

CORRUPTION WATCH

OUT OF COURT, OUT OF
MIND: DO DEFERRED
PROSECUTION
AGREEMENTS AND
CORPORATE
SETTLEMENTS FAIL TO
DETER OVERSEAS
CORRUPTION

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Out of Court, Out of Mind

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EXECUTIVE SUMMARY

Almost all foreign bribery cases brought by OECD countries have been resolved through some form of corporate settlement. The US has led the field in this practice, using Deferred or Non Prosecution Agreements to resolve the majority of foreign bribery cases since 2004. These settlements are increasingly being seen as a solution for dealing with foreign bribery with several countries looking at following the recent example of the UK by introducing Deferred Prosecution Agreements - just at the time that the use of such agreements in the US is becoming increasingly controversial.

The US experience, this report shows, reveals that these agreements have:

- consistently let individuals involved in wrongdoing off the hook;
- created a two-tier justice system for companies and represents an over-lenient response to serious crime;
- failed to deter economic crime, with apparent high rates of recidivism;
- undermined the deterrent effect of the law by shielding companies from collateral consequences such as debarment;
- lacked regulation or oversight;
- and not provided for restitution for victims or return of assets to affected countries.

A key rationale for rolling out such agreements in the US and across the globe – to prevent companies from going bust – is not backed by the evidence. Companies convicted of wrongdoing in the US do not routinely go out of business. A significant number of legal experts and commentators in the US, including judges, now argue that the use of Deferred and Non Prosecution Agreements undermines the US justice system itself and the rule of law. Recent changes in the US enforcement landscape such as increased resources for detection of bribery and a requirement for companies to give evidence of individual wrongdoing in order to get cooperation credit suggest that the enforcement landscape is changing in response to these criticisms.

The UK's introduction of a modified form of Deferred Prosecution Agreement overseen by a judge has set new standards for such agreements in the oversight provided, compensation offered to victims, and transparency of information. Critically, the UK has insisted that prosecution is a key part of its enforcement strategy alongside such agreements, and has set a high bar for such agreements to be given. However, the UK system also suffers from some inherent weaknesses when compared to the US, including the lack of admission of guilt, a failure to use a DPA as a leverage to disclose full wrongdoing, weak standards for reporting on compliance, and weak breach requirements. The UK's first DPA, in addition, did not involve any individual prosecutions.

The OECD Working Group on Bribery has consistently raised concerns about the use of settlements in its monitoring reports on implementation with the OECD Anti-Bribery Convention. Evidence from these reports shows that there has been wide use in European countries of out of court settlements to deal with foreign bribery, with inconsistent levels of transparency, individual accountability, and effective sanctioning. Such use of out of court settlements or mechanisms in the European context enables European companies to avoid the debarment provisions of the EU Procurement Directives altogether.

This paper argues for global standards on corporate best practice settlements to be developed which ensure they have deterrent effect. The Conference of State Parties for the UN Convention Against Corruption has commissioned work on whether guidelines can be developed for cooperation with affected States and return of assets from settlements. While this will help ensure representation of affected states and victims of corruption, it does not go to the heart of ensuring settlements have deterrent value. To ensure that an even enforcement playing field develops, standards that ensure such deterrent value are essential.

The OECD Working Group on Bribery should develop standards for settlements that complement those being developed in relation to UNCAC. These standards should include the following principles:

- settlements should only be used as part of a broader enforcement strategy where prosecution is the norm;
- settlements should only be used where a company has self-reported, cooperated fully and admitted wrongdoing, and where the wrongdoing is not of a serious or egregious nature;
- individuals must be prosecuted wherever possible whenever a settlement is entered into;
- judicial oversight which allows proper scrutiny of the evidence in a public hearing is essential;
- settlements must provide an equivalent level of detail about the wrongdoing as a court hearing would provide, with identification of officials who receive the bribes and company employees involved in the wrongdoing;
- compensation to victims must be an inherent part of a settlement;
- affected countries and victims should be given a right to representation at settlement hearings;
- settlements should be used to leverage full disclosure of wrongdoing within a company;
- settlements (and alternative charging) must not be used to protect companies from debarment; and
- settlements should not be used where a company has had a previous enforcement or regulatory action taken against it.

Ultimately, the purpose of the OECD Anti-Bribery Convention is itself at stake. Settlements may not provide the easy way out of the current lack of enforcement scenario that many OECD countries are in. Without a sufficient increase in detection rates and without a broader enforcement strategy that includes prosecution, it is unlikely that countries will be able to incentivise companies to self-report their wrongdoing with settlements alone. The danger is that if settlements continue to dominate the enforcement of foreign bribery offences or are seen as the panacea, the Convention's real deterrent effect will be lost. Ultimately, unless high standards can be agreed, the public around the world will lose confidence that justice in relation to overseas corruption is really being done.

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INTRODUCTION

Corporate settlements are increasingly becoming the preferred tool for dealing with economic crime by large corporations, particularly in the fields of bribery and corruption. In its 2014 Foreign Bribery Report, the OECD found that 69% of foreign bribery cases were dealt with by way of a settlement.¹

The US, which has long been seen as the most proactive enforcer of the OECD's Anti-Bribery Convention, has led the way in this regard. Deferred Prosecution Agreements and Non Prosecution Agreements have become the "*mainstay of whitecollar criminal law enforcement*" in the US.² Between 2004 and 2012, the US resolved 70 of its 84 criminal enforcement actions under the Foreign Corrupt Practices Act through either a Deferred Prosecution Agreement or a Non Prosecution Agreement.³ Only two Foreign Corrupt Practices Act cases involving corporations since 2004 have resulted in a full court trial.⁴

Many countries are now following the US trend, at a time that these settlements are becoming increasingly controversial in the US. The UK introduced Deferred Prosecution Agreements in February 2014 after having used civil recovery orders as a means of corporate settlement for overseas corruption for some years. Brazil introduced a provision for corporate leniency agreements in its 2014 anti-bribery legislation, the Clean Company Act – a provision which allowed a two thirds reduction in penalty for companies that cooperate with authorities, admit wrongdoing, and help identify those involved in the wrongdoing.⁵ It is currently in the process of making such agreements more lenient yet.⁶

Settlements have also been used to resolve foreign bribery cases in Germany, Canada, Denmark, Italy, Norway, the Netherlands, Switzerland, Japan and Greece.⁷ And several countries are looking at whether to introduce some form of settlement procedure:

- In January 2016, Ireland's Law Commission opened a consultation on regulatory enforcement and corporate offences which included looking at whether Ireland should introduce Deferred Prosecution Agreements.⁸

- In France, a draft anti-corruption bill for introduction to the Council of Ministers has been developed, which would introduce a statutory basis for a criminal settlement process (convention de compensation d'intérêt public).⁹ This appears to be in response to criticisms over lack of enforcement action in France and demands from civil society organisations for some form of settlement procedure to be introduced to help encourage enforcement action.¹⁰
- There is increasing pressure for Deferred Prosecution Agreements to be introduced in Canada, including from numerous law firms¹¹ and the Canadian company, SNC Lavalin, which has been charged in Canada with paying bribes in Libya and claims that it is at a competitive disadvantage to competitors from the US and UK because of the absence of DPAs in Canada.¹²
- A 2015 Australian Senate Committee inquiry into foreign bribery included in its remit looking at Deferred Prosecution Agreements.¹³ The International Bar Association's Anti-Corruption Committee made a submission to that inquiry urging that "*a form of structured settlement agreement be introduced as statutory amendments to Australia's criminal law.*"¹⁴ That inquiry is due to report in July 2016.

There is no doubt that settlements offer a quick, cheap and relatively easy way of bringing an enforcement action. In their favour, settlements appear to be a win-win solution for prosecutors and corporations. The company receives a punishment, so the prosecutor has a result which might not be either so readily or so quickly achievable through the court system, particularly with regard to complex financial crime.¹⁵ The company avoids the collateral and reputational damage of a conviction. As one US commentator put it: "*all of the punishment, none of the guilt*".¹⁶

Furthermore, settlements bring in easy money. The US Treasury has received \$48.6 billion in fines from corporate settlements since 2000.¹⁷ In an era of stretched public resources, turning enforcement of financial crime into a cash cow is obviously an attractive policy option for both enforcement agencies and government.

However, under the UN Convention Against Corruption, state parties must endeavour to ensure that discretionary legal powers for prosecuting corruption "*are exercised to maximise the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of the offence*" (Article 30, para 3). Settlements obviously represent one such discretionary legal power.

The key question this briefing will address is whether corporate settlements do indeed achieve real deterrence and deliver justice. Before settlements are rolled out across the globe in an uncritical manner, the lessons from the US experience and the emerging UK experience need to be heard and learnt. This briefing will also examine the need for global best practice standards on settlements to ensure that settlements are indeed effective and do indeed deter corruption.

Taking first lessons from the US and emerging criticisms of the use of Deferred Prosecution Agreements and Non Prosecution Agreements, the briefing will then look at the UK Deferred Prosecution Agreement regime built on judicial scrutiny. It will go on to look briefly at the trend towards out of court settlements in Europe before drawing some conclusions as to what global standards for corporate settlements are required.

CHAPTER ONE: LESSONS FROM THE USA

The use of corporate settlements in the US context needs to be seen in the context that 97% of all criminal cases in the US justice system – not just in relation to corporate crime - are resolved by way of plea bargaining, with only 3% going to a full trial. Corporations are also able to plea bargain, and where they do so this is sometimes referred to as a criminal settlement or resolution.¹⁸ Plea agreements are written negotiated agreements between a prosecutor and a defendant, which are accepted, modified or rejected by a court, in which a defendant pleads guilty often in exchange for a particular sentence or the dismissal of certain charges.¹⁹ Plea agreements in effect lead to a conviction.

While the Department of Justice (DOJ) still enters into plea agreements with companies, in recent years it has turned increasingly to “*alternative resolution vehicles*”, in the form of Deferred Prosecution Agreements and Non Prosecution Agreements to deal with corporations. Under a Deferred Prosecution Agreement (DPA), a defendant is required to admit relevant facts, pay a fine and commit to certain remedial measures in exchange for charges being withdrawn. A DPA usually lasts for set period of time (usually around 3 years) and is technically subject to court approval. A Non Prosecution Agreement (NPA) is a similar agreement to a DPA but no criminal case is filed before a court. In the context of the Foreign Corrupt Practices Act (FCPA), the DOJ also uses a hybrid type of enforcement action involving a guilty plea by a subsidiary (usually foreign) and an NPA or DPA with the parent company.²⁰ The DOJ also enters into civil settlements with companies. In addition, the Securities and Exchange Commission (SEC) uses cooperation agreements, DPAs and NPAs to resolve civil cases under the FCPA and under US securities laws and regulations.

The use of DPAs has helped the US achieve an impressive enforcement record in the context of the FCPA. Between 2004 and 2014, the US DOJ brought 84 enforcement actions under the FCPA. This compares with 24 enforcement actions between 1977 and 2004.²¹ This has been at a time that few other OECD countries have brought any enforcement actions whatsoever.

However, the use of DPAs and NPAs has become controversial within the US judiciary, the legal and academic communities, and the public. Some argue that such agreements do not offer meaningful punishment of corporations, that the fines they impose can easily be assimilated as a cost of doing business. Use of these agreements has rendered companies, in Professor Brandon Garrett’s words, “*too big to jail*,”²² and as such, fail to achieve justice.

Others argue that DPAs and NPAs represent an ‘over-reach’ by prosecutors, who effectively bully corporations into whatever terms they want, particularly by asking for waivers of legal privilege. For these people, such agreements represent an abuse of power or as the Economist put it, “*extortion behind closed doors*.”²³

A significant number of critics has started to argue that the use of DPAs and NPAs for corporations undermines the US justice system itself. One law professor describes their use as compromising “*the pursuit of justice, consistency in the rule of law, and basic notions of fairness*.”²⁴ A former chief of the public corruption and government fraud section at the District of Columbia’s Attorney Office states that “*their excessive use is undermining the criminal justice system*.”²⁵ Even the Financial Times has described their use in the US to deal with banks implicated in the financial crash of 2008 as “*the most blatant expression of the failure to rein in the financial industry*.”²⁶

As a result, there is growing demand in the US for the use of DPAs and NPAs to be restricted.

The Rationale for Deferred Prosecution Agreements

DPAs were originally used in the US to deal with minor offences by juveniles and first time offenders. One of their stated aims was to protect “*the vulnerable in society*”, particularly juvenile and first-time offenders charged with certain non-violent crime, by helping offenders rehabilitate without having a criminal record hanging over them.²⁷ As US Judge Sullivan observed in an October 2015 judgement, “*at this time however, deferred prosecution agreements ... are used more proportionately more frequently to avoid the prosecution of corporations, their officers and employees.*”²⁸

Use of DPAs and NPAs by the US DOJ went from two or three a year in the early 2000s to an average of 28 a year from 2006 onwards.²⁹ From 2010 to 2013, two thirds of the US DOJ’s Criminal Division corporate cases were resolved by DPAs or Non Prosecution Agreements (NPAs).³⁰ 2015 saw the resolution of 100 such agreements (87 Non Prosecution Agreements and 13 Deferred Prosecution Agreements).³¹

PURPOSE ONE: AVOIDING THE CORPORATE DEATH PENALTY

The shift towards using DPAs primarily to deal with corporate economic crime goes back to the collapse of accounting firm, Arthur Andersen. Andersen was indicted and then convicted in 2002 on obstruction of justice charges for destroying documents in the run up to Enron’s collapse that same year.³² Andersen is frequently cited as an example of how a corporate conviction is effectively a death sentence for the company, leading to the loss of jobs of innocent employees, and financial disaster for innocent shareholders. Andersen’s conviction resulted in the loss of its certified public accounting licence and thereby its ability to audit public companies.³³

In response to criticism for being instrumental in Arthur Andersen’s collapse, the US Department of Justice’s Criminal Division has turned to Deferred Prosecution Agreements or Non Prosecution Agreements to deal with economic offending by companies, particularly large companies, since 2002. DPAs and NPAs effectively insulate a company from the collateral consequences of a conviction (the most important being potential debarment from government contracting) and helps reduce its reputational damage.

However, the main justification for the roll out of DPAs – helping companies avoid the corporate death penalty - is not backed up by the evidence. Andersen was already potentially in a financially precarious position, after its profitable consulting wing split off in 2000, when it was indicted, and the firm had been struck by a series of scandals relating to its accounting practices that had seriously damaged its reputation.³⁴ Andersen’s collapse following indictment meanwhile appears to be the exception rather than the rule.³⁵ Markoff’s research in the US suggests that the “*Arthur Andersen factor*” is much exaggerated and that between 2001 and 2010 not a single publically traded company failed as a result of a conviction.³⁶ Even DOJ officials have started to recognise that corporate death is not inevitable. In March 2014, US Attorney, Preet Bharara described companies’ claims that their business will fall apart if tough enforcement action is taken against them as a “*Chicken Little routine*” that “*begins to wear thin*” because prosecutors have found that “*in reality, as we had suspected, the sky does not fall.*”³⁷ Despite this, the Andersen example and the threat of the corporate demise as a result of prosecution

continues to be cited as a key reason for the necessity of DPAs and corporate settlements both in the US and abroad.

PURPOSE TWO: ACHIEVING THE SAME OUTCOME AS A CONVICTION WITHOUT THE COST OF A TRIAL

Another key motive behind the roll-out of DPAs by the DOJ is the simple fact that prosecutors can get the same outcome in terms of financial penalties, admissions, corporate cooperation and remedial action as can be achieved by a conviction or a guilty plea but without the costs of investigation and prosecution. Lanny Breuer, former assistant Attorney General and head of the US Department of Justice's Criminal Division, for instance said in a 2012 speech that DPAs have "*the same punitive, deterrent and rehabilitative effect as a guilty plea.*"

Some evidence suggests that companies do potentially receive higher monetary penalties under a DPA than a plea bargain (though NPAs tend to involve a lesser financial penalty), and that DPAs include more non-monetary sanctions, such as the imposition of a corporate monitor and the waiver of attorney-client privilege.³⁸ Critics however point out that because DPAs and NPAs insulate companies from the collateral and reputational consequences of having a criminal conviction, the overall financial impact of a DPA or NPA may not be as great as a plea bargain, and their deterrent value is lower.

Furthermore, if DPAs are used almost exclusively to resolve financial crime, prosecutors may lose "*the expertise to try [such cases] in a courtroom in a way that makes sense to jurors.*"³⁹ Law professor Rachel Barkow points out that "*at some point you do have to be willing to take down a company to prove that you are serious about enforcing the law.*"⁴⁰ If prosecutors have lost their expertise to 'take a company down', using settlements for corporate crime will ultimately, critics argue, have diminishing returns in terms of deterrence.

PURPOSE THREE: BRINGING ABOUT CORPORATE GOVERNANCE REFORM

Additionally, prosecutors argue that through DPAs and NPAs, they can get valuable corporate governance changes from companies. In his 2012 speech, Lanny Breuer argued that the use of DPAs had had "*a truly transformative effect ... on corporate culture across the globe.*"⁴¹ His successor, Leslie Caldwell, went further when she told the OECD Working Group on Bribery in Paris in 2014 that DPAs allowed prosecutors to "*impose reforms, impose compliance controls, and impose all sorts of behavioural change that a court would never be able to impose following a conviction at trial.*"⁴²

Some have questioned whether prosecutors should be acting as regulators, by imposing corporate reform, when corporate governance is not their competence and when their primary purpose is to prosecute misconduct - not to regulate.⁴³ One former prosecutor describes the use of DPAs as replacing "*our criminal justice system ... with a quasi-regulatory regime administered by prosecutors.*"⁴⁴ Others have pointed out that most corporate governance reforms that are included in a DPA or NPA can as easily be achieved through a plea bargain.⁴⁵

PURPOSE FOUR: ENCOURAGING COMPANIES TO SELF-REPORT

In the FCPA context, DPAs and NPAs are used to incentivise companies to self-report wrongdoing and cooperate with law enforcement. Given that foreign bribery offences are by their very nature secret, with much of the evidence that would be needed for a conviction potentially in multiple jurisdictions some

of which may refuse to cooperate, incentivising companies to come forward to report their own wrongdoing is a major motivation behind the global roll-out of the use of DPAs.

Some have claimed recently that the majority of FCPA violations are revealed through self-disclosure.⁴⁶ Others that fifty percent of FCPA enforcement actions result from voluntary self-disclosure.⁴⁷ Research in 2010 showed that of 40 FCPA enforcement actions between 2002 and 2009, 15 were based on voluntary disclosures, while 19 involved companies that did not self-disclose.⁴⁸

In 2009, then assistant attorney general, Lanny Breuer, told a conference that: “*the majority of our cases do not come from voluntary disclosures. They are the result of pro-active investigations, whistleblower tips, newspaper stories, referrals from out law enforcement counterparts in foreign countries, and our Embassy personnel abroad among other sources.*”⁴⁹ It is obviously in the interests of the DOJ to give the impression that companies will be detected if they do not self-disclose their wrongdoing in order to provide the incentive for them to do so. The decision in early 2015 to triple the number of FBI agents working on foreign bribery and corruption⁵⁰, does suggest that the US is serious about improving detection of foreign bribery independently of encouraging self-reporting. Commentators linked the increase in resources for the FBI directly to criticisms that the DOJ had become too dependent on investigations conducted by those companies who were themselves involved in wrongdoing.⁵¹

Unless companies know that they are at a high risk of being detected if they do not self-disclose wrongdoing, it is self-evident that they will be more likely to risk not self-disclosing. Any efforts to encourage self-reporting through offering leniency therefore have to be intimately linked with strategies to increase detection of wrongdoing through other means.

Settlement Controversies

DPAs and NPAs have become increasingly controversial in the US for the following reasons:

THE USE OF DPAs AND NPAs HAS LET INDIVIDUALS OFF THE HOOK

Perhaps the most serious and recurring criticism is that DPAs and NPAs have become a substitute for individual accountability for financial crime. Few individuals involved in some of the serious financial scandals of the past decade have been jailed. As Senator Elizabeth Warren said in the Senate Banking Committee Hearing in March 2013, in relation to the DPA with HSBC for extensive money laundering including of Mexican drug cartel money:

*“if you get caught with an ounce of cocaine, the chances are good you’re going to go to jail... if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night. I think that’s fundamentally wrong.”*⁵²

Prior to 2004, which is when the DOJ first used a DPA to resolve FCPA charges, 83% of FCPA enforcement actions also involved a related criminal prosecution of an individual.⁵³ Conversely, between 2004 and 2014, 76% of DOJ enforcement actions relating to the Foreign Corrupt Practices Act did not result in any individuals being charged.⁵⁴ Professor Mike Koehler has shown that since 2004, where the DOJ has entered into an enforcement action that results in a guilty plea or criminal indictment, 71% of those actions have resulted in criminal charges against individuals. Where the DOJ has entered into a DPA or NPA only 9% of such enforcement actions resulted in charges against individuals. Koehler argues

that the reason for a greater number of individual charges where there is a plea agreement is that these types of enforcement actions are higher quality actions, based on greater evidence.

The lack of individual prosecutions is not just limited to the FCPA. At a broader level, only 23 (33%) of 66 DPAs with financial institutions between 2001 and 2014 resulted in individual employees being prosecuted.⁵⁵ In February 2016, the chair of the Financial Crisis Inquiry Commission, Phil Angelides, wrote to the US Department of Justice urging it to conduct an urgent investigation into “*individual misconduct*” at major financial institutions before the 10 years statute of limitations expired, several of whom, such as Bank of America and JP Morgan, had entered large civil settlements with the DOJ for their role in the selling of ‘toxic’ mortgages that led to the 2008 financial crisis. Angelides wrote that individual investigations were necessary in order to “*restore faith in the fairness of our justice system and to ensure deterrence for future wrongdoing.*”⁵⁶ He told the Financial Times that the fact that no senior executives had been held to account “*breeds a great amount of cynicism and anger about the nature of our judicial system.*”⁵⁷

US Judge Sullivan severely criticised a September 2015 DPA that the DOJ made with General Motors for misleading the public over a safety defect that led to the loss of lives, in which the company paid a fine of \$900 million. Sullivan described the case as “*a shocking example of potentially culpable individuals not being criminally charged*”.⁵⁸

The DPA with General Motors was made a week after the DOJ announced a shift in policy, known as the Yates memo, towards holding culpable individuals to account.⁵⁹ The Yates memo states that in order to qualify for cooperation credit, companies must provide all relevant facts relating to individuals responsible for misconduct.

It is too early to assess how much difference the Yates memo will make. One former DOJ prosecutor predicted in November 2015 that the DOJ would back away from its all or nothing approach because it would make companies less likely to cooperate.⁶⁰ Other commentators expressed their concern that individuals would get scapegoated by companies⁶¹ and that companies would sacrifice individuals that they would already have to take action against to show remedial action had been taken.⁶² Clearly if the policy results in companies sacrificing ‘lower-down’ employees but protecting ‘higher-ups’, it will not convince a sceptical public that individuals are in reality being held to account.

Without prosecution of individuals involved in the wrongdoing it is questionable whether real deterrence of financial crime can be achieved and justice be seen to be done. US Judge Rakoff in particular has suggested that: “*the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing.*”⁶³

Holding individuals to account need not and should not however be a substitute for holding corporations to account. As US Attorney Preet Bharara put it: “*It should not be one or the other; prosecute individuals or institutions. To effectively deter criminal conduct and do justice, we need to do both.*”⁶⁴

THE USE OF DPAs AND NPAs CREATES THE IMPRESSION THAT COMPANIES CAN BUY THEMSELVES OUT OF THE JUSTICE SYSTEM AND REPRESENT AN OVER-LENIENT RESPONSE TO SERIOUS CRIME

A key issue with offering DPAs and NPAs solely to corporate offenders is that it makes it appear that companies can buy their way out of the justice system in a way that no other person can. According to

one legal critic, this potentially leads to a “*dual system of justice that favours large financial institutions.*”⁶⁵ Evidence suggests that DPAs and NPAs are used disproportionately for large domestic companies in the US.⁶⁶ As Senator Elizabeth Warren puts it in her January 2016 report, *Rigged Justice*, the failure to prosecute corporations and their executives “*has a corrosive effect on the fabric of democracy and our shared belief that we are all equal in the eyes of the law.*”⁶⁷

The DPA that the DOJ entered into with HSBC in 2012 in relation to allegations of money laundering laws particularly with regard to money from drug cartels in Mexico caused widespread outcry in the US.⁶⁸ A New York Times editorial stated: “*when a prosecutor decides not to prosecute to the full extent of the law in a case as egregious as this, the law itself is diminished.*”⁶⁹

Many legal commentators have argued in the same vein that to give DPAs and NPAs in cases of serious wrongdoing undermines the legal system itself. A former US white-collar crime prosecutor writes that by “*wrongly allow[ing] even the most serious corporate offenders effectively to buy their way out of criminal liability, [DPAs] erode the moral force of the criminal law.*”⁷⁰ Another former top DOJ prosecutor of environmental offences and now law professor, David Uhlmann, agrees. He writes that “*when the most serious criminal violations can be handled outside the criminal justice system ...the rule of law is weakened.*”⁷¹ Uhlmann argues that the use of DPAs and NPAs “*minimize[s] criminal conduct and may risk condoning it*”.

The issue of whether DPAs are appropriate for cases of egregious wrongdoing was brought to the fore in February 2015, when for the first time ever a US Judge rejected a DPA in a criminal case, on the grounds that it was “*grossly disproportionate to the gravity*” of the conduct in question. Judge Leon raised serious concerns about the Deferred Prosecution Agreement with Dutch company, Fokker Services, which related to Fokker shipping aircraft systems to Iran, Sudan and Burma in breach of US sanctions against those countries. Leon was particularly concerned about:

- the inadequacy of the fine (which only represented the revenue collected from illegal transactions and no more);
- the fact that no individuals were prosecuted while a number of employees implicated in the conduct were allowed to stay with the company after some “training”;
- and finally the fact that no independent monitor had been appointed.

Leon concluded that “*it would undermine the public’s confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anaemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our countries’ worst enemies.*”

Some legal experts in the US are arguing for the abolition of DPAs and NPAs altogether, on the grounds that plea bargains achieve most of the objectives of a DPA but with greater accountability. Others, such as former prosecutor, David Uhlmann, argue that “*if [DPAs] occur at all, [they] should be limited to relatively minor cases where civil or administrative enforcement is not available or the exceptional case where other non-criminal alternatives are inadequate.*”⁷² There is no doubt that the use of DPAs and NPAs for cases of serious wrongdoing has increased the controversy surrounding them and undermined public trust in enforcement of serious white collar crime in the US.

THE USE OF DPAs AND NPAs FAIL TO DETER ECONOMIC CRIME

Despite the record fines imposed through DPAs and NPAs, there is growing concern that these agreements offer little deterrent value and are seen as a cost of doing business.⁷³ Randall Eliason, former fraud prosecutor from the US Attorney's office for the District of Columbia suggests that *"if the prospect of real criminal sanctions against the company is removed, then engaging in criminal activity becomes just another dollars-and-cents decision. The moral condemnation aspect of a criminal conviction is lost – and with it the unique deterrent value of criminal law"*.⁷⁴

In 2009, the US Government Accountability Office undertook a review of the DOJ's use of DPAs and NPAs and recommended that the US DOJ develop performance measures to assess the efficacy of their use. In particular it suggested looking at recidivism rates among companies offered DPAs and NPAs, and whether a company successfully meets the terms of the agreement.⁷⁵ Without such measures, the GAO concluded it would be difficult for the DOJ to justify its increasing use of such agreements. The OECD Working Group on Bribery also noted that despite giving the US *"an impressive FCPA enforcement record"*, the *"actual deterrent effect [of DPAs and NPAs] has not been quantified."*⁷⁶

The seemingly high rate of recidivism among companies who receive DPAs is increasingly cited as one of the factors that point to their low deterrent value.⁷⁷ US Judge Rakoff cites the case of Pfizer, which between 2002 and 2009 was offered no fewer than four DPAs for criminal wrongdoing, as an example of *"the patent ineffectiveness"* of DPAs to deter corporate criminal wrongdoing.⁷⁸ Concerns over recidivism rates among companies being offered DPAs has led to calls for the DOJ to refuse to enter into a second DPA with a company if it is already operating under one, or *"two strikes and you're out."*⁷⁹

Karpoff, Lee and Martin suggest that the US, which is regarded as the most aggressive enforcer of anti-bribery laws globally with by far the highest levels of fine, *"imposes insufficient expected penalties to offset firms' economic incentive to bribe"*. Their research shows that financial penalties would need to increase by 9.2 times or the probability of getting caught to 58.5% to offset that incentive.⁸⁰ Law academics Stevenson and Wagoner likewise argue that *"the fines imposed for engaging in foreign corrupt practices comprise a tiny fraction of the potential revenue generated by lucrative contracts ...[and] when discounted by the low probability of detection, these sanctions are far too low to deter unlawful activity."*⁸¹ Since the majority of FCPA violations are disposed of by DPAs or NPAs, the question is whether the full deterrent value of the FCPA has been blunted by their use.

Companies which receive penalties for violations of the FCPA tend to face little reputational loss, as long as the charges against them are not comingled with financial fraud charges.⁸² It is not clear whether this low reputational loss is specific to the FCPA and foreign bribery itself or is linked to the use of DPAs to resolve foreign bribery charges. Other anecdotal evidence suggests that DPAs in general limit reputational loss.⁸³ One former federal prosecutor, Michael Clarke, told the Washington Post in relation to bank settlements: *"companies are happy to enter into these deferred prosecution agreements because it's become so commonplace now. They take a bath in the press for a finite period. The stock market doesn't even seem to punish them."*⁸⁴

But the real issue at the heart of whether DPAs and NPAs lack deterrent value is the protection they offer from the collateral consequences of a conviction.

DPAs AND NPAs SHIELD COMPANIES FROM COLLATERAL CONSEQUENCES SUCH AS DEBARMENT

One of the key reasons why the use of DPAs and NPAs limits the full deterrent value of the law is that they shield companies from potential debarment. As the OECD Working Group on Bribery noted in its 2010 report on the US implementation of the anti-bribery Convention, while the US has the legal framework to debar companies for FCPA violations, *“it has rarely done so in foreign bribery cases.”*⁸⁵ While theoretically, a DPA or an NPA does not stop an agency debaring a company, this does not appear to have happened in practice.

The US is not alone. The OECD Foreign Bribery Report found that of 427 foreign bribery enforcement actions between 1999 and 2014, only two had resulted in debarment.⁸⁶ This is despite the fact that the OECD specifically recommends that companies convicted of corruption face the sanction of being excluded from public contracts. The OECD Foreign Bribery Report urged countries to ensure that companies and individuals convicted of foreign bribery *“can be and are debarred from participation in national public procurement contracting.”*

The lack of debarment resulting from FCPA enforcement actions led to concerns in 2010 in the US House of Representatives that *“settlements of civil and criminal cases by the DOJ are being used as a shield to foreclose other appropriate remedies such as suspension and debarment”*.⁸⁷ In September 2010, the House of Representatives introduced the Overseas Contractor Reform Bill in response to these concerns stipulating that companies that violate the FCPA be automatically proposed for debarment. The Bill was passed unanimously by the House but was not enacted before the House was suspended, and so lapsed.

However, the lack of debarment from FCPA violations is not just down to the use of DPAs. In some instances the DOJ has specifically crafted plea agreements with companies to ensure that they avoid debarment. In the Siemens and BAE cases, the DOJ brought alternative charges to corruption charges against the companies specifically to help the companies avoid debarment rules under the EU Procurement Directive,⁸⁸ and possibly in the US too. While BAE's \$400 million fine from the DOJ was touted at the time as one of the largest criminal fines in the history of the DOJ's *“effort to combat overseas corruption”*, a year after BAE pleaded guilty to making false statements about its FCPA compliance programme, BAE had received 13,000 contracts or subcontracts from US government bodies worth over \$6 billion, including a \$40 million contract with the FBI itself which had helped investigate BAE's wrongdoing.⁸⁹ Critics rightly question how much financial pain BAE actually felt from its fine in that context.

Without debarment, enforcement actions involve solely the imposition of a fine. The danger with fines on their own, some argue, is that *“they create the impression that corporate crime is permissible provided the offender merely pays the going price.”*⁹⁰ Critics of DPAs argue that companies should face debarment as a consequence of wrongdoing. Brandon Garrett in *Too Big to Jail* argues that *“for corporate prosecutions to have real teeth, debarment and suspension should be exercised more clearly and forcefully, particularly for recidivists.”*⁹¹ Mike Koehler, a professor who specialises in the FCPA, likewise argued in testimony before the US Senate in November 2010 that debarment is necessary *“in order for the DOJ's deterrence message to be clearly heard and understood.”*⁹² Others argue that debarment is potentially the most significant deterrent to engaging in bribery and other crimes.⁹³

One of the dangers of crafting enforcement actions to avoid collateral consequences, whether through a DPA or selective charging, is that it creates an uneven enforcement system. O'Sullivan argues that to take

collateral consequences into account makes criminal charging a matter of “*market roulette*”.⁹⁴ Those companies that have substantial government contracts are in effect likely to be treated more leniently. As O’Sullivan argues, to take collateral consequences of debarment into account also results in prosecutors effectively work with guilty parties to avoid “*the valid regulatory interest*” that procurement bodies have in knowing whether a company has been involved in wrongdoing. Ultimately, by shaping enforcement actions around debarment risks, companies are shielded from the consequences of their actions by the people whose sole job should be holding them to account before the law.

But it also puts corporations in the position of having special pleading rights, based on the threat of going out of business, above individuals. As Judge Sullivan noted in his powerful 2015 judgment calling for DPAs to be used as originally intended, “*society is harmed at least as much by the devastating effect that felony convictions have on the lives of its citizens as it is by the effect of criminal convictions on corporations.*” Individuals do not get their criminal charges shaped, however, by the collateral impact a conviction might have on the community.

THE USE OF DPAs and NPAs IS UNREGULATED AND LACKS ANY OVERSIGHT

There is growing consensus that the lack of judicial or independent oversight in the use of DPAs and NPAs in the US has left prosecutors with unfettered power. Prosecutors essentially act as judge and jury. As a result, the boundaries of the laws concerned are not tested and there is scope for abuse of power. As Barkow and Cipolla put it, “*DPAs and NPAs operate in an unregulated sphere without the presence of a neutral arbiter to check the exercise of prosecutorial discretion and power*”.⁹⁵

There has been increasing judicial concern in the US. For some time, judges essentially rubber-stamped settlements put before them by prosecutors. But in September 2009, Judge Rakoff rejected a civil settlement or Consent Judgement put before him by the Security and Exchange Commission (SEC) and the Bank of America on the grounds it did not “*comport with the most elementary standards of justice and morality.*” In February 2010 he reluctantly approved a modified settlement between the SEC and Bank of America describing it as “*half-baked justice at best*”.⁹⁶ SEC settlements have tended to use a ‘neither admit nor deny’ formula which Rakoff argued made it impossible for him to judge whether the penalty fitted the crime and kept the public in the dark.⁹⁷

Rakoff went on to reject another settlement between the SEC and Citigroup in 2011, ruling that the \$285 million fine imposed on Citigroup in that settlement was “*pocket change*” for Citigroup and was “*neither reasonable, nor fair, nor adequate, nor in the public interest.*”⁹⁸ Rakoff was forced to sign off on the settlement after an appeal court said he had overstepped the mark. The Appeal court said that judges could not demand facts in Consent Judgements, and that while “*trials are primarily about truth... Consent decrees are primarily about pragmatism.*”⁹⁹ Rakoff issued his own 3 page opinion in response stating that as a result of the Appeal Courts ruling, SEC settlements overseen by the courts would “*be subject to no meaningful oversight whatsoever.*”¹⁰⁰

Rakoff’s refusal to rubber stamp SEC settlements sparked off a rash of other judges questioning or rejecting SEC settlements. In June 2013, the SEC modified its ‘neither admit nor deny’ policy stating that it may require admissions of wrongdoing in egregious cases, though for some this did not go far enough.¹⁰¹

US judges have started to flex their muscles in relation to DOJ criminal settlements as well. Judge Gleeson approved the DPA with HSBC in July 2013 on the grounds that it accomplished much of what a

criminal conviction would have done, but he asserted the right of the court to reject or accept a DPA, stating that the court was not “a potted plant”. The court, he argued, must protect itself from “lending a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety.”¹⁰² Gleeson made the DPA “subject to a continued monitoring [by the court] of its execution and implementation”, requiring quarterly reports to be made.

In February 2015, when Judge Leon rejected the DPA in the Fokker case, he did so on the grounds that it was not an appropriate exercise of prosecutorial discretion though he said he would consider another more appropriate settlement if it was put before him.¹⁰³ He argued that “the integrity of judicial proceedings would be compromised by giving the Court’s stamp of approval to either overly-lenient prosecutorial action or overly-zealous prosecutorial conduct.” An appeals court is currently considering whether Judge Leon was justified in his rejection of the DPA or even had the power to reject it.¹⁰⁴

Legal experts argue that without oversight, whether judicial or through the Department of Justice itself, the discretion that DPAs allow prosecutors “violates the rule of law.”¹⁰⁵ If the Appeals Court upholds the Fokker ruling, then judicial oversight of DPAs may well become a more regular part of US DPAs, though NPAs will remain outside of any judicial scrutiny whatsoever.

Judicial oversight may not, however, be a panacea. Some judges will provide more oversight and demand more transparency than others and it will depend on what legal basis their oversight is based (there is no proper statutory footing for DPAs in the US, with prosecutors relying on the Speedy Trial Act to bring them before a court). Ultimately if judges are limited solely to the submissions of the prosecutor and the defendant who have pre-agreed a deal, it is questionable how deep their assessment of the merits of a DPA can ever be.

TAX DEDUCTIBILITY OF FINES AND PENALTIES AND TRANSPARENCY OF SETTLEMENT DETAILS

Another issue that has made settlements controversial in the US in recent years has been the fact that companies that enter into settlements in the US are able to claim tax deductions on the fines and penalties, and that details of settlements are frequently scanty. A 2015 study by the Public Interest Research group found that of the \$80 billion paid in fines in out of court settlements between 2012 and 2014, \$48 billion could have been written off as a tax deduction by the companies involved.¹⁰⁶ It also found that while the DOJ makes details available about its large settlements, the Department only disclosed the texts of settlement in 25% of cases. In September 2015, the US Senate passed the Truth in Settlements Act which would require detailed, publically accessible disclosure, including details of tax deductibility, of the settlement agreements between government agencies or regulatory bodies and companies.¹⁰⁷

The US tax code specifically prohibits companies from taking a tax deduction on criminal fines or civil penalties, and the DOJ has long written into some DPAs that companies must not seek a tax deduction from their fine. The Public Interest Research Group in its 2015 study found, however, that only half of DOJ’s largest criminal settlements between 2012 and 2014 specified the tax status for penalties while the tax-status of the non-penalty part of the fine (eg. compensation and restitution) was not specified. For instance, the 2013 civil settlement between the DOJ and JP Morgan Chase for illegally marketing and selling mortgage backed securities imposed a fine of \$13 billion, \$11 billion of which the DOJ allowed the bank to classify as a legitimate business expense that could be deducted against tax. PIRG concluded

that the DOJ only ensured that between 2012 and 2014 18.4 percent of settlement fines were non-tax deductible.

In 2013, the US Internal Revenue Service stated that unless expressly forbidden to do so, “almost every defendant/tax payer deducts the full amount” of the settlement as a business expense.¹⁰⁸ Some have argued that for companies not to be able to seek such tax deduction represents a hidden penalty which penalises US companies more heavily than non-US ones.¹⁰⁹ The Public Interest Research Group however makes the point that the tax-deductibility of settlements undermines their deterrent value and sends the message that the activity that forms the basis of the settlement “is acceptable business as usual” as well as depriving the US tax payer of important tax dollars.

DPAs, NPAs and PLEA BARGAINS IN RELATION TO CORRUPTION AND FOREIGN BRIBERY DO NOT PROVIDE FOR RESTITUTION FOR VICTIMS OR RETURN THE PROCEEDS OF CORRUPTION TO AFFECTED COUNTRIES

The World Bank and UNODC, Stolen Asset Recovery Initiative (StAR) 2013 report, *Left out of the Bargain: Settlements in Foreign Bribery Cases and implications for asset recovery* found that of 395 settlements for bribery between 1999 and mid-2012, resulting in \$6.9 billion of monetary sanctions imposed, only \$197 million or 3.3% was returned to the countries whose officials were bribed.¹¹⁰

Since the US has imposed by far the majority of those sanctions, most of the money has gone to the US Treasury. US law professor, Andy Spalding, notes: “tragically this does little to help the true victims of the bribery.”¹¹¹ Although early FCPA enforcement actions did include restitution to victims, later ones have not.¹¹² The issue is specific to the FCPA and is not limited to DPAs. DPAs for other financial crime regularly include restitution clauses, while it is not clear whether restitution for FCPA violations would be available even with a full court trial.¹¹³

There have been attempts in recent years to get US courts to recognise the importance of restitution for victims of corruption, although the issue is legally fraught. In May 2011, the Costa Rican Electricity Institute (ICE) sought a court injunction to block a settlement between the DOJ and Alcatel-Lucent, which comprised a DPA with the parent company and plea agreements with subsidiaries. ICE, whose officials including directors had been bribed, argued that no individual was being sanctioned and that the settlement “provides that the illegal proceeds obtained from victims be distributed to the [US] Federal government.”¹¹⁴ ICE argued that by waiving pre-sentence investigation and report, the settlement avoided the requirement for mandatory restitution to victims and that under the Crime Victims Rights Act, it should be recognised as a victim and awarded restitution. The case was rejected both in the first instance and on appeal on the grounds that ICE suffered from institutional corruption, and was therefore a co-conspirator with the company rather than a victim and that ICE had failed to demonstrate that it was directly harmed by the offending.¹¹⁵ The DOJ also pointed out that Alcatel Lucent had already been required by the Costa Rican government to pay it \$10 million in reparations for ‘moral damages’. The case showed how hard it is to identify victims of corruption in the US legal system.

Following on from this, in March 2012, Nigerian NGO Social and Economic Rights and Accountability Project wrote to the SEC asking it to “establish an efficient case-by-case process for the payment of some or all of FCPA civil penalty and disgorgement to or for the benefit of the victimized foreign government agency or the citizens of the affected foreign country.”¹¹⁶ The SEC said it would give “appropriate consideration” to the suggestion. It is not clear that the SEC has in fact returned any FCPA fine to an affected country since.

Andy Spalding has argued that in the FCPA context, the DOJ could set up a Supplemental Transparency Project along the lines of the Supplemental Environmental Project already in place for companies who violate environmental laws in the US who may voluntarily agree to perform a project to improve the environment. Spalding cites the DOJ brokered deal in 2008 to create the BOTA Foundation, an organisation to improve the lives of children in poverty in Kazakhstan, as the beneficiary of \$80 million of bribe payments found in Kazakh leaders' Swiss bank accounts, paid by a US lawyer, James Giffen.¹¹⁷

Whether such voluntary agreements would satisfy the basic notion of fair compensation for damage caused that restitution encompasses is a matter for debate. What is clear is that as Spalding puts it *“using enforcement revenue to benefit actual victims is the next frontier of anti-corruption law enforcement,”*¹¹⁸ with all its uncertainties. Article 53 (b) of the UN Convention Against Corruption clearly states that State Parties should ensure that its courts can *“pay compensation or damages to another State Party that has been harmed”* by corruption offences. What the Convention is silent on is what should happen where a State Party that has been harmed refuses to seek such compensation or damages. Clearly, allowing all the money paid by companies by way of penalty for corruption offences to go into the treasuries of wealthy countries is not a morally sustainable position.

Conclusion

The lessons from the US suggest that the use of alternative resolution mechanisms such as DPAs and NPAs raises real and significant concerns about whether corporate crime and bribery in particular are being effectively deterred. The absence of individual prosecutions appears systemic to the use of such mechanisms. And the fact that DPAs and NPAs shield companies from collateral consequences such as debarment has blunted the deterrent effect of the law. Judges, former prosecutors and legal academics have all raised the spectre that the use of DPAs and NPAs, particularly for recidivist companies and in cases of egregious wrongdoing, has undermined the US justice system itself and public confidence in it.

The recent Yates memo stipulating that companies must give up information on individuals in order to receive a DPA or NPA may represent an important shift in US enforcement patterns, particularly if the US DOJ backs up its words with action by prosecuting those companies that do not do so. The US also needs to ensure that companies are not shielded from debarment by the use of DPAs and NPAs, and that greater levels of compensation are given to countries affected by bribery.

CHAPTER TWO: THE UK'S DEFERRED PROSECUTION REGIME – NEW STANDARDS OR MORE OF THE SAME?

The UK government introduced DPAs in February 2014 as “*the next instrument in the battle against economic crime*” which, the government said, “*too often goes without redress*” in the UK.¹¹⁹

In introducing them the government specifically adapted DPAs to the UK system, which unlike the US does not endorse plea bargaining, to ensure that they were subject to judicial scrutiny. This was, in part, to avoid the criticisms made of DPAs in the US and to ensure “*scrutiny and transparency throughout the process.*”¹²⁰ Additionally, the UK has eschewed Non Prosecution Agreements altogether and has stated that prosecution would continue to be the priority where a “*DPA would not be in the public interest or an organisation’s alleged wrongdoing is very serious.*”¹²¹ David Green, the Director of the Serious Fraud Office, which is largely responsible for negotiating DPAs with companies in relation to financial crime, has said that the bar for getting a DPA “*is a high one,*”¹²² with a self-report by a company and full cooperation essential.

Because of the more nuanced approach the UK has taken and the judicial scrutiny built in to the UK’s regime, commentators in Australia, Canada and Ireland have all suggested that the UK model may provide the way forward for corporate settlements. Arguments for stronger corporate liability in the UK

Background to the Introduction of DPAs in the UK

The key reasons for introducing DPAs in the UK were to:

1. avoid “*the uncertainty, expense, complexity or length of a criminal trial*”;¹²³
2. incentivise companies to self-report their wrong-doing thereby resulting in more cases of economic crime being identified and penalised;¹²⁴
3. avoid the “*unintended detrimental consequences*” of a criminal prosecution for a company, including “*adverse share price movements and failure of organisations*” which impact on innocent employees, investors, pensioners and customers.¹²⁵

DPAs were introduced on the back of serious criticism from the OECD about the Serious Fraud Office’s use of civil recovery orders to deal with overseas corruption. In March 2012, the OECD stated that this settlement process was “*opaque, lacks accountability and thus fails to instil public and judicial confidence.*”¹²⁶ The government has recognised that civil recovery orders do not ultimately penalise companies for their wrongdoing or allow victims to be compensated.¹²⁷ While civil recovery orders remain part of the SFO’s armoury, they have not been used in relation to overseas corruption cases in recent years.¹²⁸

DPAs were also introduced to enable the UK to enter into settlements that included other jurisdictions, particularly the US. In a key court ruling, *Innospec*, in March 2010, a high court judge ruled that prosecutors were not in a position to agree sanctions for criminal conduct with a company, that any arrangements to do so were unconstitutional and that “*no such arrangements should be made again.*”¹²⁹ Without the introduction of DPAs, UK prosecutors would have been unable to participate in global

settlements except by civil means. Under the DPA regime in the UK, prosecutors and companies can agree sanctions, although a judge must decide whether the DPA is *'in the interests of justice'* and whether the terms are fair, reasonable and proportionate.

Reaction to the Introduction of DPAs in the UK

Although there was significant support for the introduction of DPAs in the UK, (86% of the 75 respondents to the MOJ consultation were in favour) and the proposals were passed in Parliament without serious dissent, some concerns were raised about the impact that their introduction would have on public confidence in the justice system. The City of London Law Society warned in its response to the government's consultation that their introduction would create *"perceptions that such crime is not treated as seriously as other crime which may undermine public confidence in the criminal justice system"*. The Criminal Bar Association meanwhile warned that *"the public will lose confidence in a justice system in which it would appear that money could provide a means by which individuals avoid prosecution."* Lord Beecham also noted in a debate in the Lords on the introduction of DPAs that *"the public will need to be convinced that we are not creating a privileged class of potential defendants without achieving significant benefit."*¹³⁰

Others have questioned whether DPAs will work in the UK without changes to the UK's weak corporate liability laws.¹³¹ Several law firms and bodies highlighted in their response to the consultation that DPAs could not be *"a panacea to the difficulties in the existing law on corporate criminal liability."* And some have argued that without the stick of prosecution, the *"carrot of leniency"* offered through DPAs is unlikely to work. Several responses to the consultation queried whether the SFO was sufficiently resourced to provide that stick. The Criminal Bar Association stated: *"it is clear that any non-prosecuting measures such as DPAs, with self reporting at their heart, are only as effective as the willingness and capacity of the State to prosecute complex crime where necessary"*. It quoted Lord Woolf, former Chief Justice, who said *"unless people are convinced that the SFO ... means business, all the other changes being made in the regulatory world will be as nought"*.

This could be achieved by amending existing legislation on economic crime or by creating a new stand alone offence of failure to prevent economic crime which would require pre-legislative scrutiny and public consultation.

How does the UK's DPA Regime Measure Up to the US in Practice?

It took nearly 2 years after DPAs were legislatively introduced for the UK's first DPA to materialise. On 30th November 2015, the high court approved a DPA between the SFO and Standard Bank for failure by Standard Bank to prevent bribery by its Tanzanian subsidiary under Section 7 of the Bribery Act. Although it may be too early to tell how the DPA system will roll out in the UK, the first DPA was seen as setting some important precedents and provides a useful example of how UK DPAs will compare with US ones.¹³²

ADVANTAGES OF THE UK'S DPA OVER THE USE MODEL

Judicial oversight

Under the Crime and Courts Act, a DPA must be reviewed by a judge to assess whether it is in the interests of justice. A UK DPA has to go through two stages of judicial approval: one for approval to

proceed and the other an approval of the final agreement. However, much of this oversight effectively takes place behind closed doors. The first stage of approval where the real judicial scrutiny of an agreement takes place will always be in private, as specified by the legislation.

The fact that judges can ask the prosecutor and the company difficult questions obviously increases both scrutiny and potentially public confidence in the agreement. Judge Leveson made a point of noting in his judgment approving the Standard Bank DPA that he had made a “*detailed analysis*” of both the circumstances of the offence and the assessment of the financial penalty imposed and that “*there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest.*”¹³³ Leveson significantly released both the judgment for his preliminary and final approval of the DPA.¹³⁴

It remains the case that UK judges are limited to the evidence put before them that is essentially agreed between the prosecutor and the defendant.¹³⁵ Third parties such as victim states or individual victims are not able to present additional evidence to the court and due to the confidentiality of the DPA process the public will not know about a DPA until it is in effect a done deal.

Compensation

Under the terms of Standard Bank’s DPA compensation was awarded to Tanzania (though whether it was sufficient is another question.)¹³⁶ UK prosecutors have been committed for some time to ensuring reparations in corruption cases where possible, leaving the thorny issue of how to return money to potentially corrupt jurisdictions essentially to government. However, UK Courts have not been so willing to grant compensation in corruption cases. In the 2010 *Innospec* case, Lord Justice Thomas stated that while compensation was “*desirable*”, there were insufficient funds to encompass both compensation and a fine, and questioned why the SFO was seeking compensation for one country (Iraq) and not another (Indonesia). In the 2016 sentencing of Smith and Ouzman, the first overseas corruption case to go before a UK jury, the judge refused to give compensation altogether on the grounds he was not sure which institution the compensation should go to and whether it would get there, that he had no evidence that the countries concerned were seeking it, and no evidence that they had sought to take action against their own officials.¹³⁷

The result of this is that the UK is in the somewhat perverse position where companies that cooperate and self-report, and are therefore rewarded with a DPA, will be required to compensate while those that end up before the courts are unlikely to.

Transparency and provision of detail

The Standard Bank DPA provided a significant amount of detail about the alleged offences involved. This compares favourably to the US where as Gibson Dunn notes “*DPAs frequently do not go into the level of detail included in the Standard Bank DPA and rely more heavily on general descriptions of events.*”¹³⁸ Another example of better practice in the UK DPA was the clear naming of the officials alleged to have received bribes and involved in paying them either by name or by rank. Typically US DPAs rarely identify the foreign officials or individuals involved.

This level of transparency sets an important precedent for settlements globally. Unless DPAs can provide as much information about an offence as a court trial would, it is unlikely that the public will have full

confidence in their transparency. Critically in corruption cases, it is crucial that the public of affected countries are able to know the names of officials who took bribes so they can also be held to account.

More stringent conditions for being given a DPA

In the US, cooperation is a factor that prosecutors consider when deciding whether to offer a DPA or not, and the DOJ makes clear when it brings criminal action against a company that this is often due to lack of cooperation. In the UK, the bar is currently considerably higher. The Code of Practice on Deferred Prosecution Agreements makes clear that a self-report by a company of its wrongdoing and provision of information of which the prosecutor would otherwise have been unaware is a key over-riding consideration.

SFO staff have restated this approach publicly on a regular basis. The Standard Bank DPA confirmed this approach, when Leveson stated that in assessing whether the agreement was in the public interest, “*of particular significance was the promptness of the self-report*”. Moreover as the 2016 guilty plea by Sweett shows,¹³⁹ where a company does not self-report or cooperate in the initial stages of an investigation, even if it provides information about an alleged offence and decides to cooperate at a later date, the SFO will not issue an invitation for a DPA.

DISADVANTAGES OF THE UK’S DPA REGIME COMPARED TO THE US MODEL

Failure to use the DPA as leverage for full disclosure of wrongdoing

In the US, DPAs often have a requirement for a company to disclose details about any newly uncovered potentially corrupt payments. Each of the FCPA related DPAs since 2011 includes some form of reporting requirement to disclose ‘questionable’ payments uncovered. Some DPAs go further and require disclosure of any potential criminal violation. As Gibson Dunn note, the Standard Bank DPA only required the bank to cooperate with the SFO with regard to the conduct that is the basis for the DPA. This provides Standard Bank “*with greater flexibility when considering disclosure of unrelated conduct*” compared to a US DPA.¹⁴⁰

US DPAs often also require disclosure about information relating to a parent company and affiliates. There is no such requirement in the Standard DPA which Gibson Dunn calls “*surprising*” given the role of the Bank’s Tanzanian subsidiary.

Reliance on company’s internal investigation

It is clear that the SFO relied heavily on Standard Bank’s internal investigation as the basis for information about the alleged wrongdoing and did not seek information independently from Tanzania. The Judge approving the DPA did not appear from documents in the public domain to question whether the SFO had adequately investigated whether Standard’s version of events were true or would stand up to court scrutiny. In particular, the SFO did not seek or obtain any documentation from Tanzania to corroborate assertions made by the company.¹⁴¹ Its own investigation appears to have been limited to interviews with various employees and former employees of Standard Bank in the UK. A local employee who was alleged to have committed the predicate offence of bribery which Standard failed to prevent – the wrongdoing that the DPA was based on – has now initiated legal action against Standard Bank for misrepresenting her role and failing to give her adequate right to reply.¹⁴²

Weaker compliance reporting standards

The Standard Bank DPA has “a much less detailed compliance review and remediation program than that commonly seen in US DPAs.”¹⁴³ And reporting requirements on compliance is much more generous. In the US, companies need to report annually for the entire term of the agreement. Standard Bank’s DPA stipulated that the Bank must complete its review and remediation program within two years and there is no follow-on reporting requirement.

Weaker breach requirements

Under the UK’s DPA model breach of a DPA must be determined by a court and not by the prosecutor which gives greater oversight over potential breaches. However, in the US there are much broader and expansive causes for breach of agreement. For instance, the commission of any crime and commission of any acts that would violate the FCPA if they had occurred within the FCPA’s jurisdictional reach can be a basis for breach. Under the Standard Bank DPA, the basis for a breach of agreement is restricted to failure to comply with terms relating to the payment and the corporate compliance program. As Gibson Dunn put it: “the commission of a criminal act – even a violation of the UK Bribery Act – during the term of the agreement would not appear on the face of the DPA to be cause for breach”.¹⁴⁴

No requirement for admission of guilt

Under the Code of Practice on Deferred Prosecution Agreements, while the prosecutor and the defendant company must agree a set of facts, there is no formal requirement for an admission of guilt in respect of the charges at issue. Thus under the Standard Bank DPA, the bank agreed that the Statement of Facts was “true and accurate” but did not formally admit to the Section 7 failure to prevent the bribery offence that was the basis for the DPA. Under the terms of a DPA, the Statement of Facts agreed between the prosecutor and the defendant is to be treated as an admission by the defendant only if any future criminal proceedings are brought against the company in relation to those Facts.

Under US DPAs, companies are generally required to admit to the wrongdoing concerned. Admission of guilt is key to public confidence in the use of DPAs and to avoid public perception that companies are able to buy themselves out of the justice system.

SIMILARITIES BETWEEN THE US AND UK REGIMES

Lack of individuals held to account

The DPA Code of Practice states that “it will ordinarily be appropriate that those individuals [whose actions have incriminated the company] be investigated and where appropriate prosecuted.”¹⁴⁵ Justice Leveson in approving the Standard Bank DPA commented that “it is obviously in the public interest that individuals involved in the conduct at issue are investigated and prosecuted” but he also noted that “no allegation of knowing participation in an offence of bribery is alleged either against Standard Bank or any of its employees.”

The apparent failure of the SFO to investigate whether any individuals at the UK branch of Standard Bank which authorised and drew up the agency agreement at the centre of the alleged offence committed an offence, sets a very worrying precedent. The UK’s first DPA suggests that the strongest and most consistent criticism of the US regime – that individuals are let off the hook by DPAs – may apply equally to the UK.

Avoidance of collateral consequences

Theoretically a company that receives a DPA may be subject to discretionary debarment for ‘grave professional misconduct’ under the EU Procurement Directives’ provisions on mandatory exclusion. In practice, because a DPA is not a conviction, this is highly unlikely. Furthermore, a company that receives a DPA will by definition have cooperated with the investigating authorities, given compensation and been required to undertake remedial corporate governance measures – all aspects of ‘self-cleaning’ which a company must undertake in order to show itself to be a reliable economic operator under the EU Procurement Directives’ in the event of a conviction. It is worth noting that the UK government has said that even a conviction under the Section 7 ‘failure to prevent’ offence will only incur discretionary exclusion.¹⁴⁶

However, in the Code of Practice on Deferred Prosecution Agreements, one of the public interest factors a prosecutor may take into account is whether a conviction “*is likely to have disproportionate consequences for the company*” under the law of any country “*including but not limited to the European Union*” (2.8.2. vi). The current guidelines on corporate prosecution meanwhile clearly state that a public interest factor against prosecution is that “*a conviction is likely to have adverse consequences for the company under European law, always bearing in mind the seriousness of the offence and any other relevant public interest factors*”.¹⁴⁷ The OECD Working Group on Bribery has asked the UK to remove such references to the EU debarment rules from prosecution guidelines.¹⁴⁸ But this suggests that a DPA could still be used to help a company avoid debarment under the EU Procurement Directives.

Possibility of repeat DPAs

A key question relating to whether DPAs will have deterrent effect is whether a company in the UK could be offered a DPA more than once. A significant factor in favour of a prosecution under the Code of Practice on DPAs is ‘*history of similar conduct*’. In the Standard Bank DPA, Judge Leveson noted that Standard Bank had no previous convictions for bribery and corruption and ruled that a fine and regulatory action from the UK’s Financial Conduct Authority for failings in Standard Bank’s anti-money laundering procedures was a different and unconnected issue.¹⁴⁹ This raises the prospect that a company could receive a second DPA for a different economic crime, if judges and prosecutors only look at ‘*similar conduct*’ in a very narrow sense.

Conclusion

The experience so far suggests that the UK, at least under the current leadership of the Serious Fraud Office, will have a more balanced approach to the use of DPAs than the US, with prosecution clearly still very much part of the prosecutor’s weaponry, and much stricter criteria for entering into DPAs. DPAs will also have greater judicial oversight and higher levels of transparency.

However, if a trend develops in DPAs whereby the SFO fails to bring related prosecutions of individuals for the conduct in question, and only takes a narrow view of whether a company has a history of ‘*similar conduct*’, there is a real risk that DPAs in the UK will fail to instil public confidence and to deter economic crime. Additionally, the fact that companies do not need to admit guilt under a DPA in the UK, nor make full disclosure of all wrongdoing they uncover in their investigations suggests significant weaknesses in the UK’s DPA regime.

CHAPTER THREE: KEEPING COMPANIES OUT OF COURT – CORPORATE SETTLEMENTS FOR BRIBERY IN EUROPE¹⁵⁰

The OECD Working Group on Bribery has long recognised the use of out of court settlements to resolve foreign bribery cases as a ‘horizontal issue’ affecting various different parties to the OECD Anti-Bribery Convention. The OECD’s concern has been whether such settlements are likely to comply with Article 3 of the Convention, which requires parties to ensure that bribery of foreign officials is “*punishable by effective, proportionate and dissuasive criminal penalties.*” However, this concern has often been dwarfed by the deeper concern that there has been little enforcement of foreign bribery offences in European countries at all, with the OECD issuing press releases about its serious concern about lack of implementation of the Convention in several instances.¹⁵¹

From the OECD’s monitoring reports on compliance with the Convention it is clear that many European countries have used some form of out of court settlement to resolve all of the few foreign bribery cases that they have investigated, and that in the European context there have been precious few prosecutions of companies for foreign bribery offences.¹⁵² In some cases, this has been due to weak corruption or corporate liability laws or other legal impediments. In a few cases, courts have either not convicted or overturned convictions.

Dutch Out of Court Settlements

Under article 74 of the Dutch Criminal Code and a Directive on Large and Special Transactions, prosecutors can enter into out of court settlements to resolve charges against companies. Out of court settlements do not require an admission of guilt, but prosecutors have the discretion to require such admission as part of the settlement. Settlements should not be used for offences which require punishment of over 6 years or in cases of public concern without justification.¹⁵³ Settlements involving cases of public concern must be approved by the Minister of Security and Justice. Where the fine is over 50,000 Euros, the Directive stipulates that the public prosecutor’s office must issue a press release disclosing the parties, the fine and information about the offence. Such settlements can also include compensation to victims.¹⁵⁴

The Netherlands has resolved three foreign bribery cases through out of court settlements. This includes a case in December 2012 against Ballast Nedem, a Dutch construction company, for payments made to foreign agents, and a related December 2013 case against KPMG for its role in concealing Ballast Nedem’s payments. Very little detail was provided of the substance of the allegations and no individuals have yet been held to account. Ballast Nedem paid a fine of €5 million and was required to relinquish a claim to €12.5 million from the tax office, and KPMG, €7 million Euros.¹⁵⁵

In November 2014, the Dutch public prosecutor’s office (Openbaar Ministerie) offered Dutch company SBM Offshore an out-of-court settlement in which the company paid \$240 million as a fine and disgorgement for payments in Equatorial Guinea, Angola and Brazil but without admitting guilt. No action was taken against any Dutch individuals. The public prosecutor’s office issued a statement in the case of SBM Offshore, providing reasons why it had chosen an out of court settlement (SMB’s self-reporting of material and introduction of new corporate governance measures) and gave some limited detail about the allegations, including the amount of commission payments made in each country (totalling \$250 million).¹⁵⁶

The settlement was controversial in the Netherlands when news reports revealed that SBM may have ‘contained’ its investigation and been selective about what it revealed to enforcement officials in both the US and at home.¹⁵⁷ A statement from the Dutch Shareholders Association, VEB, in response to these reports, said: “because of the settlement..., the court case has been avoided and as a result a lot of information about the alleged corruption has been kept from the public domain”.¹⁵⁸

In February 2016, Openbaar Ministerie entered into another out of court settlement with Russian telecom company, Vimpelcom, headquartered in the Netherlands. It was part of a joint settlement with the US DOJ, in which Vimpelcom and its subsidiary paid \$397.5 million to the Dutch and \$397.6 million to the US DOJ and SEC in fines for bribes paid to an Uzbek government official in order to win bids for Uzbek telecom providers.¹⁵⁹ In this case, the Dutch public prosecutor’s office issued a Statement of Facts, modelled on US DOJ ones (thus withholding names of company officials and the foreign officials bribed), and has stated that it is pursuing a prosecution against individuals. A press release on its website gives some detail about how it reached its decision to enter into an out of court settlement and assess fine levels.

The OECD said in 2006 it would monitor the Netherlands’s use of out of court settlements to ensure that they result in “effective, proportionate and dissuasive sanctions” as required by the Anti-Bribery Convention.¹⁶⁰ As it noted in its 2011 Phase 3 report of the Netherlands: “an out of court settlement would not be taken into account for EU debarment purposes. This may prove a very serious incentive to companies to try to settle (foreign) corruption cases out of court.”¹⁶¹ The Netherlands’s use of two out of court settlements to deal with foreign bribery cases comes in the context of severe criticism by the OECD in 2013 that the Netherlands was failing to “vigorously pursue foreign bribery allegations” after the OECD found that 14 out of 22 allegations of foreign bribery had triggered no investigation at all by the Dutch enforcement authorities.¹⁶²

The Netherlands may be seeking to get quick results in wake of OECD criticism by pursuing out of court settlements. Its latest settlement with Vimpelcom shows an attempt at greater transparency as well as the ability to achieve relatively high fine levels. However, if Dutch authorities continue to use only out of court settlements, this will shield companies from the collateral effects of the EU Procurement Directive, which stipulates that companies that are convicted of corruption must be excluded from public procurement for 5 years unless they can show they have ‘self-cleaned.’ It also remains to be seen how effectively the Dutch authorities will act against individuals.

Norwegian Penalty Notices

In Norway, cases against companies are typically settled out of court in the form of a penalty notice from the prosecutor’s office specifying a fine.¹⁶³ In the context of foreign bribery, Økokrim, the Norwegian authority for investigating economic and environmental crime, has exclusively relied on penalty notices to deal with cases against companies.¹⁶⁴

When OECD examiners asked Økokrim in 2011 why they hadn’t taken a foreign bribery case to court to help establish sanction levels, officials replied that “economic crime trials are usually very lengthy and a much bigger burden on law enforcement resources furthermore, representatives of companies sometimes also prefer a swifter conclusion to a case to minimise the reputational risks to their corporation which prolonged media exposure may cause.”¹⁶⁵ The OECD Working Group identified the issue of penalty

notices as one they needed to follow up noting that Norway had no “*prosecutorial guidelines or guidance from the courts*” with regard to their use.

In January 2014, Yara – a Norwegian fertilizer firm 36% owned by the Norwegian government – was fined \$48.5 million by way of a penalty notice for paying bribes in Libya, Russia and India. Yara, which uncovered and reported the bribes, admitted guilt, and the former CEO who was in charge at the time and 3 members of his senior management team have subsequently been prosecuted and convicted in July 2015. Very little detail was made public about the facts of the case.

Prior to the Yara case Økokrim had issued three penalty notices against companies for foreign bribery including in the Statoil case, where the Norwegian oil company was fined \$3 million initially for bribery but later for trading in influence. In one case, the company refused to accept the penalty notice and the case went to the Court of Appeal where the penalty notice was upheld.¹⁶⁶

While Norway scores highly on bringing individuals to account and requiring admission of guilt while entering into out of court settlements, it has little transparency in its penalty notices, the use of which protects companies from debarment under the EU Directives which require a final court order as the basis for debarment.

Italian Patteggiamentos

In Italy, all foreign bribery enforcement actions taken to date against companies have been under the patteggiamento system, which is a form of plea bargain.¹⁶⁷ Italian judges oversee a patteggiamento and exercise control over whether it is accepted or not. A patteggiamento allows for a one third reduction in penalty, possibility of receiving a suspension of the sentence, possibility of an ‘extinction’ of the offence after 5 years if no other offences are committed by the company or individual, and the avoidance of additional sanctions (such as debarment). While patteggiamentos are overseen by a judge, little information appears to be made public, and to get access to the court ruling, an individual or organisation has to prove its ‘interest’.

In 2011 the OECD Working Group on Bribery recommended that Italy make public as much as possible the terms of a patteggiamento including the reason as to why it was appropriate. In 2014, the Working Group found that Italy had not made any effort to do so.¹⁶⁸ A patteggiamento generally requires no admission of guilt. Agusta Westland’s UK subsidiary for instance entered into a patteggiamento in Italy in August 2014, which it explained in its annual report for that year was “*neither an affirmation of liability, nor an acceptance of guilt.*”¹⁶⁹ Agusta Westland SpA was fined €80,000 while the UK subsidiary Agusta Westland Ltd, was fined €300,000 and had €7.5 million confiscated.¹⁷⁰

Thus while Italian patteggiamento’s are overseen by a judge there is little transparency about the terms of the agreement, and agreements specifically protect companies from debarment. Furthermore, fines have been very low and actions against individuals have tended either to be insignificant or dropped. However, the OECD noted that Italy’s use of patteggiamentos needs to be seen in the context of a large number of cases (22 out of 29) being dropped under the Italian legal system because they have become time-barred. In this context, patteggiamentos may, the OECD say, play the role of a ‘safety-net’, getting companies to accept a fine before the low statute of limitations (6 years) expires.

Swiss Summary Punishment Orders

The OECD Working Group on Bribery noted in its 2011 Phase 3 for Switzerland, that Switzerland had dealt with all cases of foreign bribery it has had to that date by means of a summary punishment order and or 'Reparation'. Summary punishment orders are usually used for minor offences in Switzerland that do not merit a penalty of longer than 6 months imprisonment. Under such an order, the prosecutor and the offender agree a penalty, in exchange for the offender recognising the facts in the charge brought against it. Under a 'Reparation' meanwhile, the defendant is exempt from liability once it has made all efforts as can reasonably be expected to compensate the wrongdoing. Reparations should, according to statute, only be used where there is little public interest or little interest by the injured party in bringing a prosecution. Switzerland dealt with both Alstom and a Swedish subsidiary of Siemens, SIT,¹⁷¹ by way of 'Reparation'.

There is little transparency with regard to summary punishment orders which are confidential unless someone can prove a legitimate interest in viewing it. Prosecutors are not required to state the reasons for using a summary punishment order nor provide details for how a fine is calculated. The OECD Working Group on Bribery recognised that this was an issue affecting other parties to the Convention, but recommended that the authorities make public the reasons for using a summary punishment order, 'reparation' or simplified procedure, the basis for the decision, and the sanctions involved.¹⁷²

Danish Out of Court Settlements

Denmark has resolved just one case of foreign bribery cases by means of an out of court settlement or penalty notice. Under the Danish Administration of Justice Act, a prosecutor can impose a penalty notice with a specified fine. It is not a requirement of these notices that companies self-report or cooperate and there is little transparency. Officials from SØIK, the Danish Serious Economic and International Crime Public Prosecutor, told the OECD that it was 'self-evident' that there would be less transparency in an out of court settlement since the purpose of these settlements was "to end the prosecution in a more silent way."¹⁷³

The OECD Working Group on Bribery concluded, in similar wording to its criticism of the civil recovery process in the UK, that the settlement process in Denmark is "opaque, lacks accountability and thus fails to instil public and judicial confidence." The OECD also urged Denmark to develop a clear framework for such settlements and ensure that individuals were also prosecuted.

A legislative amendment in 2014 allowed the public to request information about a penalty notice in a settlement, but the OECD noted that since the public is not informed about settlements it would not be in a position to require such information. Denmark had taken no further steps to develop a framework for such settlements.¹⁷⁴

German Administrative Procedures

Germany is an unusual and complex case because although it ranks second behind the US in proactive enforcement of the OECD Anti-Bribery convention and has brought a significant number of actions against companies and individuals, German law does not provide for criminal liability. Between 2005 and 2013, six legal entities were sanctioned for corruption under administrative law (although a criminal court can order the participation of a company in criminal proceedings against an individual), and 141 individuals sanctioned through a mix of criminal law and through a procedure whereby charges are dismissed (the

OECD Working Group on Bribery has raised concerns about this procedures and noted that the majority of individual penalties have involved suspended sentences, while corporate fines have generally been low).¹⁷⁵

A recent introduction under the German Criminal Procedure Code allows negotiated sentencing agreements which can be used for companies ordered to participate in criminal proceedings. Such agreements require a confession from the defendant and that the prosecutor must present the same level of evidence as in a full trial. The OECD Working Group on Bribery stated that it would be monitoring its use.

Conclusion

Various European countries, which generally represent a low enforcement environment on foreign bribery offences, have tended to use out of court settlements or some related procedure as a quick route to achieving fines against companies for foreign bribery offences. The OECD Working Group on Bribery has consistently raised concerns about this practice, whether there is a suitable legal or other framework in place to govern such settlements, whether there is any transparency in these settlements, whether sanctions are sufficiently high under such settlements, and whether individuals are being prosecuted.

What is very clear is that by using out of court settlements European countries are effectively helping their companies avoid the provisions of mandatory exclusion from debarment in the EU Procurement Directives. Although out of court settlements may help these countries increase their enforcement figures on paper, it is highly questionable whether they are likely to have a real deterrent effect if they continue to shield companies from debarment, fail to hold individuals to account, lack transparency and fail to achieve significant penalties.

CHAPTER FOUR: A CALL FOR GLOBAL STANDARDS ON CORPORATE SETTLEMENTS

As more and more countries use out of court mechanisms or alternative resolutions to resolve foreign bribery and corruption cases and others contemplate the introduction of such mechanisms, it becomes increasingly important that the international bodies monitoring enforcement of corruption take stock and assess whether these mechanisms are likely to deter bribery effectively, and deliver a just outcome.

Currently, these mechanisms often fail to provide a means for victims of corruption to be represented and compensated. They also fail to give public confidence that justice is being done fairly, and that corporate offenders are not being given special pleading rights. Some have argued that their use undermines the very justice system and the rule of law itself in countries that use them. Others have argued that settlements provide as Professor Koehler puts it, merely “a façade of enforcement,” rather than real deterrence.

The 2015 Conference of State Parties for the UN Convention Against Corruption has already called for the inter-governmental working group on asset recovery to gather information regarding the use of settlements and to “to analyse the factors that influence the differences between the amounts realised in settlements and other alternative mechanisms and the amounts returned to affected states with a view to considering the feasibility of developing guidelines to facilitate more coordinated and transparent approach for cooperation among affected States and effective return.”

It is imperative that the OECD Working Group on Bribery which monitors implementation of the OECD Anti-Bribery Convention also conducts, whether in tandem with the UN Office on Drugs and Crime (UNODC)’s efforts to analyse settlements in relation to UNCAC, or as part of a separate exercise, an assessment of the effectiveness of settlements and seeks to establish some global principles or best practice standards for settlements.

This is for two reasons. First, different standards are emerging in the use of deferred prosecution agreements and out of court settlements primarily with regards to foreign bribery which means that an uneven enforcement playing field is developing. Second, the OECD comprises many of the leading industrial countries who could set a global example by agreeing best practice standards. This would help lead an upward spiral rather than a downward spiral with regard to settlement practices.

Some work has already been done in elaborating what such standards could include. The 2014 World Bank/StaR report on settlements, *Left Out Of The Bargain*,¹⁷⁶ came up with key recommendations about settlements with regard to the role of affected states in settlements. These included that:

1. countries should have clear legal framework regulating settlements;
2. countries should transmit information proactively to affected countries when pursuing settlements and inform affected countries of legal avenues available to participate in investigation and/or claim damages (Articles 46 (4) and 56 of UNCAC);
3. countries should consider permitting courts to recognise claims of affected countries when deciding on confiscation (article 35 (c) of UNCAC); and

4. countries should proactively share information about concluded settlements to affected countries, including underlying facts of the case, terms of the settlement, any self-disclosures and evidence gathered by the investigation.

This is a good starting point for guidelines on how to ensure that settlements are not concluded in such a way that affected countries receive none of the penalties imposed and are not excluded from the settlement process. The fact that the UK's Serious Fraud Office informed the Tanzanian anti-corruption authorities of the pending Deferred Prosecution Agreement with Standard Bank in 2015 and appears to have asked their opinion on whether they had any objections, offers a good example of how these authorities can be included.

Ensuring that affected governments or anti-corruption authorities can make submissions in Deferred Prosecution Agreement hearings or during settlement negotiations, and where they choose not to do so, allowing civil society organisations to make representations through victim or community impact statements, is crucial in giving affected countries and their citizens greater voice and representation in these proceedings.

But ensuring representation of affected states and victims of corruption will not on its own ensure the deterrent value of corporate settlements.

In 2015, Transparency International recommended, in its report, *Can Justice Be Achieved Through Settlements*,¹⁷⁷ that there should be a “*threshold test*” to assess whether a settlement would be a better alternative to a prosecution. Where settlements are used instead of prosecution, they should meet the principles of transparency, due process, accountability and reparation for victims. TI made the following specific recommendations:

1. settlements should require an admission of wrongdoing;
2. settlements should only be used where a company self-reports and genuinely cooperates with an investigation;
3. settlements must not be influenced by factors external to the case, such as those prohibited under Article 5 of the OECD Anti-Bribery Convention (identity of legal person, impact on foreign relations or economic impact);
4. settlements must be made public, including the terms, statement of facts and justification;
5. all settlements should be subject to judicial review and public hearing, and the views of affected stakeholders should be reflected in settlements;
6. settlements must not preclude further legal action in other jurisdictions;
7. settlements must include dissuasive sanctions, at a minimum comprising the benefit from the wrongdoing;
8. settlements should not preclude prosecution of individuals and should preclude companies paying the fine of individuals;
9. debarment and disqualification should be considered;
10. settlements should require companies to strengthen and monitor compliance programmes and companies to report publically on how it has met the terms of the settlement;
11. settlements should allow for prosecution of intermediaries and professional enablers; and
12. settlements should provide for compensation to victims while fines and disgorgement should be set aside for anti-corruption work, disbursed by an independent entity.

These recommendations provide an important base for what should be global standards for using settlements in foreign bribery cases. Similar principles were outlined by UK NGOs writing to the Director of the Serious Fraud Office in June 2015 about the introduction of Deferred Prosecution Agreements in the UK.¹⁷⁸

The following lessons from the US, the UK's emerging DPA regime and Europe's trend towards out of court settlements outlined in this report suggest the need for similar principles to the TI ones:

1. **Settlements on their own are unlikely to achieve real deterrence and should only be used as part of a broader enforcement strategy where prosecution is the norm.** If settlements are used sparingly as part of a broader enforcement regime where prosecution is the norm, they can have a role to play in encouraging corporate self-reporting of crime. However, enforcement agencies need to be able to show that they are willing and able to detect and prosecute cases of corruption to give full deterrent effect to the law.
2. **Settlements should only be used where a company has self-reported, cooperated with enforcement authorities and admitted guilt, and where the wrongdoing is not of a serious or egregious nature.** Unless high standards are set for when companies can agree a settlement, the danger is that settlement fines become a cost of doing business. The use of settlements for cases of very serious wrongdoing, meanwhile, offends notions of justice and undermines public confidence in their use.
3. **Individuals must be held to account and prosecuted wherever possible whenever a settlement is entered into.** All countries should move to the position outlined in the 2015 Yates memo in the US that a settlement is conditional on a company giving evidence about individuals' involvement and responsibility for wrongdoing right up the chain of command. Ideally, settlements should not be entered into unless they can be accompanied by individual prosecutions for the wrongdoing in question.
4. **Judicial oversight undertaken in a public hearing is crucial to public confidence in the settlement process but only if it allows for proper scrutiny of the evidence.** Rubber-stamping of agreements by Judges is unlikely to provide public confidence. Such oversight should be exercised in public with full transparency.
5. **Settlements must provide an equivalent level of detail about the wrongdoing to the public as a court hearing would.** This must include names and rank of officials and company employees involved in the wrongdoing, amounts paid, how the offence was committed and a full analysis of the public interest factors considered when deciding to offer a settlement.
6. **Compensation to victim countries must be an inherent part of a settlement.** It cannot be right that the wealthiest countries bringing enforcement actions against their own companies for paying bribes in other countries should reap the financial gain when there is widespread recognition of the social harm that bribery causes. Compensation should be broader than just the bribes paid however and reflect the real social harm.
7. **Affected countries and victims should be given a right to representation at settlement hearings or during settlement negotiations.** Best practice would include giving affected states a right of objection to a settlement. Where affected states chose not be represented at a hearing or during negotiations, civil society organisations should be able to make representations about the harm of the corruption through impact statements.

8. Settlements should be used to leverage full disclosure of wrongdoing within a company.

Since settlements are usually based on an internal investigation by a company, settlements should only be given where prosecutors can satisfy themselves that the company has revealed the full extent of wrongdoing committed and provided information about any other wrongdoing it has uncovered in the process.

9. Settlements should not be given to companies that have had previous enforcement or regulatory action taken against it. Repeated use of settlements for companies that have already been subject to enforcement actions of any type encourages recidivism and removes the deterrent value of a settlement completely. To this effect, settlements should enjoin companies not to commit any further offences

Finally, the systematic use of settlements in the US and by European countries has enabled companies to avoid debarment. This is clearly at odds with the 2009 OECD Recommendation that companies who have been found to have engaged in bribery should be excluded from tendering for public contracts and other public advantages. It also frustrates the intention behind the EU Procurement Directives which specifically requires companies convicted of corruption to be excluded from tendering.

The use of settlements has thereby effectively prevented public procurement authorities from knowing about significant wrongdoing that might impact on their decisions as to whether to allow companies to tender for contracts. But it has also shielded companies from what many agree is perhaps the most powerful and potentially important deterrent to engaging in bribery. Unless settlements are used more sparingly or a way can be found for settlements to incur debarment, it is unlikely that this deterrent will ever be properly put into effect.

Conclusion: Global Standards are Essential

Global standards for the use of corporate settlements are increasingly essential. The UN Conference of State Parties has already commissioned work on collecting information on and analysing settlements with a view to developing guidelines for return of assets from settlements to affected states. The World Bank and UN Office on Drugs and Crime's Stolen Asset Recovery Initiative have also made recommendations for how such recovery and greater participation of affected states can be achieved.

The OECD Working Group on Bribery which provides proactive monitoring of State Parties enforcement of the OECD Anti-Bribery Convention needs to undertake a similar exercise looking at the deterrent effect of settlements. It also needs to develop guidelines for best practice in the use of settlements to help create a more even enforcement playing field. The lessons learned in looking at the decade of US experience of using such settlements, the emerging experience from the UK and the use of out of court settlements in Europe suggest some important principles that could form the basis for such guidelines.

The purpose of the OECD Anti-Bribery Convention is itself at stake. If settlements continue to be used in a way that lacks transparency, leaves individuals responsible for wrongdoing unpunished, and shields companies from debarment, it is questionable whether the fight against foreign bribery can ultimately succeed.

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