Deferred Prosecution Agreements in England & Wales: Castles Made of Sand?

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INTRODUCTION

Negotiated settlements are increasingly regarded as an alternative tool against corporate criminality, with numerous countries now embracing such settlements.[1] In England and Wales, amidst concerns relating to corporate criminal liability, the government introduced deferred prosecution agreements (DPAs) in 2014. A DPA has been described as 'a bargain under which the prosecutor undertakes not to proceed with the prosecution of a corporation for a fixed time in return for the defendant mending its ways and paying a financial penalty for the privilege.'[2] Similar powers are well established in some jurisdictions, particularly the US,[3] and they have recently been introduced elsewhere too. For example, France introduced equivalent powers in 2016, namely the Judicial Convention of Public Interest.[4] In 2019, French authorities issued Guidelines on this power, which are influenced by, *inter alia*, experiences from England and Wales. In 2018, both Singapore[5] and Canada[6] introduced DPAs directly influenced by experiences in England and Wales. Other countries are considering introducing DPAs,[7] including Ireland. The Irish Law Reform Commission has proposed the introduction of DPAs based on the regime in England and Wales, rather than that in the US.[8] Thus, five years on from their introduction in England and Wales, it is timely to re-examine the DPA regime, not least given its influence on developments in other jurisdictions.

DPAs have been welcomed as a pragmatic response to corporate crime[9] and, in the words of the House of Lords Select Committee, are 'an excellent way of handling corporate bribery'.[10] They are not uncontroversial, however. For example, there are concerns that companies are enabled to negotiate, or buy, their way out of prosecution[11] and that negotiated settlements impinge upon the presumption of innocence.[12] Furthermore, unlike conventional plea bargaining – where an offender

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[1] For a recent, expansive overview, see Abiola Makinwa and Tina Soreide (eds), *Structured Settlements for Corruption Offences: Towards Global Standards?* (International Bar Association, 2018).

[2] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: post-legislative scrutiny* (HL Paper 303, 2019) para.233.

[3] There is an extensive literature on DPAs in the US. See, for example, Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2016).

[4] Law No 2016-1691 of 9 December 2016 (Loi Sapin 2), introducing the '*Convention judiciaire d'intérêt public*' (CJIP).

[5] Criminal Justice Reform Act 2018, s.35.

[6] Bill C-74 2018, Division 20. The Canadian legislation uses the term Remediation Agreements.

[7] In Australia, legislation providing for DPAs had been introduced (Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017) and a public consultation undertaken on a Code of Practice, however the legislation lapsed at the end of parliament (July 2019).

[8] Law Reform Commission, *Report on Regulatory Powers and Corporate Offences* (October 2018) p.264.

[9] Rita Cheung, 'Deferred Prosecution Agreements: Cooperation and Confession' [2018] *Camb LJ* 12.

[10] House of Lords Select Committee (n.2) para.328.

[11] Nicola Padfield, 'Deferred prosecution agreements' (2012) 7 *Archbold Review* 4.

[12] Douglas Husak, 'Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality' (2014) 8(2) *Criminal Law & Philosophy* 353. For a contrasting view, see Roger Shiner and Henry Ho,

pleads guilty in exchange for leniency at sentencing – DPAs do not require companies to plead guilty, thus they are not called to account for their wrongdoing in a criminal trial.[13]

This article examines three key aspects of the development of the DPA regime to date,[14] that, we argue, have resulted in a weak foundational basis for the regime notwithstanding its robust legal framework. Specifically, we explore: whether a DPA is in the public interest; the requirement of self-reporting; and the terms of a DPA. Even though there are admittedly only five Agreements to date, it is nonetheless useful to reflect upon the lessons to be learnt from these infant years. While DPAs were enacted to overcome obstacles to prosecuting companies and they have been widely lauded, we are not convinced by such contentions. The argument advanced in this article is that practice has been haphazard, rather than tied to any core principles, and lacks a clear underlying purpose. This situation is particularly evident in the three areas discussed in this article, which leads to the conclusion that the DPA regime stands on shaky foundations.

DPAs: BACKGROUND AND LEGAL FRAMEWORK

In a 2012 consultation on DPAs, a Ministry of Justice consultation document recognised that '[t]he present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime'.[15] Key obstacles include: long, complex investigations and trials; difficulties in identifying wrongdoing; limited powers of enforcement agencies; and difficulties associated with the identification principle.[16] It was also noted that: 'If more offending commercial organisations are to be brought to justice and if offending is to be dealt with more quickly and efficiently, the SFO and other prosecuting agencies need additional tools.'[17] Given difficulties in successfully pursuing criminal prosecution, DPAs were regarded as a 'pragmatic step to try to obviate some of the hurdles in regulating the behaviour of corporate entities.'[18] Ultimately, DPAs would be enacted under the Crime and Courts Act 2013, and the regime was brought into force in February 2014.[19]

A DPA is a discretionary tool whereby the prosecutor and company enter negotiations as an alternative to prosecution.[20] In order to enter into a DPA the prosecutor must apply a two-stage test involving an evidential stage and a public interest stage. First, the prosecutor must be satisfied that the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied. If this is not met, the prosecutor must be satisfied that there is 'at least a reasonable suspicion based upon some admissible evidence' that the company has committed an offence, and that there are 'reasonable grounds for believing that a continued investigation would provide further admissible evidence within

'Deferred Prosecution Agreements and the Presumption of Innocence' (2018) 12(4*) Criminal Law & Philosophy* 707.

[13] For wider discussion of calling offenders to answer for wrongdoing, see Anthony Duff et al, *The Trial on Trial, vol.3* (Hart, 2007).

[14] i.e. up to early-August 2019. This timeframe thus includes the most recent DPA (Serco, approved in July 2019), the lifting of reporting restrictions in the Sarclad DPA (also in July 2019), Corporate Co-operation Guidance from the SFO (made public in August 2019), as well as the House of Lords Select Committee Report on the Bribery Act published in March 2019.

[15] 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.23.

[16] *Ibid*, para.3 (Foreword).

[17] *Ibid*, para.30.

[18] Michael Bisgrove and Mark Weekes 'Deferred Prosecution Agreements: A Practical Consideration' (2014) 6 *Criminal Law Review* 416, 417.

[19] Crime and Courts Act 2013, s.45 and Sched.17; Crime and Courts Act 2013 (Commencement No. 8) Order 2014. Currently, DPAs only apply in England and Wales: Crime and Courts Act 2013, s.61.

[20] SFO/CPS, *Deferred Prosecution Agreements Code of Practice* (2014), para.1.1 (herein, 'DPA Code').

a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.'[21] Second, the prosecutor must be satisfied that the public interest would be properly served by entering into a DPA with the company.[22] If this two-stage test is passed and a DPA is considered appropriate, an indictment will be preferred (where the court approves the DPA) but will then be immediately suspended.[23] Where the two-stage test is not passed, and where it is not considered appropriate to continue the criminal investigation, the prosecutor should consider whether a civil recovery order is appropriate.[24]

The Code of Practice specifically emphasises that a company 'has no right to be invited to negotiate a DPA.'[25] Indeed, 'in many cases, criminal prosecution will continue to be the appropriate course of action.'[26] It is worth setting out in full the requirements before negotiations may be initiated:

> 'Where the prosecutor is satisfied that:
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> i. either the evidential stage of the Full Code Test in the Code for Crown Prosecutors is met, or there is a reasonable suspicion based upon some admissible evidence that P has committed an offence;
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> ii. the full extent of the alleged offending has been identified;
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> and
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> iii. the public interest would likely be met by a DPA,
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> then the prosecutor may initiate DPA negotiations with any P who is being investigated with a view to prosecution in connection with an offence specified in the Act.'[27]

The prosecutor should also consider whether or not prosecution is in the public interest: 'The more serious the offence, the more likely it is that a prosecution will be required in the public interest.'[28] Ultimately, applying the public interest factors necessarily involves a balancing exercise and will be a matter of discretion.[29]

Where a DPA is successfully negotiated, it may include a broad range of terms including (but not limited to): a financial penalty; compensation to victims; donations to charities/third parties; disgorgement of any profits made; implementation of a rigorous internal compliance/training programme; cooperation in any investigation; and payment of reasonable costs to the prosecutor.[30] Other possible terms include prohibition from engaging in certain activities; financial reporting obligations; robust monitoring; and cooperation with sector wide investigations.[31] The terms must be 'fair, reasonable and proportionate', which will be case-specific.[32] The amount of any financial penalty must be broadly comparable to any fine that might have been imposed upon conviction if the company had pleaded guilty in criminal proceedings.[33] Significantly, 'The basis of the DPA and its written terms will be explained in an agreed written application to the court.'[34] A DPA must include a statement of facts, which may include admissions by the company.[35] Any factual issues must be

[21] DPA Code, para. 1.2.i.
[22] DPA Code, para. 1.2.ii.
[23] DPA Code, para.1.6. See Crime and Courts Act 2013, Sched.17, para.2.
[24] DPA Code, para.1.7.
[25] DPA Code, para.2.1.
[26] DPA Code, para.2.1.
[27] DPA Code, para.2.2.
[28] DPA Code, para.2.4.
[29] DPA Code, para.2.6. Para.2.8 sets out a non-exhaustive list of factors that might be relevant in deciding whether a criminal prosecution is appropriate or not.
[30] Crime and Courts Act 2013, Sched.17, para.5.
[31] DPA Code, para.7.10.
[32] DPA Code, para.7.2.
[33] Crime and Courts Act 2013, Sched.17, para.5(4).
[34] DPA Code, para.7.3.
[35] Crime and Courts Act 2013, Sched.17, para.5(1).

resolved by the parties: 'The court does not have the power to adjudicate upon factual differences in DPA proceedings.'[36] While there is no requirement for formal admissions of guilt, the company must admit the contents and meaning of key documents referred to in the statement of facts.[37] If the company is subsequently prosecuted for the alleged offence, the statement of facts will be treated as proof by formal admission.[38]

There are two initial stages of judicial involvement in the DPA process, a preliminary hearing and final approval of the DPA.[39] Prior to the preliminary hearing, a draft confidential application, along with any supporting documentation, must be submitted to the court.[40] This application must be made after the commencement of negotiations, but before the terms of the DPA are agreed; the application will be for a declaration that entering into a DPA is in the interests of justice and the proposed terms are fair, reasonable and proportionate.[41] Subject to such a declaration being granted, the prosecutor must apply for a formal declaration from the court that the DPA is in the interests of justice and the terms are fair, reasonable and proportionate.[42] A DPA only comes into force following approval at this final hearing.[43]

At any point when a DPA is in force, if the prosecutor believes that the company has failed to comply with the terms of the DPA then the prosecutor may apply to the court. The court must then decide, on the balance of probabilities, whether the company has so failed to comply. If so, then the court may either i. invite the parties to agree proposals to remedy the failure to comply, or ii. terminate the DPA.[44] If, however, the DPA remains in force until its specified expiry date, then proceedings will be discontinued by the prosecutor giving notice to the court.[45]

To date five DPAs have been approved by the courts,[46] involving Standard Bank,[47] Sarclad Ltd,[48] Rolls Royce PLC,[49] Tesco Stores Ltd,[50] and Serco Geografix Ltd.[51] These Agreements provide insights into the conditions required for negotiations between the authorities and implicated companies to take place, and the expectations of each party as to the terms of agreement. In the rest

[36] DPA Code, para.6.2.
[37] DPA Code, para.6.3.
[38] Crime and Courts Act 2013, Sched.17, para.13(2). See DPA Code, para.6.4.
[39] See also The Criminal Procedure (Amendment No. 2) Rules 2013, Part 12.
[40] DPA Code, paras.9.3-9.4.
[41] Crime and Courts Act 2013, Sched.17, para.7(1). The hearing must be held in private: para.7(4).
[42] Crime and Courts Act 2013, Sched.17, para.8(1)-(2). This application may be in private: DPA Code, para.10.4. There is provision for variation of the terms: Sched.17, para.10.
[43] Crime and Courts Act 2013, Sched.17, para.8(3). Where the DPA is approved, the court must give its reasons in open court: para.8(6). Para.8(7) provides for postponement of publication to avoid prejudicing proceedings.
[44] Crime and Courts Act 2013, Sched.17, para.9(1)-(3). The prosecutor must publish the decision of the court, and the reasons for that decision, unless ordered not to do so: para.9(5)-(8).
[45] Crime and Courts Act 2013, Sched.17, para.11(1).
[46] Significantly, the first four were approved by Sir Brian Leveson, President of the Queens Bench Division, who retired in June 2019. The fifth DPA was approved by Justice William Davis in July 2019. For in-depth consideration of different Agreements, see Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery orders and Deferred Prosecution Agreements* (Palgrave 2018).
[47] *SFO v Standard Bank plc (now known as ICBC Standard Bank plc)*, Southwark Crown Court, Case No: U20150854, November 30, 2015.
[48] *SFO v Sarclad Ltd*, Southwark Crown Court, Case No: U20150856, July 8, 2016. This judgment had previously been redacted, and the company was referred to as 'XYZ Ltd'. Reporting restrictions were removed in July 2019: SFO News Release, Three individuals acquitted as SFO confirms DPA with Sarclad (July 16, 2019).
[49] *SFO v Rolls Royce PLC; Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017.
[50] *SFO v Tesco Stores Ltd*, Southwark Crown Court, Case No: U20170287, April 10, 2017.
[51] *SFO v Serco Geografix Ltd*, Southwark Crown Court, Case No: U20190413, July 4, 2019.

of this article, we focus on three issues that go to the heart of the DPA regime, namely the public interest; self-reporting; and the terms of an Agreement.

PUBLIC INTEREST

It is necessary to consider whether a DPA is in the public interest, a factor that the court must determine at both the preliminary and the final hearings.[52] According to the Code of Practice,

> 'Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence, which includes the culpability of P and the harm to the victim. A prosecution will usually take place unless there are public interest factors against prosecution which outweigh those tending in favour of prosecution.'[53]

Thus, there is a balancing exercise with the seriousness of the offending being weighed against countervailing factors. In each Agreement, the seriousness of the offence was a key consideration for the court. The response of the company was a significant factor, however; the company's initial response after discovering the conduct in question, early engagement with the SFO, the extent of cooperation, and changes in ownership were factors that influenced the court in determining that a DPA would be in the public interest. In Sarclad, for example, the relevant factors that meant a DPA was in the public interest were identified as follows:

> 'the seriousness of the predicate offence or offences; the importance of incentivising the exposure and self-reporting of corporate wrongdoing; the history (or otherwise) of similar conduct; the attention paid to corporate compliance prior to, at the time of and subsequent to the offending; the extent to which the entity has changed both in its culture and in relation to relevant personnel; and the impact of prosecution on employees and others innocent of any misconduct.'[54]

The Rolls-Royce case gives further insight into whether a DPA will be in the public interest or not. The conduct in question was undoubtedly of a serious nature, and there were aggravating factors.[55] Notwithstanding, Leveson P considered that there were 'strong countervailing considerations'[56] justifying a DPA, including: Rolls-Royce had been extremely cooperative; the company had also reached agreements with authorities in other jurisdictions; the company had taken significant corporate compliance steps after the offending; change of culture and personnel; the consequences of conviction were considered (though Leveson P stressed that these were not determinative); a negotiated settlement would avoid significant expenditure of time and money that would be inherent in a criminal prosecution; and a settlement in this instance would incentivise other companies to self-report.

In considering the interests of justice, and after detailing the above considerations, Leveson P stated:

> 'My reaction when first considering these papers was that *if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades*, involving countries around the world, making truly vast corrupt payments and, consequentially, even greater

[52] Crime and Courts Act 2013, Sched.17, para.7(1)(a) and 8(1)(a).
[53] DPA Code, para.2.5.
[54] Sarclad judgment (n.48), para.15.
[55] Rolls-Royce judgment (n.49), para.35. Similarly in the Tesco judgment (n.50), paras.47-48 the court identified various factors that pointed towards criminal prosecution.
[56] Rolls-Royce judgment (n.49), para.35.

> profits, *then it was difficult to see when any company would be prosecuted*.' (emphasis added)[57]

That notwithstanding,

> 'I accept that 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.'[58]

Ultimately, for Leveson P, 'the question becomes whether it is necessary to inflict the undeniably adverse consequences on Rolls-Royce that would flow from prosecution because of the gravity of its offending even though it may now be considered a dramatically changed organisation.'[59] Leveson P concluded that a DPA would, in the circumstances, be appropriate. There are significant difficulties with this approach, however. The DPA Code of Practice states: 'The more serious the offence, the more likely it is that prosecution will be required in the public interest.'[60] The conduct at issue undoubtedly included serious criminal offences that, we contend, should be dealt with by criminal prosecution, rather than a negotiated settlement. Indeed, as Leveson P explicitly recognised, if Rolls-Royce was not prosecuted in this instance, then it is difficult to see when a company would be prosecuted.[61]

The 'public interest' factors identified by Leveson P are debateable: both cooperation by the company and changes in culture/personnel are factors that might be reflected at the sentencing stage, following criminal conviction, as opposed to avoiding prosecution.[62] Being influenced by the consequences of criminal conviction[63] is extraneous: indeed Leveson P expressly stated that 'the purpose of the procurement rules is specifically to discourage corruption and they should not be circumvented.'[64] Yet, that is the effect of this DPA. It is trite to say that a company, such as Rolls-Royce, is not immune from prosecution, and that 'a company that commits serious crimes must expect to be prosecuted and if convicted dealt with severely',[65] when Rolls-Royce did in fact avoid prosecution (notwithstanding the financial penalties, discussed later).[66] What we thus see is that the consequences of criminal conviction have led prosecutors and the judiciary to shy away from pursuing conviction.[67] Avoiding potential debarment, then, can be seen as one attraction to companies to enter DPA negotiations. In Serco, however, Davis J was troubled by the potential for an Agreement to circumvent debarment rules and explicitly declared his reluctance to engage in a quasi-political decision in that

[57] Rolls-Royce judgment (n.49), para.61.
[58] Rolls-Royce judgment (n.49), para.62.
[59] Rolls-Royce judgment (n.49), para.63.
[60] DPA Code, para.2.4.
[61] Rolls-Royce judgment (n.49), para.61.
[62] We do acknowledge, however, practical difficulties in securing a conviction.
[63] Considerations as to the consequences of conviction were also evident in the Sarclad (n.48, para.18) and Tesco (n.50, para.61) judgments.
[64] Rolls-Royce judgment (n.49), para.61. 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' in Tina Soreide and Abiola Makinwa (eds) *Negotiated Settlements in Bribery Cases* (Edward Elgar, forthcoming).
[65] Rolls-Royce judgment (n.49), para.57.
[66] This assumes, of course, that the company will satisfy all the terms of the DPA during the period that the prosecution is deferred.
[67] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269.

regard.[68] Significantly, the judge noted that the facts in this instance could amount to grave professional misconduct, which is a ground for discretionary exclusion under debarment rules.[69] In that instance, however, a letter from a government official confirmed that the company had self-cleaned and thus could continue acting as a supplier to government.[70]

A further contentious issue in the Rolls Royce judgment is that economic considerations and the impact on Rolls-Royce, its employees and shareholders who would be affected in the event of criminal prosecution influenced the judge when considering the public interest.[71] Similar considerations are evident in other DPAs: for example, in Sarclad the court considered 'the interests of workers, suppliers, and the wider community'[72] while in Tesco it was said that the impact on other parties (including employees, pensioners, and those in the supply chain) 'is undeniably a relevant factor.'[73] That, however, appears to be at odds with the OECD Anti-Bribery Convention.[74] Despite protestations that such considerations are not determinative, nor are companies like Rolls-Royce immune from prosecution,[75] the approach of Leveson P does suggest that the larger, or more strategically important, a company is, then the more likely it is that a DPA will be deemed to be in the public interest.[76] Moreover,

> 'no reference was made to the victims of the corruption that Rolls Royce committed. None of the prosecuting authorities from the countries where bribes were paid appear to have been given a right to make representations to the court. And no real assessment of the potential harm caused by Rolls Royce's corruption appears to have been made by the SFO.'[77]

Furthermore, in criminal proceedings against individuals, the impact on third parties (such as family members) would be dealt with at the sentencing stage – not pre-trial when determining whether a prosecution is in the public interest.

The contentions promulgated by the SFO are disingenuous; indeed, the suggestion that a DPA 'would avoid the significant expenditure of time and money which would be inherent in any prosecution of Rolls-Royce'[78] is worrying. Admittedly, DPAs are cheaper and quicker to resolve than criminal prosecution, but surely the SFO did not mean to imply that the bigger the company under investigation, and the more complex the case, the more they would be open to settlement. Yet, that is exactly what happened: the SFO impressed upon the court that resourcing consideration, particularly in relation to investigations/ prosecutions of large companies, do influence its decisions whether to proceed with a case, and that in such situations it is open to negotiation. This stance, however, leaves a distinct sense of unease, not least given that the approach to large(r) companies

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[68] 'For me to take a course which would amount to a favourable determination of the position of a private company vis-à-vis public procurement would involve me in a quasi-political decision. That is not the function of a judge in any context and certainly not in the context of the approval of a course which leads to a company not being prosecuted for serious fraud.' Serco judgment (n.51), para.27.

[69] Public Contracts Regulations 2015, Reg.57(8).

[70] For wider consideration of debarment and self-cleaning, see Erling Hjelmeng and Tina Soreide, 'Debarment in Public Procurement: Rationales and Realization' in Gabriella Racca and Christopher Yukins (eds) *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014).

[71] Rolls-Royce judgment (n.49), paras.52-57.

[72] Sarclad judgment (n.48), para.18.

[73] Tesco judgment (n.50), para.64.

[74] OECD Anti-Bribery Convention, Art.5. Indeed the Code of Practice explicitly states that regard should be had to Article 5 when considering the public interest: DPA Code, para.2.7.

[75] Rolls-Royce judgment (n.49), para.57.

[76] Karl Laird, 'Deferred prosecution agreements and the interests of justice: a consistency of approach?' [2019] *Crim LR* 486, 496.

[77] Sue Hawley, 'A Failure of Nerve: The SFO's Settlement with Rolls Royce', *Corruption Watch* (January 19, 2017).

[78] Rolls-Royce judgment (n.49), para.58.

potentially – as Reilly argues - compromises the pursuit of justice, results in inconsistency in application of the law, and undermines basic notions of fairness.[79]

The Rolls-Royce agreement – notwithstanding the significant penalties ultimately imposed – confirms that corporate wrongdoing is differentially enforced. While some might argue that a DPA in this instance was a pragmatic approach,[80] this negotiated settlement demonstrates the inability (or disinclination) of the SFO to criminally pursue larger companies. Moreover, the DPA reinforces concerns that, in the context of corporate wrongdoing, so-called smaller fish will be targeted for criminal prosecution while larger companies will be able to enter negotiations. Such concerns are evident in the conviction of Skansen Interiors Ltd.[81] The company had secured two contracts after paying a bribe of £10,000 and promise of a further £29,000. Following the appointment of a new CEO, an internal investigation was initiated; an anti-bribery and corruption policy was put in place; and the matter was self-reported to authorities. The company cooperated with the police investigation, including by handing over legally privileged material. Nonetheless, the company was prosecuted, and convicted, under section 7 of the Bribery Act (failure to prevent bribery).[82] By cooperating and self-reporting, Skansen had expected to negotiate a DPA, but this option was not considered by the CPS as the company had been dormant since 2014 and had no assets to pay any financial penalty. However, given the company's position, the only penalty that could be imposed upon conviction was an immediate discharge. Thus, the decision to prosecute in this instance has been described as 'somewhat needless and arguably unprincipled'.[83] Indeed, as was recognised by the House of Lords Select Committee on the Bribery Act, 'The suspicion lingers that SIL was perhaps not fairly treated by the CPS either in relation to the prosecution or in relation to the refusal of a DPA.'[84]

Skansen can be contrasted with Serco Geografix Ltd, where a DPA was approved in relation to a dormant company. Significantly, though, the Agreement extends to Serco Group PLC and its subsidiaries.[85] Thus, Serco Group PLC assumed responsibility for the financial penalty and the SFO's costs. It also undertook to implement specified ethics and compliance procedures, mirroring those imposed on Serco Geografix Ltd by the DPA.[86] As Davis J stated, 'Since SGL is a dormant company, the obligations to which it is subject under the agreement are of limited value. Of genuine and substantial effect are the undertakings given by Serco Group PLC.'[87] Indeed, without those undertakings the goals of the DPA could not have been realised. The undertakings by Serco Group PLC were said to strengthen the public interest in favour of a DPA.[88] This is a significant development, and it might be expected that future DPAs will provide for similar undertakings by parent companies.

SELF-REPORT

In the 2012 consultation on DPAs, it was stated that:

[79] Peter Reilly, 'Justice Deferred is Justice Denied: We Must End our Failed Experiment in Deferring Corporate Criminal Prosecutions' [2015] *BYU Law Review* 307.
[80] Rita Cheung, 'Deferred Prosecution Agreements: Cooperation and Confession' [2018] *Camb LJ* 12.
[81] See Max Walters, CPS secures first conviction for failure to prevent bribery, *The Law Society Gazette*, March 9, 2018.
[82] See Allen & Overy, Failure to prevent bribery: guilty verdict in first contested case (March 27, 2018). Two individuals were also convicted and imprisoned for their involvement: CPS, 'Company directors jailed for bribery' (April 23, 2018).
[83] Peter Binning, A Bribery Act prosecution "pour encourager les autres", *CorkerBinning Blog* (March 9, 2018).
[84] House of Lords Select Committee (n.2) para.226.
[85] This undertaking is provided for in an 'Attachment A' attached to the judgment.
[86] Serco judgment (n.51), para.41.
[87] Serco judgment (n.51), para.41.
[88] Serco judgment (n.51), para.42.

> 'There are currently insufficient incentives for commercial organisations to engage and cooperate with UK authorities at earlier stages to achieve better outcomes. At present, the general criminal law proceeds on the basis that the only circumstances in which an organisation can make admissions of wrongdoing and be punished are in the context of criminal proceedings which result in a conviction and sentence by a competent court.' [89]

An important aspect of the DPA framework, then, is the emphasis on (proactive) cooperation from companies. Indeed, the Code of Practice indicates that the SFO expects a high level of cooperation, honesty and proactive engagement from the company in order for a DPA to be suitable.[90] And it had been expected that a self-report from the company would be a pre-requisite.

The first two DPAs both involved self-reporting. With Standard Bank, for example, the bank engaged with the SFO at an early stage and there was extensive and frank cooperation. Indeed, Leveson P emphasised: 'Of particular significance was the promptness of the self-report, the fully disclosed internal investigation and cooperation of Standard Bank.'[91] Given that this case was described as a 'template' by the SFO Director,[92] it might be expected that self-reporting, self-investigation and extensive cooperation would be key factors in deciding to enter into DPA negotiations in future cases. In both Standard Bank and Sarclad, 'the DPA followed what was a self-report at a time that the SFO neither had knowledge of, nor known means of likelihood of learning about, the conduct which led to the DPA'.[93] In these terms, self-reports clearly provide a mechanism to identifying *some* criminality that may have remained unknown, but this in itself is problematic as it implies cases are otherwise unlikely to be detected. Where self-reports do occur, companies and enforcement authorities may expect a swifter (and therefore less resource intensive) and more certain resolution to corporate criminality on amenable terms. Further, companies are incentivised to self-report through the expectation of a more lenient sanction.[94] Such benefits do not always materialise, however. For example, negotiations for a DPA will not necessarily be swift,[95] and it is not guaranteed that a DPA will be forthcoming (as happened Skansen, discussed above).

Moreover, what if the wrongdoing was particularly complex? With Standard Bank, for example, there was a one-off corrupt payment. If that wrongdoing had been more prevalent, involving more extensive culpability, and being more difficult to prove, a more rational response might well have been not to disclose the corrupt payment, not least given the low risk of detection. Empirical research on deterrence indicates that it is the certainty of punishment, not the severity of punishment, that is the core factor in effective deterrence.[96] In other words, it is the 'apprehension probability' that affects levels of deterrence.[97] The approach of the SFO, then, in the first two Agreements - where the importance of a self-report and cooperation was stressed – was not unexpected. Insistence on self-reporting as a pre-condition to entering into negotiations for a DPA would send out a powerful message to corporate wrongdoers: come forward, cooperate, and settle the issue – or else the SFO will prosecute if the wrongdoing does subsequently come to light. This stance, however, appears to have been significantly undermined by the approach in Rolls-Royce.

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[89] Ministry of Justice (n15), para.31.

[90] DPA Code, para.2.8.2 and para.2.9.1 *et seq*.

[91] Standard Bank judgment (n.47), para.14. Similar sentiments were expressed in the Sarclad judgment (n.48), para.16.

[92] SFO, 'Press Release - SFO agrees first UK DPA with Standard Bank', November 30, 2015.

[93] Rolls-Royce judgment (n.49), para.21.

[94] See Polly Sprenger, *Deferred Prosecution Agreements: The law and practice of negotiated corporate criminal penalties* (Sweet and Maxwell, 2015) ch.10 for further consideration of self-reporting.

[95] The Rolls Royce case, for instance, involved a four-year investigation.

[96] Daniel S. Nagin, 'Deterrence in the Twenty-First Century' (2013) 42(1) *Crime and Justice* 199.

[97] *Ibid*, p.202.

The Rolls-Royce DPA appears to be, in the words of the OECD, 'an interesting exception to the rule that a self-report is a precondition for a DPA'.[98] We would put it more strongly – the effect of this agreement (absent a self-report, and with a generous reduction in penalty) runs counter to the emphasis placed on encouraging companies to come forward and self-report. In this instance, the SFO investigation was triggered by a whistleblower, rather than by a self-report.[99] It would not have been surprising, then, if the SFO had pursued a criminal prosecution (notwithstanding the practical hurdles to securing a conviction). Yet, the SFO instead entered into negotiations for a DPA. Leveson P noted that the absence of a self-report 'would usually be highly relevant in the balance [i.e. between prosecution and DPA]'.[100] However, he was persuaded that the nature and extent of the co-operation provided by the company should be treated as akin to a self-report.[101] It should be noted, however, that despite such *extraordinary* cooperation, there have been no prosecutions of individuals and, in February 2019, the SFO announced the closure of the Rolls-Royce investigations (prosecution of individuals alongside DPAs is discussed later).[102] Moreover, the conclusion that the cooperation from Rolls-Royce be treated as akin to a self-report is disingenuous. In the first two DPAs, the self-report was noted as bringing unknown criminal conduct to the attention of the authorities.[103] This is an important element of the DPA process, which should not be undermined by treating cooperation as akin to self-reporting.

The lack of a self-report *might* have been somewhat justifiable given the company's cooperation if the issue solely related to the resolution of the allegations by a DPA. However, Leveson P went a step further and granted a 50% reduction in the penalty to reflect the extent of cooperation. Thus, the cooperation was treated as akin to a self-report and it entitled Rolls-Royce to the maximum discount (discussed later). This approach would appear to be disingenuous: a company can now fail to disclose but remain eligible not only for a DPA but also for the maximum discount. This undermines the incentive to self-report and the message transmitted from the SFO (namely: self-report and negotiate a settlement, or else face prosecution if the wrongdoing subsequently comes to light). Now the message would appear to be that the absence of a self-report will not be fatal to entering into DPA negotiations so long as the company subsequently cooperates to a high level. Indeed, the House of Lords Select Committee on the Bribery Act has suggested that 'the highest level of discount should be available only to a company which has self-reported and given full co-operation.'[104] The most recent development in relation to self-reporting happened in July 2019, with the Serco DPA, where the interpretation of self-report was further widened. In that instance, the SFO was already investigating (separate) allegations against the company. As part of its internal investigation into those separate allegations, the company discovered emails that purportedly disclosed further wrongdoing. This further wrongdoing was then reported to the SFO, and this was treated as a self-report.[105]

An important consideration in the context of self-reporting is that many instances of self-reporting will involve reports by senior company executives that were not employed at the time of the apparent criminality. For example, the self-report might arise in the wake of regime change which led to discovery of the offences, subsequent internal investigations and then external self-reporting. Self-reports are inherently geared towards the notification of past, rather than current, criminality, given that those at a senior level who knew of the criminal conduct tend to have already left the

[98] OECD, *Implementing the OECD Anti-Bribery Convention. Phase 4 Report: United Kingdom* (OECD, 2017), p.16.
[99] See Rolls-Royce judgment (n.49), para.16, where it is noted that concerns were first raised in internet postings.
[100] Rolls-Royce judgment (n.49), para.22.
[101] Rolls-Royce judgment (n.49), para.22. See Rita Cheung, 'Deferred Prosecution Agreements: Cooperation and Confession' [2018] *Camb LJ* 12, 13.
[102] SFO, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals (February 22, 2019).
[103] See text to n.93.
[104] House of Lords Select Committee (n.2) para.308.
[105] Serco judgment (n.51).

company at the time of the self-report (or shortly afterwards). Thus, it might be that companies will only self-report where the criminality is sufficiently historical for no-one currently at the firm to be implicated. In that case, self-reporting is unlikely to reach to those companies knowingly and actively involved in criminality. Thus, the DPA regime presents a cosy environment for self-reporting historical criminality. Further, the company then emphasises the regime change and new personnel as being factors that influence whether a DPA is in the public interest (as discussed above).

Finally, it is important to consider how claims of legal professional privilege might impact upon the DPA process.[106] Indeed, in *AL*[107] the SFO was criticised for its approach to supposedly privileged material. This judicial review case related to the failure of a company (Sarclad) to provide interview notes, with senior executives suspected of wrongdoing, which had formed part of the material used by the company in deciding to self-report. The company asserted privilege over the interview notes, but ultimately gave an 'oral proffer' summary. While this summary was disclosed to defendants in criminal proceedings linked to the Sarclad DPA, the full interview notes were not (as the SFO did not have them and the company refused to provide them to the SFO). It was common ground that the material in question was 'relevant and not peripheral',[108] yet the SFO did not pursue disclosure in accordance with the terms of the DPA following the company's assertion of privilege (notwithstanding that the SFO disagreed with the stance that the notes were privileged). The application for judicial review was ultimately unsuccessful as, so the court held, the appropriate forum for the matter to be resolved was the Crown Court. Nonetheless, the court was critical of the SFO's failure to pursue this material.[109]

> 'In short, the SFO: failed to address relevant considerations, took into account irrelevant matters, provided inconsistent and inadequate reasons for its decisions, and applied an incorrect approach to the law. These public law errors were material. If on proper analysis no privilege applies (either per se or because of waiver) then XYZ Ltd should simply disclose the interview records forthwith. There would be no need to pursue a cumbersome and unreliable horizontal testing exercise as an alternative. Save for our conclusion on proper forum … we would have quashed the decision of the SFO and remitted it for reconsideration.'[110]

The issue of legal professional privilege was also considered by the Court of Appeal in *ENRC*.[111] Commenting specifically on DPAs, the court stated that the purpose of the statutory scheme under the 2013 Act is to encourage self-reporting and a negotiated resolution.[112] The court then continued:

> 'It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. 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.'[113]

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[106] Given word limits, it is not possible to consider wider issues of legal professional privilege. For discussion, see Bankim Thanki *et al*, *The Law of Privilege* (OUP, 2018, 3rd ed). Our intention here is simply to outline matters that have arisen in relation to privilege and DPAs.

[107] *R (AL) v SFO* [2018] EWHC 856.

[108] *Ibid*, para.78.

[109] *Ibid*, para.95 and 124.

[110] *Ibid*, para.125.

[111] *Director of the SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.

[112] *Ibid*, para.115.

[113] *Ibid*, para.116.

Furthermore,

> 'to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO.'[114]

In the context of the facts in *ENRC*, 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.'[115] Significantly, then, a different approach now appears to be adopted by the SFO. In Serco, for example, the SFO requested that Serco Group PLC and its subsidiaries should not interview any witnesses while the criminal investigation was underway. Instead, an independent law firm was appointed by the company to conduct a full document review and to provide the SFO with a detailed report of the findings. The company also waived (some) privilege in respect of accounting material.[116] Looking ahead, as suggested in *ENRC*,[117] it might be expected that waiver of privilege will be a central issue in determining the extent of cooperation from a company during DPA negotiations. Indeed, the SFO Director has stated that waiving privilege over internal investigative material will be a strong indicator of cooperation and a factor 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.[118] Indeed, extracts from the SFO Operational Handbook under the heading of 'Corporate Cooperation Guidance', made public in August 2019, specifically state that failure to waive privilege and to provide witness accounts are factors that will be influential in deciding whether or not to prosecute, but curiously also state that the company 'will not be penalised by the SFO.'[119] Laird, however, is critical of suggestions that a waiver of privilege should be required for a DPA to be deemed in the public interest: 'A failure to waive privilege should not be determinative as the corporate is effectively being expected to waive a fundamental right.'[120] Furthermore, an expectation of waiver might discourage self-reporting.

TERMS OF DPAs

Given that DPAs provide for the suspension of criminal proceedings against a company, the terms of the agreement are significant. There was (indeed, for many, there still is) scepticism that companies are able to negotiate, or buy, their way out of prosecution.[121] As the 2012 consultation acknowledged,

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[114] *Ibid*, para.117.
[115] *Ibid*, para.117.
[116] Serco judgment (n.51), para.24.
[117] *Eurasian Natural Resources Corporation Ltd* (n.111), para.117.
[118] Lisa Osofsky, Speech – Fighting fraud and corruption in a shrinking world, Royal United Services Institute (April 3, 2019).

[119] SFO, *SFO Operational Handbook: Corporate Co-operation Guidance*, p.5 of published extract (August 2019). Chapters in this Operational Handbook 'are being redacted in line with Freedom of Information principles, to avoid compromising our operations, and are being published as these versions become available.' Released chapters are available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/ (last accessed September 29, 2019).
[120] Karl Laird, 'Deferred prosecution agreements and the interests of justice: a consistency of approach?' [2019] *Crim LR* 486, 493.
[121] We have already expressed our concern in this regard: see Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz

'Public confidence in the justice system is vital. The public need to have confidence that a prosecutor is not entering into a "cosy deal" with a commercial organisation "behind closed doors".'[122] Significantly, though, in the five years that DPAs have been in operation, the courts have aligned to 'the view that that whilst a DPA is a punishment it must also incentivise.'[123]

A DPA can include a wide range of terms, such as financial penalties, compensation, disgorgement of profits, to name a few.[124] The terms of a DPA must be 'fair, reasonable and proportionate', which will be case-specific.[125] Significantly the legislation requires 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.'[126] A 2017 OECD report indicated that the Southwark Crown Court judges they visited 'considered that the construction of DPAs in the UK has been quite robust and proportionate' with 'appropriate checks and balances' for the courts.[127] Moreover, initial scepticism that companies could end up 'buying' their way out of trouble have - for some - been somewhat assuaged by the size of the financial penalties thus far.[128]

Table 1: Overview of DPAs

Company	Date	Self-report	Discount	Nature of DPA
Standard Bank plc	November 2015	Yes	1/3	Compensation of US$6m plus interest of $1,046,196.58. Disgorgement of profit of $8.4m. Financial penalty of $16.8m. Payment of costs of £330,000.
Sarclad Ltd	July 2016	Yes	50%	Disgorgement of gross profit of £6,201,085. Financial penalty of £352,000. SFO agreed not to seek costs.
Rolls-Royce plc & Rolls-Royce Energy Systems Inc	January 2017	No	50%	Disgorgement of profit of £258,170,000. Financial penalty of £239,082,645. Payment of costs of £12,960,754.
Tesco Stores Ltd	April 2017	Yes	50%	Financial penalty of £128,992,522.[129] Payment of costs of £3m.
Serco Geografix Ltd	July 2019	Yes	50%	Financial penalty of £19.2 million.[130] Payment of costs of £3.7 million.

Campbell and Nicholas Lord (eds) *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018).

[122] Ministry of Justice (n15), para.80.

[123] *AL* (n107), para.51.

[124] Crime and Courts Act 2013, Sched.17, para.5.

[125] DPA Code, para.7.2.

[126] Crime and Courts Act 2013, Sched.17, para.5(4).

[127] OECD (n.98), p.56.

[128] See Nicola Padfield, 'Deferred Prosecution Agreements' [2016] *Criminal Law Review* 449.

[129] Separate from this DPA, the FCA required Tesco to establish a compensation scheme (of £84.4m) under the Financial Services and Markets Act 2000.

[130] A separate settlement had previously been agreed with the Ministry of Justice for £70 million: Serco judgment (n.51), para.21. In a further, separate settlement, Deloitte was fined and reprimanded for its audit of SGL: see Julia Kollewe, *Deloitte fined £4.2m over Serco tagging scandal,* The Guardian (July 4, 2019).

In the Standard Bank case, Leveson P took account of Sentencing Council Guidelines[131] and 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.[132] There were doubts, particularly amongst legal practitioners, that this approach might not incentivise companies to self-report with the aim of agreeing a DPA. More specifically, there were doubts whether companies would voluntarily come forward given that the financial penalty would be the same as would be imposed subsequent to a criminal conviction with an early guilty plea.[133] Significantly, then, in the next DPA, and in each subsequent one, the company was granted a discount of 50%.

Before considering this discount further, we first consider the company's ability to pay. As Leveson P said in approving the Sarclad DPA:

> 'At what level of criminality is it necessary simply to allow the SME to become insolvent and to what extent is it appropriate to mitigate the financial penalty, knowing that the SME is only able to make any substantial payment with the support of the substantial company of which the SME is a wholly owned subsidiary? On the one hand, allowing the SME to continue to trade (assuming necessary compliance has been put in place) is in the public interest but, on the other hand, nothing must be done to encourage the pursuit of criminal behaviour through a corporate vehicle which can be abandoned as insolvent if necessary.'[134]

In that case, the disgorgement and financial penalty figures 'were determined in a context where Sarclad has limited means and ability such that the maximum amount it would be able to provide towards paying any financial obligation imposed without becoming insolvent is estimated to be £352,000.'[135] The total gross profit from the implicated contracts was £6,553,085.[136] Here, the court imposed financial orders equivalent to that gross profit (which differed from the approach in the other DPAs).

With this DPA the culpability starting point was high, but the parties submitted a (lower than expected) harm multiplier figure of 250%.[137] Applying this figure (ie 250% of the gross profit £6,553,085), the starting point for a financial penalty would be almost £16.4m. In applying a discount for a guilty plea, Leveson P reduced the figure to £8.2m: it was felt that 'a discount of 50% was appropriate not least to encourage others to conduct themselves as Sarclad has when confronting criminality'.[138] This 50% discount is significant: not only is it higher than the one-third discount in the Standard Bank Agreement, practitioners welcomed it as an incentive for companies to self-report.[139] The rationale here was clear: 'Given the self-report and admission, under the guideline, a full reduction of one third is justified and appropriate. In addition, given that the admissions are far in advance of the first reasonable opportunity having been charged and brought before the court, that discount can

[131] Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (2014). For further discussion of financial penalties in the UK, see Sprenger (n94), p.420 *et seq*.
[132] Standard Bank judgment (n.47), para.16.
[133] Ellen Gallagher, 'The Standard Bank DPA – the first of many?', *International Bar Association Blog*, June 9, 2016.
[134] *SFO v XYZ Limited, Preliminary DPA Judgment*, Southwark Crown Court, Case No: U20150856, July 8, 2016, para.3.
[135] Sarclad judgment (n.48), para.20.
[136] Sarclad judgment (n.48), para.9.
[137] Even then, it was noted that the multiplier figure 'was always going to be academic given Sarclad's means and ability to pay'. Sarclad judgment (n.48), para.23.
[138] Sarclad judgment (n.48), para.23.
[139] Lloyd Firth, 'The UK's second DPA: a hopeful judgment', *Economia*, July 25, 2016.

be increased as representing additional mitigation.'[140] That notwithstanding, a 50% discount feeds concern that companies receive preferential treatment compared to individual wrongdoers.

Even with the 50% discount, the figure was said to be 'wholly unrealistic' for Sarclad; Leveson P then went on to consider 'all the circumstances'[141] – again here the economic considerations weigh heavily in the judgment. He stated that 'the interests of justice did not require Sarclad to be pursued into insolvency.'[142] Furthermore, '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.'[143] In the circumstances the court imposed total financial orders equating to the gross profit on the implicated contracts (i.e. disgorgement of £6,201,085 and a financial penalty of £352,000).[144] In the words of Leveson P 'the overall sum payable (whether called disgorgement or financial penalty) sufficiently marks the offending and is itself fair, reasonable and proportionate.'[145] According to the then-SFO Director, David Green, '[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.'[146] A clear message has thus been communicated to companies: if they can demonstrate a risk of insolvency alongside full cooperation in the investigation, this will in turn represent a mitigating factor even in those cases where the criminality is systematic, extensive and repetitive. It is difficult to imagine a scenario where full, exemplary cooperation would not be offered following a self-report (as happened here).

Further problems with awarding a 50% discount became apparent in the Rolls-Royce DPA. While the company in this instance had co-operated to a high level, there had been no self-report. In such circumstances, it might have been expected that the full discount would not be applied. That, however, proved not to be the case. This begs the question: why should companies even consider a self-report now? As the OECD states, the 'generous reduction in sentence granted by the Court raises a question about incentives for self-reporting.'[147] A counter view here, though, is that the level of penalty will be clearly demarcated for companies (in contrast to criminal conviction and attendant consequences) which might thus provide an incentive to enter into a DPA.[148] It remains to be seen how this discount will impact on the development of DPAs going forward. We have reservations, however, at the prospect that a company that does not self-report can receive such a discount.

A separate point worth mentioning here is that there is the possibility for financial orders to be paid in instalments. The Rolls-Royce DPA involved considerable sums from disgorgement of profits (£258,170,000) and a financial penalty (£239,082,645 – which includes the 50% reduction). Rolls-Royce requested time for payment, and the SFO accepted that point.[149] However, there has been criticism that the repayment term is 'overly generous', undermines the deterrent value of DPAs, and could result in DPA financial penalties being regarded as a potential cost of business.[150] This repayment term can be contrasted with the later Agreements involving Tesco and Serco, which required payment of the full amount within 30 days. This latter approach is, we suggest, to be preferred.

A further contrast between Rolls-Royce and other Agreements relates to further investigations: in Rolls-Royce, there were assurances that 'on approval of the DPA, [the SFO] would

[140] XYZ Preliminary judgment (n134), para.57, referring to CJA 2003, s.144 and the sentencing guidelines
[141] Sarclad judgment (n.48), para.24.
[142] Sarclad judgment (n.48), para.24.
[143] Sarclad judgment (n.48), para.24.
[144] Sarclad judgment (n.48), para.24.
[145] Sarclad judgment (n.48), para.24.
[146] SFO, 'Press Release – SFO secures second DPA', July 8, 2016.
[147] OECD (n.98), p.16.
[148] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269.
[149] Rolls-Royce judgment (n.49), para.128.
[150] Hawley (n77).

not consider it to be in the interests of justice to investigate or prosecute [Rolls-Royce] for additional conduct pre-dating the DPA and arising from the currently opened investigations into Airbus and Unaoil (which, in any event, is covered by the deferred prosecution agreement reached by Rolls-Royce in the United States).'[151] This is problematic in that it essentially grants immunity for other illegal conduct by the company or its employees. In Tesco, for example, there is no such protection against prosecution or regulatory action for conduct not disclosed prior to the DPA nor for any future criminal conduct, which is a better approach than that adopted in Rolls-Royce.

An important consideration with DPAs is whether criminal prosecutions are also envisaged against individuals involved in the criminal activity. Moreover, to what extent will companies assist (or be required to assist) the SFO in any such prosecution? In Tesco, prosecutions were envisaged, and brought, against individuals in relation to false accounting[152] and fraud by abuse of position.[153] Ultimately, however, in December 2018 the trial judge stopped the prosecution at the 'half-way point' on the grounds that the prosecution case was too weak to be left to the jury.[154] Interestingly, in approving the DPA, Leveson P had explicitly stated: '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.'[155] Notwithstanding the assistance provided by Tesco, no individual was held accountable for the criminal conduct in question. Moreover, the collapse of the individual prosecutions could potentially deter companies from entering into DPA negotiations, not least given the reputational and financial consequences, as well as requirements to cooperate with the SFO.[156] Subsequently, in February 2019, the SFO announced in relation to the Rolls-Royce case that: '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.'[157] Thus, in that case also, no individuals would now be held accountable. If the cooperation had indeed been so extensive, as was emphasised by Leveson P, then it is surprising that there would be insufficient evidence to support individual prosecutions. Further, in July 2019, the prosecution of individuals related to the Sarclad DPA resulted in a jury acquittal.[158] Thus, of the five Agreements to date, no prosecutions were brought in two instances (Rolls-Royce and Standard Bank), in another, charges were brought but these were dismissed by the judge (Tesco), another resulted in jury acquittal (Sarclad), and in the remaining one a decision is not expected until mid-December 2019 (Serco). This is an aspect of negotiated settlements that needs to be kept under review by the authorities, to ensure that individual accountability is properly pursued.

Relatedly, for a company to be convicted in criminal proceedings, it must generally be established that a 'controlling mind' of that company possessed the necessary *mens rea* for the offence in question.[159] Thus, where individual prosecutions subsequent to a DPA are either unsuccessful or are not brought – as has happened in four instances to date – companies (or their

[151] Rolls-Royce judgment (n.49), para.134.
[152] Theft Act 1968, s.17.
[153] Fraud Act 2006, s.1 and 4.
[154] Zoe Wood and Sarah Butler, Two Tesco directors cleared of fraud as judge labels case 'weak', *The Guardian*, December 6, 2018. Subsequently, in January 2019 the SFO offered no evidence against a third individual and he was formally acquitted: BBC News, Former Tesco director Carl Rogberg has been acquitted of fraud (January 23, 2019).
[155] Tesco judgment (n50), para.73. The company is also required to procure the same assistance from Tesco Plc.
[156] Joanna Dimmock, 'Tesco trial collapse highlights dangers of an early deferred prosecution agreement' *White & Case Alert* (February 1, 2019).
[157] SFO, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals (February 22, 2019).
[158] SFO, Press Release, 'Three individuals acquitted as SFO confirms DPA with Sarclad' (July 16, 2019).
[159] See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. For wider consideration, see Neil Cavanagh, 'Corporate Criminal Liability: An Assessment of the Models of Fault' (2011) 75 *JCL* 414.

shareholders) might question the decision to enter into a DPA. Particularly problematic for the individuals concerned is that notwithstanding acquittal in criminal proceedings they might nonetheless be identified in (separate) DPA proceedings as having committed criminal conduct.[160] Notably, there is no provision for a judgment or statement of facts to be revised to remove references to individuals.[161] Thus, where these documents are unredacted at the conclusion of criminal proceedings against individuals, those individuals might well have been acquitted[162] but are nonetheless named and shamed in the DPA documents. One way around this issue is to ensure that individual prosecutions are investigated and prosecuted before the DPA is announced (or negotiated). That would ensure fairness to individuals, particularly where the criminal proceedings result in an acquittal. A further benefit is that, where individual prosecutions are successful, it would demonstrate that criminal prosecution is a viable option for the authorities (absent negotiation of a DPA). On the other hand, however, if individual prosecutions are unsuccessful then companies are less likely to be inclined to negotiate a DPA, given the threat of criminal prosecution of the company is no longer viable.[163] A second difficulty here is that companies will often be attracted to negotiate a DPA for a speedy resolution. If individual prosecutions are to take place first, and of course these are likely to take significant time to progress, then there will not be a speedy resolution nor certainty for the company.

A further consideration related to the terms of a DPA is not strictly concerned with the *terms* themselves, but rather relates to how those terms impact upon parent companies.[164] In the Sarclad DPA, the parent company (Heico Companies LLC) had offered to provide necessary financial support in the event that a DPA was to be agreed, even though 'there was neither contractual nor legal obligation on Heico, as an innocent parent company, to contribute towards a financial penalty imposed upon one of its subsidiaries for criminal conduct by that subsidiary.'[165] If a subsidiary is prosecuted and unable to pay the penalty imposed, then it can be wound up. But, as counsel for Sarclad accepted, 'a parent company receiving financial benefits arising from the unlawful conduct of a subsidiary (albeit unknown) must understand how this will be perceived'.[166] Heico had in fact received £6m in dividends from Sarclad since acquiring it in 2000. It was agreed between Sarclad and Heico that, as well as providing financial support to meet the terms of the DPA, Heico would also return £1,953,085 of these dividends to Sarclad. In concluding, Leveson P stated:

> 'Before parting from this case, I must underline one further point. Heico was entirely ignorant of what had been happening at Sarclad and its conduct when it had intimation of the facts has been beyond reproach. Its behaviour and its support for Sarclad have been important features in allowing the case to be resolved in the way in which it has.'[167]

Where, however, there is evidence that a subsidiary is established as a vehicle through which corrupt payments may be made (and can be abandoned in the event of prosecution), then a parent company itself will likely face prosecution under section 7 of the Bribery Act. Leveson P emphasised that 'A

[160] See, eg, the Tesco Statement of Facts, para.9 (and throughout) which specifically identified the individuals concerned and, in a section headed 'Evidence of False Accounting' (para.54 et seq) detailed their supposed criminal conduct.

[161] Maria Cronin & Craig Hogg, Time to rethink DPAs after Tesco failures, *Law Society Gazette*, February 25, 2019.

[162] Indeed, the individual prosecutions linked to the Tesco DPA were stopped by the trial judge, and an acquittal directed, on the basis that there was insufficient evidence for a jury to consider: SFO, News Release, 'No case to answer' ruling in case against former Tesco executives (December 6, 2018).

[163] Unless a 'failure to prevent' offence might be established on the facts.

[164] It is, of course, well established that companies have their own separate legal personality and subsidiaries are, generally, to be treated as distinct from their parent company: see *Salomon v Salomon & Co Ltd* [1897] AC 22.

[165] Sarclad judgment (n.48), para.21.

[166] Sarclad judgment (n.48), para.21.

[167] Sarclad judgment (n.48), para.28.

preexisting plan to behave corruptly through the subsidiary would obviously be treated as a seriously aggravating feature.'[168]

A notable development in this regard is the Serco Agreement, involving a dormant company that has no plans for future trading. In that instance, the conduct in question involved both the dormant company and its parent company, and the parent company was the ultimate beneficiary. However, there was no basis for attributing criminal liability to that parent company.[169] While the Agreement was with the dormant subsidiary, it actually extends beyond that subsidiary to encompass Serco Group PLC and its subsidiaries.[170] Thus, Serco Group PLC agreed to pay the financial penalty and the SFO's costs, as well as to implement specified ethics and compliance procedures. This is an important development in the context of DPAs. Notwithstanding that the parent company could not be prosecuted (nor subject to a DPA itself), 'it will be the parent company which necessarily must engage in any compliance programme and cooperate with law enforcement agencies.'[171]

CONCLUSION

Five years on from the introduction of DPAs, it is timely to step back and take stock of developments thus far. There have been many plaudits from policymakers and practitioners, most notably in the 2019 House of Lords Select Committee report.[172] Notwithstanding plaudits, this article has deliberately struck a note of caution. In concluding, it is useful to stress key areas that will influence the continued development of the DPA regime over the coming years.

Whilst there was initial hope that the adoption of DPAs had 'the potential to revolutionise the approach to corporate criminal liability traditionally adopted in the UK',[173] experiences thus far have failed to live up to this expectation. A key aspect of this is, of course, that there are inherent difficulties with establishing corporate criminal liability itself. A wider reconsideration of corporate criminal liability has not materialised,[174] thus should a company not agree a DPA there is often no credible threat to that company. Contrast that with the situation in the US, for example, where companies know that the threat of prosecution is lurking in the background.[175] This threat does not exist in England and Wales where the identification principle renders corporate prosecution rare, except in cases of small and medium sized businesses. The lack of a credible threat has the potential to undermine the DPA regime: as Campbell states 'It must be recognised that DPAs are introduced as a way of mitigating the issues with existing law but still are predicated upon it. If DPAs are to be a useful addition to the legal landscape then there must be mutual incentives to agree one, as well as a possible alternative for the State to deploy. Even if prosecution is a last resort, it must be viable and feasible.'[176] While there have been some efforts at reform, particularly the adoption of failure to prevent laws, such offences are not themselves without controversy.[177] Thus, when considering whether DPAs offer an alternative – one that is attractive to both the authorities and to companies – it is important to also

[168] Sarclad judgment (n.48), para.28.
[169] Serco judgment (n.51), para.40.
[170] See 'Attachment A' accompanying the judgment.
[171] Serco judgment (n.51), para.42.
[172] House of Lords Select Committee (n.2).
[173] Costantino Grasso 'Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBCSB Plc' (2016) 5 *Journal of Business Law* 388, 388.
[174] Notwithstanding a public consultation in January 2017: Ministry of Justice, *Corporate Liability for Economic Crime, Call for Evidence*. Cm 9370 (January 2017).
[175] In the US, the identification principle does not apply; rather the principle of *respondeat superior* applies.
[176] Liz Campbell, 'Trying corporations: why not prosecute?' (2019) 31(2) *Current Issues in Criminal Justice* 269.
[177] Consideration of such offences is beyond the scope of this article. For wider discussion, see Celia Wells, 'Corporate failure to prevent economic crime – a proposal' [2017] *Crim LR* 426.

bear in mind the lack of a credible threat of criminal prosecution. Ultimately, the lack of a credible threat of criminal prosecution could undermine other aspects of the DPA regime, considered below.

A related point is whether companies will be attracted to enter into a DPA. While there are five Agreements to date, and rumours of others being negotiated, so too are there criticisms that the DPA regime is not entirely attractive to companies. In particular, the requirement that any financial penalty imposed as part of a DPA should be broadly comparable to any fine that would have been imposed upon conviction following a guilty plea has given rise to some discontent. For some companies, the financial penalty as well as the payment of SFO costs, appointment of a corporate monitor, and implementing new compliance/ethics procedures, could be off-putting. On the other hand, however, the discount offered – up to 50% - is itself attractive. Moreover, the possibility of avoiding debarment rules will be particularly significant for those companies tendering for public contracts.[178] And, of course, entering into a DPA provides certainty to the company[179] and, assuming that the terms are complied with, brings criminal proceedings to an end. Thus it remains to be seen whether companies will be attracted to enter into a DPA, or whether they will be more inclined to adopt a wait-and-see approach and to contest allegations in criminal proceedings in appropriate circumstances. We retain concerns, though, in relation to the 50% discount, particularly in the absence of self-reporting by the company. Furthermore, the 50% discount reinforces our concerns that corporate criminality is differentially enforced.[180]

While a DPA can provide certainty, and finality, to the company, the same cannot be said for individuals involved in the relevant conduct. Individual prosecutions are an important aspect of any negotiated settlement: indeed the House of Lord Select Committee agreed 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'.[181] Moreover, it has been suggested that prosecuting individuals would represent an additional deterrent.[182] To date, however, there have been no successful prosecutions of individuals for conduct related to DPAs. Furthermore, in those instances where proceedings were instigated, there have been concerns, for example whether it is appropriate for a DPA to identify individuals as having engaged in criminality where those individuals are later acquitted in criminal proceedings. Indeed, the failure of individual prosecutions in proceedings related to the Sarclad and Tesco Agreements might strengthen companies' resolve to tough it out and to decline to enter into DPA negotiations.

Ultimately, a lot of the contentious issues can be traced to a core difficulty with the DPA regime, namely the lack of clarity as to purpose. DPAs were introduced to overcome difficulties in prosecuting companies, but also to achieve swift, efficient, cost-effective resolutions. DPAs were intended to be effective in tackling corporate crime, but also to encourage self-reporting and self-policing by companies. So too were they intended to deliver proportionate and effective penalties, but also to provide restitution for victims and protection of employees and suppliers.[183] Thus, as

[178] Though, as noted in Serco, this can depend on the facts of specific cases. In relation to the facts in Serco, see para.11 *et seq* of the judgment.

[179] See, eg, Peggy Hollinger and Catherine Belton, Rolls-Royce shares climb on back of bribery settlement, *Financial Times* (January 17, 2017).

[180] Nicholas Lord and Colin King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in Liz Campbell and Nicholas Lord (eds) *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018).

[181] House of Lords Select Committee (n.2), p 88.

[182] Nicholas Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) *JCL* 245, 260.

[183] See Ministry of Justice (n.15).

Bronitt argues, there is a lack of a clear underlying philosophy of justice in the DPA regime.[184] This lack of a clear philosophy of justice has, perhaps inevitably, resulted in many practical difficulties, as evidenced throughout this article. The weak foundations of the DPA regime are problematic: as Jimi Hendrix said, 'castles made of sand fall in the sea, eventually'.[185]

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[184] Simon Bronitt, 'Regulatory bargaining in the shadows of preventive justice: Deferred Prosecution Agreements' In: Tamara Tulich et al, (eds) *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017).

[185] Jimi Hendrix Experience, 'Castles Made of Sand'. *Axis: Bold as Love* (1967).