) (in this context, the author analyzes the ongoing trend by American courts to (self-)attribute innovative powers of control over this type of out-of-court agreements).

5. *Conclusion*

DPAs represent a legal instrument that has gained recognition and acceptance in various jurisdictions, including the United States, the United Kingdom, and France. These agreements have emerged as a significant mechanism at the intersection of corporate law and justice, particularly regarding the question of whether they enable companies to evade liability. The investigation into DPAs conducted in this paper has revealed that these agreements offer a multifaceted approach, presenting both advantages and disadvantages.

This article leans towards the support of DPAs due to the diverse array of advantages they entail. As seen above, one of the primary benefits of DPAs lies in allowing companies to circumvent the stigma and the severe repercussions often associated with traditional criminal proceedings. Moreover, DPAs mandate and facilitate substantial organizational transformations within corporations. Indeed, as a condition for avoiding prosecution, companies are required to implement comprehensive internal reforms, ranging from corporate governance improvements to robust compliance programs. In addition to these, DPAs impose obligations to report extensively on corporations' compliance measures, progress, and any subsequent violations or lapses. The very structure of DPAs thus serves as a tool to instigate a more vigilant and accountable corporate environment, promoting a culture of compliance.

While DPAs have faced criticism, many of these drawbacks can be effectively addressed. One key aspect that mitigates the apprehension regarding the deterrent effect of DPAs is the acknowledgment of wrongdoing by companies entering into such agreements. In fact, while DPAs allow companies to avoid criminal prosecution, the acceptance of responsibility is a fundamental prerequisite. Furthermore, addressing concerns related to the lack of transparency in DPAs can be effectively managed by implementing a system of judicial review, similar to the robust model present in the

United Kingdom. This judicial oversight provides an essential check and balance system, fostering accountability and fairness in the implementation of DPAs.

It cannot be denied that, within the existing legislation, DPAs present limitations that call for legislative amendments aimed at achieving a fairer and more comprehensive legal framework. For instance, one of these limits is the absence of specific provisions for individual liability: DPAs primarily hold corporations accountable, yet they do not comprehensively address the culpability of individuals involved in corporate misconduct. Similarly, DPAs often focus on corporate-level penalties, reforms, and fines, without providing a mechanism to directly compensate those affected by the misconduct. Consequently, the presence of these limitations underscores the pressing need for more inclusive and rigorous laws that fill any gaps.

In conclusion, the analysis conducted in this paper opens on to asserting that – with effective implementation and continual improvements in legislation – DPAs can serve as a pivotal instrument in promoting corporate responsibility and upholding the principles of justice in the corporate sphere. Therefore, it is paramount that not just legal scholars and practitioners, but also, and especially, economic actors get acquainted with DPAs in order to appreciate the advantages they bring over traditional prosecution, as they offer a semblance of accountability while building a corporate culture of transparency, accountability, and systemic reform.