

The rise and globalization of negotiated settlements: How an American procedure, the Deferred Prosecution Agreement (DPA), became a transnational key tool to fight transnational corporate crimes

Michel A. Perez*

“Crimes are more effectively prevented by the certainty than by the severity of the punishment.”

Cesare Beccaria, 1764¹

“DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe.”

Lanny A. Breuer, US Assistant Attorney General, 2012²

“Non-trial resolutions have become a prominent way of enforcing serious economic offences.”

OECD, 2019³

Certified Anti Money-laundering Specialist (CAMS)
Senior Fellow, Law School, New York University, PCCE, NY, USA
Representative in the US of Labex ReFi
PhD candidate, Sorbonne Law School, Université
Paris 1 Panthéon-Sorbonne, Paris, France
* Email : michelaperez@gmail.com

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ABSTRACT

The use of corporate deferred prosecution agreements (DPAs) to fight corporate crimes in the USA, and more recently in other countries, has raised some challenges. However, the benefits of these procedures are significant when compared to the lengthy and costly ways of “traditional” justice. DPAs provide governments with limited resources a method to more efficiently resolve white-collar criminal charges through the developing concept of “negotiated justice.”

The development of procedures similar to the American DPA in other jurisdictions, notably the UK and other countries of common law tradition, as well as in some civil law jurisdictions such as France, has created a new legal paradigm in recent years. Even the European Union is building a transnational enforcement system, underscoring the necessity of adopting comparable provisions in domestic laws worldwide. As illustrated in an OECD (Organization for Economic Cooperation and Development) survey published in March 2019, the diversity of judicial systems around the world precludes a “one size fits all” approach for a procedure to fight corporate crimes. However, coordinated prosecutions among agencies of different jurisdictions and the creation of international prosecutorial bodies and enforcement are signs of the emergence of a new transnational judicial system. This research seeks to

- 1 Cesare Beccaria, On Crimes and Punishments [Dei Delitti e Delle Pene], 1764 (David Young trans., Hackett Publ'g Co, 1986) .
- 2 Lanny A. Breuer, U.S. Asst. Atty. Gen., Speech the New York City Bar Association (Sept. 13, 2012), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>
- 3 OECD, Report on Resolving Foreign Bribery Cases with Non-Trial Resolutions 3 (2019), available at <https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm>.

analyze and evaluate the effectiveness and desirability of these tools as a means of combating corporate crimes.

Keywords: DPA; corporate crime, settlement; transnational, procedure, negotiated justice

العنوان: بزوغ وعولمة اليات مفاوضات التسوية

ملخص

على الرغم من التحديات التي اثارها استخدام اتفاقيات المقاضاة المؤجلة للشركات (DPAs) لمكافحة جرائم الشركات في الولايات المتحدة، ومؤخراً في بلدان أخرى إلا أن فوائد هذه الإجراءات مهمة عند مقارنتها بالأساليب المطولة والمكلفة للعدالة «التقليدية».

توفر اتفاقيات سلام دارفور للحكومات ذات الموارد المحدودة طريقة لحل التهم الإجرامية المقترفة من قبل ذوي الباقات البيضاء بشكل أكثر كفاءة من خلال تطوير مفهوم مفاوضات التسوية «العدلة المفاوضة» فقد تم تطوير إجراءات مماثلة للعدالة المفاوضة لوزارة الشؤون الأمريكية في ولايات قضائية أخرى، ولا سيما المملكة المتحدة وبلدان أخرى من تقاليد القانون العام، وكذلك في بعض الولايات القضائية للقانون المدني مثل فرنسا مما أدى الى تبلور قناعة وفكر قانوني جديد في السنوات الأخيرة.

علاوة على ذلك فإن الاتحاد الأوروبي في طور تشكيل نظام إنفاذ عبر وطني، مما يؤكد على ضرورة اعتماد أحكام قابلة للمقارنة في القوانين المحلية في جميع أنحاء العالم. وكما هو موضح في استطلاع منظمة التعاون الاقتصادي والتنمية (OECD) الذي نشر في مارس 2019، فإن تنوع الأنظمة القضائية في جميع أنحاء العالم يحول دون اتباع نهج «مقاس واحد يناسب الجميع» لمكافحة جرائم الشركات. ومع ذلك، فإن المحاكمات المنسقة بين وكالات السلطات القضائية المختلفة وإنشاء هيئات ملاحقة دولية وإنفاذ ماهي الا علامات على ظهور نظام قضائي جديد عبر وطني. بناء على ذلك، تسعى هذه الدراسة إلى تحليل وتقييم أهمية وفعالية هذه الأدوات كوسيلة لمكافحة جرائم الشركات.

الكلمات المفتاحية: اتفاقيات المقاضاة المؤجلة، جرائم الشركات، التسوية، عبر وطني، إجراءات، العدالة المفاوضة

“Negotiated justice” is an expression that has been commonly used, sometimes with a negative connotation in Europe, by corporate lawyers and legal scholars since the beginning of this century. The concept known in America as “negotiated settlement” is well established in the USA and other common law jurisdictions, but it is relatively new in civil law countries, which comprise most of Continental Europe. This term mostly covers non-trial agreements reached directly between large corporations and national financial supervisors with no or limited judicial review. According to a recent Organization for Economic Cooperation and Development (OECD) study, “[n]on-trial resolutions, also referred to as settlements, have been the predominant means of enforcing foreign bribery and other related offences since the entry into force of the Anti-Bribery Convention, twenty years ago.”⁴ Advocates of settlements argue that their compromising rather than adversarial nature constitutes an incentive for wrongdoers to self-report to prosecutors and increases the prospects of corporate governance reforms.

The best known and most used of the procedures to reach negotiated settlements is the American “Deferred Prosecution Agreement” (DPA). It became a model for other jurisdictions and has served as a major tool in the hands of prosecutors around the world to police and change corporate behavior since the beginning

of the 21st century. During the last two decades, DPAs and similar procedures heralded major changes in organizations’ governance. They could force companies to:

- oust or reassign executives and directors;
- agree to pay substantial penalties, fines, restitutions, and other remedial relief;
- change long-standing sales and compensation practices;
- set up, staff and implement extensive controls, compliance and reporting programs; and
- nominate a corporate monitor who not only reports to the prosecutor but also has wide investigative powers and broad discretion over compliance and the supervision of business decisions.

This article reviews how a relatively obscure American procedure became a major tool in corporate enforcement and how it has led to a new concept of “transnational negotiated justice.”

1. INTRODUCTION: THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

In the USA, the concept of corporate criminal liability was established by the Supreme Court more than a century ago, in particular in the case of *New York Central Railroad Company v. United States* decided on February 23, 1909. In this case, the Court established that “corporations can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.”⁵ A number of well-publicized cases were successfully prosecuted by American authorities throughout the 20th century,⁶ but a sea change in the enforcement of corporate criminal law occurred when the Department of Justice (DOJ) and other agencies started to extensively use pretrial diversion procedures referred to as Pretrial Diversion Agreements (PDAs). Pretrial diversion is defined by the DOJ Offices of Attorneys as:

“[A]n alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service... In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.”⁷

DPAs and NPAs (non-prosecution agreements) are the most frequently used forms of pretrial diversion in the United States.

In other major jurisdictions, the notion of corporate, as opposed to individual, liability could be differently defined but is broadly acknowledged today. Some jurisdictions like the UK are governed by a common law legal system, while others, including Germany and France, have civil law legal structures. Today, all major European jurisdictions recognize criminal liability for corporate entities. Procedures similar to the American DPA and NPA, are being implemented across the continent. Even the Court of Justice of the European Union has implicitly approved of the introduction of criminal settlements as long as the principle of *ne bis in idem*, comparable to the US double jeopardy principle, is ensured.

4 *Id.* at 11.

5 See *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481 (1909).

6 Some of the best-known cases were *Standard Oil* and, more recently, *AT&T*, the tobacco companies, *General Motors*, and *Microsoft*.

7 See U.S. Dep’t of Justice, *Justice Manual* § 9-22.000 (covering the Pre-Trial Diversion Program).

Switzerland, Singapore, Australia, and Canada also introduced similar processes. According to an OECD study published in March 2019, at least twenty-seven jurisdictions have in place one or more “non-trial resolution system to resolve a foreign bribery case.”⁸ However, the gradual adoption of new procedures should not be construed as the cookie cutter or “copy and paste” importation of the American DPA, but rather a transposition “only if” certain conditions, namely judicial supervision, are met.

This paper first analyzes the rise of negotiated settlements in the USA as a means of resolving corruption cases, then turns to an examination of how similar procedures are being implemented in other jurisdictions, with a specific focus on analyzing the challenges to be overcome for an effective fight against corporate corruption.

2. THE RISE OF NEGOTIATED SETTLEMENTS IN THE USA

US Assistant Attorney General Breuer explains the American prosecutors:

“...had [two decades ago] only the blunt instrument of criminal indictment with which to attack corporate crime. Prosecutors faced a stark choice when they encountered a corporation that had engaged in misconduct – either indict or walk away. In the 1990s, however, the government began doing something new: agreeing to defer prosecution against the corporation in exchange for an admission of wrongdoing, cooperation with the government’s investigation, including against individual employees, payment of monetary penalties, and concrete steps to improve the company’s behavior. And, over the last decade, DPAs have become a mainstay of white collar criminal law enforcement. The result has been, unequivocally, far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts.”⁹

2.1. A history: from the early 1900s to 9/11

According to Peter Reilly,¹⁰ DPAs “emerged in the early 1900s as a way to address non-serious misdemeanor charges, such as retail theft, especially when committed by juveniles or first-time offenders. Their use was justified to protect vulnerable persons in society. In 1914, the Chicago Boys’ Court implemented deferred prosecution in the hope that juvenile offenders would not be stigmatized as “criminals” for the remainder of their lives. After World War II, the use of DPAs for individuals was frequent, and it was common to combine deferred prosecution with community-based counseling, training, and job-placement programs.

In 1977, the DOJ promulgated standards for the deferral of prosecution, citing three principal objectives: (1) to prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services; (2) to save prosecutive and judicial resources for concentration on major cases; and (3) to provide, where appropriate, a vehicle for

restitution to communities and victims of crime. They clarified that the procedure was intended for application to individuals in small cases rather than to large corporations.

On May 20, 1992, the DOJ and the SEC (Securities Exchange Commission) announced that they had reached a settlement with Salomon Brothers, an investment firm, that was generally considered to be the first modern era corporate NPA. The DOJ press release reads in part: “Salomon Brothers Inc. would pay a total of \$290 million in sanctions, forfeitures and restitution to resolve charges arising out of alleged misconduct in Treasury auctions and government securities trading.”¹¹ The settlements were reached following a ten-month multi-agency investigation. Otto Obermaier, US Attorney for the Southern District of New York, noted that Salomon had extensively cooperated in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct. He said that “[w]hile the alleged violations were serious, we believe that the combination of punishments is adequate, and **there is no need for invoking the criminal process. Salomon’s cooperation has been exemplary. Such actions were virtually unprecedented in my experience.**”

This seminal case established that in exchange for full cooperation and remediation, the prosecuting authority has the discretion to stop the criminal judicial process. Similarly, the first modern corporate DPA was signed in 1994 when Mary Jo White, the then US Attorney for the Southern District of New York, entered into an agreement with Prudential Securities in a letter dated October 27.¹²

Subsequently, on June 16, 1999, the DOJ provided detailed guidance for the federal prosecutions of corporations in what became known as the “Holder Memo.”¹³ It reads in part:

“Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime... In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider [specific] factors... Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation’s willingness to make restitution and steps already taken to do so, as well as other remedial actions such as implementing an effective corporate compliance program, improving an existing one, and disciplining wrongdoers, in determining whether to charge the corporation... The primary goals of criminal law are deterrence, punishment, and rehabilitation..., however, these goals may be satisfied without the necessity of instituting criminal proceedings”.

The widespread use of DPAs and NPAs followed shortly in the wake of the federal government indictment of the large accounting firm Arthur Andersen on May 6, 2002.¹⁴ The dramatic increase starting

8 OECD, *supra* note 3, page 12.

9 Breuer, *supra* note 2.

10 Peter R. Reilly is Associate Professor of Law, Texas A&M University School of Law. His article *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions* was published in the *Brigham Young University Law Review* in January 2016. Our paragraphs on “Juvenile Origin” and “The Salomon Case and The Holder Memo” draw directly from his historical analysis. See Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Criminal Prosecutions*, 2 B.Y.U. L. Rev. 307 (2015).

11 See Press Release, Dep’t of Justice, Department of Justice and SEC Enter \$290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), available at https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm.

12 See U.S. Dep’t of Justice, U.S. Attorney, Southern District of New York, Prudential Sec. – Deferred Prosecution Agreement (Oct. 27, 1994), available at <http://corporatocrimereporter.com/documents/prudential.pdf>. Mary Jo White was the first woman to be United States Attorney for the Southern District of New York, serving from 1993 to 2002. On January 24, 2013, President Barack Obama nominated her to become Chair of the U.S. Securities and Exchange Commission.

13 The Memorandum, which is 13 pages long, was signed on June 16, 1999 by then Deputy Attorney General Eric Holder who became the first Attorney General in the Obama Administration.

14 See James R. Copland, *The Shadow Regulatory State, The Rise of Deferred Prosecution Agreements*, Civ. Just. Rep., no. 14, May 2012, at 1.

in 2003 in the number of federal DPAs and NPAs is explained by two factors.¹⁵

First, the collapse of the venerated Arthur Andersen accounting firm in the wake of its federal indictment for a single count of obstruction of justice – the wisdom of which was further challenged by its subsequent reversal of conviction by the US Supreme Court – highlighted the risks and costs of prosecuting businesses as entities. Andersen was reportedly offered a DPA, but it objected to the accompanying conditions. The firm's collapse cost thousands of employees their jobs, more than 20,000 according to some accounts, and reduced large companies' choice of accounting firms. The DPA then appeared to be a more surgically focused way to address corporate criminal behavior than large-scale trials and an adequate procedure to remedy corporate shortcomings without endangering the survival of the corporate entity itself.

Second, the 9/11 terrorist attacks were a huge shock that changed the priorities of the US judicial system. The majority of federal, state, and specialized agencies personnel who were working on cases of corporate wrongdoing were then reassigned to tasks linked to counter-terrorism effects as their top priority. Thus, the DOJ and other departments and agencies had less personnel available to work on corporate criminal cases. They also had to develop more efficient, less resource-consuming ways to handle white-collar crimes.

On the heels of the Andersen case, Deputy US Attorney General Larry Thompson issued a new memorandum on January 20, 2003, addressing whether to prosecute corporations. The Thompson memo reaffirmed the principles of the 1999 Holder Memo and expressly offered pretrial diversion to cooperating corporations – “[i]n some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation.”¹⁶

2.2. The mechanics: How it works

A DPA or NPA is basically a way of imposing a term of probation before a conviction. Both types of agreements are classified as pretrial diversion agreements (PDAs), and all PDAs are negotiated settlements reached between a defendant, which, in the USA, could be a corporation or an individual, and a prosecuting party, most frequently a District Attorney who is part of the DOJ or sometimes an agency such as the Securities and Exchange Commission (SEC). PDAs allow prosecutors to sanction a firm without triggering the collateral consequences of a formal conviction, such as debarment, delicensing, or a prohibition against bidding for public markets.

In the DPA process, the government files charges but then agrees to hold them in abeyance pending the company's successful completion of certain terms in the agreement for a period of time. If the conditions set forth in the agreement are met to the government's satisfaction, then the charges are dismissed. Typically, the terms of both DPAs and NPAs come directly from the US Sentencing Guidelines, which are under the purview of Congress. Generally, the government's terms require, at minimum, an admission of wrongful conduct supported by a detailed factual basis. Other provisions that may arise include limits on public statements, restrictions on a company's ongoing business

practices, and, in some cases, the appointment of a monitor to oversee the company's compliance with the agreement's terms.¹⁷ The period of time, or the probation period, in which compliance with the terms is required before the charges are dismissed, varies from agreement to agreement. Among the 100 cases settled in 2015, a record year, the probation period varied from six months (Ansun Biopharma) to ten years (Exide Technologies); that year the majority of cases, which were part of a special DOJ program with Swiss banks, had a probation period of four years.

Deferred prosecution (or non-prosecution) is a procedure available to federal or state prosecutors and some enforcement agencies at their discretion. It can be used for many types of crimes as defined by American law. They have been used in virtually all areas of corporate criminal wrongdoing, including antitrust, fraud, domestic bribery, tax evasion, environmental violations, banking regulation infractions, as well as foreign corruption cases. By offense category, the violations frequently noted relate to laws that regulate securities and trading, competition, environmental and safety issues, foreign bribery (FCPA – Foreign Corrupt Practices Act¹⁸), healthcare and FDA (Food and Drugs Administration) regulations, tax-related matters and monetary transactions, frauds (such as overbilling of services), and money laundering. American laws and statutes provide extensive powers to enforcement agencies. For instance, in the case of the FCPA, the DOJ website states:

“With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States. The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions.”¹⁹

Frequently, several governmental agencies are involved in the negotiation of a DPA or NPA. In addition to one or several representatives of the DOJ (Tax Division, Fraud Division, District Attorneys), settlements may also be signed off on by officers of the SEC, the FDA, and other federal or state supervisory entities. In 2013, the SEC signed an NPA settlement for the first time in a matter involving the Ralph Lauren Corporation.

The key difference between an NPA and a DPA is that DPAs are filed by the DOJ in federal court with a charging document and are subject to judicial approval. On the other hand, NPAs can simply be letter agreements between the DOJ and the entity subject to the agreement. Regarding NPAs, there is no public filing of charges and they are not subject to judicial review. This means that it is not possible to establish accurate statistics regarding the use of terms contained in NPAs.

In practice, NPAs and DPAs are negotiated in the same manner, usually over a few months, between the target entity (or rather its executive management and legal team that often includes internal and external lawyers) and a team of legal enforcers, comprising representatives from one or several different governmental agencies. The settlement agreement is a formal document signed by all parties; it generally includes:

- an acknowledgement of responsibility for past conduct;

¹⁵ *Id.* at 3.

¹⁶ See Memorandum from Larry D. Thompson, Deput Attorney General, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_DOJthomp.authcheckdam.pdf.

¹⁷ This description is based on Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, Crim. Just., Summer 2006, at 36.

¹⁸ The Foreign Corrupt Practices Act (FCPA) was passed in 1977 and prohibits companies from offering bribes, kickbacks, or other payments or favors to foreign government officials.

¹⁹ See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 et seq. (2017), available at <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

- an acknowledgement that if the defendant commits similar conduct during the agreed upon probation period, the government may prosecute for any crime, including the subject matter of the agreement;
- an obligation to cooperate with the government’s continuing investigation, including making employees available for testimony;
- a waiver of the defendant’s right to a speedy trial and defenses;
- language that prohibits the defendant from making contradictory factual representations to those found in the agreement; and
- the imposition of penalties, fines, restitutions, and other remedial relief.

The use of the DPA/NPA procedure is thus geared toward transforming corporate behavior.

Depending on the severity of the offenses, the nature of the business, and other factors considered by the prosecutors, the agreement may impose on the defendant the appointment of an independent monitor at its expense. Corporate monitors are primarily responsible for assessing and reporting to a government agency on the effectiveness of the corporate compliance and ethics programs of companies that have had significant legal or regulatory issues resolved by a DPA, NPA, or administrative settlement.²⁰

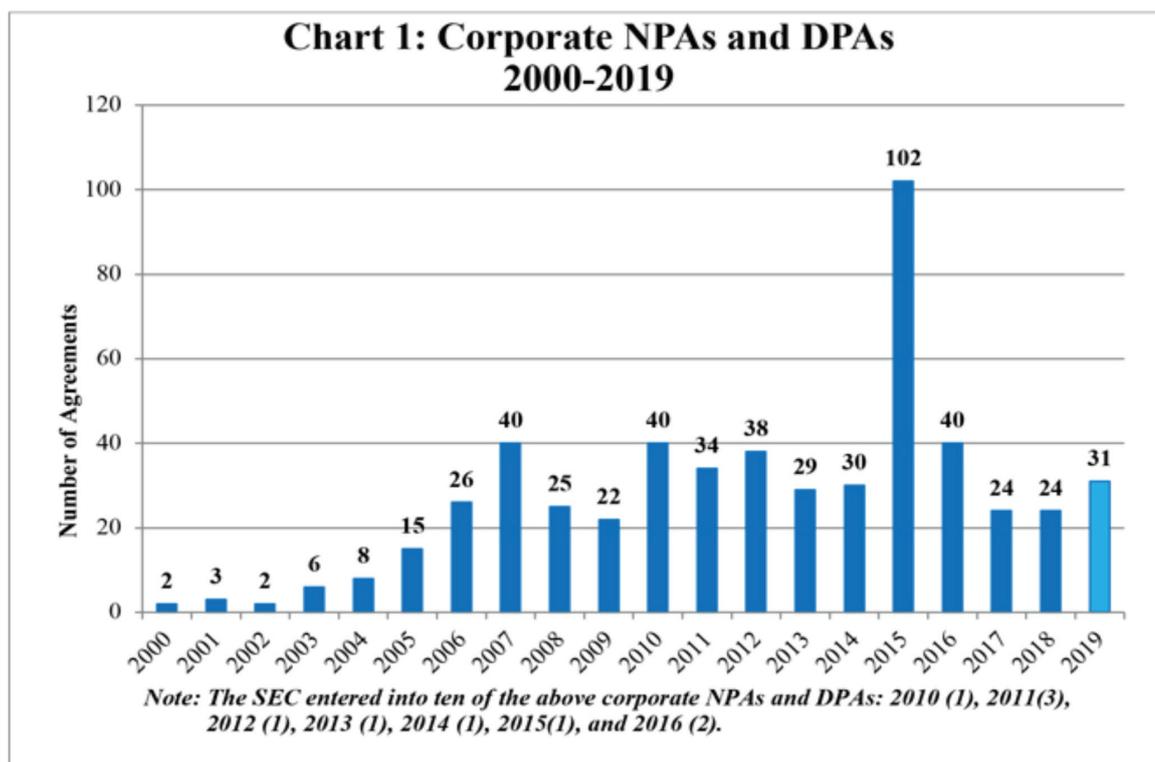
It should also be noted that DPAs and NPAs have a significant financial impact, and the publicity around discussions with

governmental entities could affect stock prices of public companies and their capacity to compete.

2.3. A prevalent tool against corporate crime

In 2012, Lanny A. Breuer, the then Assistant Attorney General, declared that: “DPAs have become a mainstay of white collar criminal law enforcement.”²¹ Since 2000, the well-known law firm Gibson Dunn has published an annual, and now biannual, report that includes a detailed tally and analysis of recent cases.

The number of DPA and NPA resolutions in the USA is impressive as could be seen in chart 1. For the first time in 2005, the number of cases settled in the USA was a two-digit figure. In subsequent years, with the exception of 2015, the annual number varied between twenty-two and forty cases, including cases handled by both the DOJ, which dealt with the vast majority, the SEC, and other agencies. The spike in 2015 is attributable to the implementation of an agreement with Switzerland that invited Swiss banks to self-disclose tax-related conduct (and pay associated penalties) in exchange for NPAs. If one excludes the seventy-five NPAs signed with Swiss banks pursuant to this agreement, the yearly number of procedures has remained relatively stable during the last decade. Notably, changes in the US government administration do not seem to affect this trend. The reputedly pro-business Trump administration continues to use settlements as aggressively as its predecessors. As of most recent numbers, thirty-one agreements were signed during 2019, well in line with previous years.



Source: Gibson Dunn – <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/>.

²⁰ See Jason T. Wright, *The Corporate Compliance Monitor’s Role in Regulatory Settlement Agreements*, Stout (Mar. 1, 2014), <http://www.srr.com/article/corporate-compliance-monitors-role-regulatory-settlement-agreements#sthash.NplxqTXo.dpuf>.

²¹ Breuer, *supra* note 2.

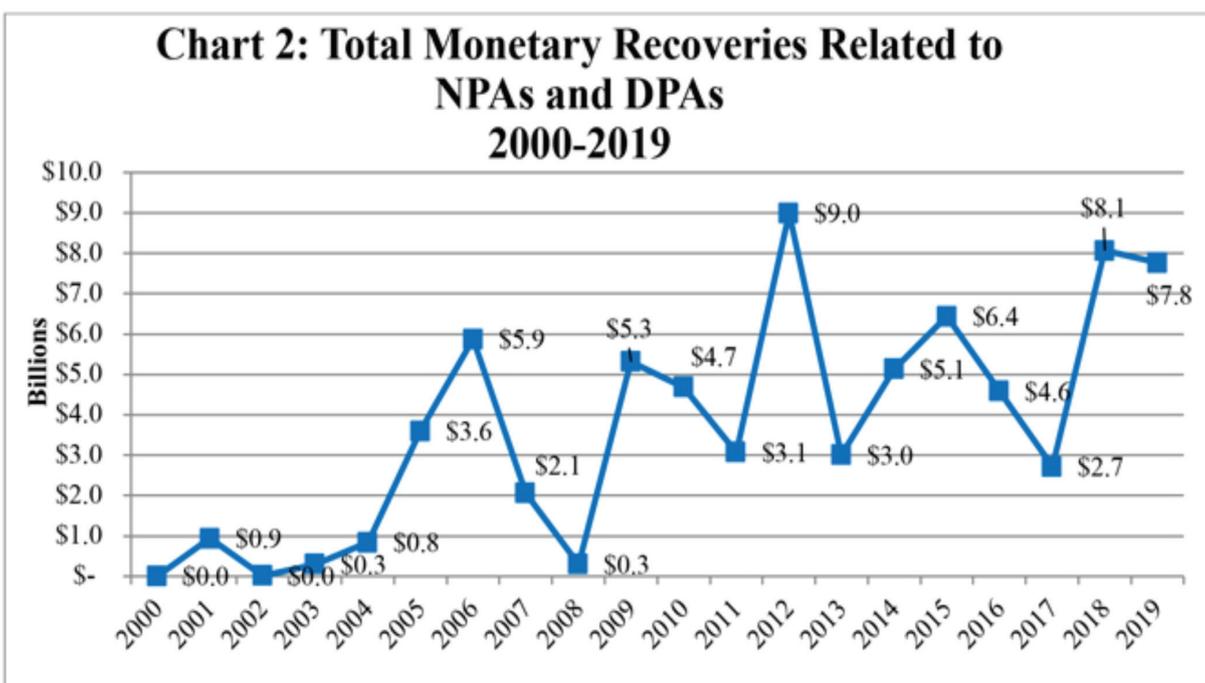
²² See F. Joseph Warin et al., Gibson Dunn, *2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (2020)*, available at <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/>.

The monetary penalties are substantial, as can be seen in Chart 2, which traces monetary recoveries *directly* related to NPAs and DPAs settled in the USA. As an indication, according to the statistics compiled by Gibson Dunn, total penalties for only AML (anti-money laundering)/sanctions violations during 2006–2017 amounted to more than \$110 billion.²²

The general trend for the last decade for monetary recoveries, with a notable peak in 2012 when \$9 billion were collected after some large settlements, is relatively stable. “Only” \$2.7 billion was collected in 2017, but the annual aggregate amounts were \$8.1 billion in 2018 and \$7.8 billion in 2019. Most corporate settlements include monetary penalties in the tens or hundreds of millions of US dollars.

However, in order to correctly assess the monetary costs and

deterrent effects of US enforcement actions, we should keep in mind that some of the largest corporate penalties assessed stem not from NPAs/DPAs, which are used by prosecutors to settle “regular” crimes, but by other procedures that are used to adjudicate crimes considered particularly serious. For instance, Chart 2 does not include the \$8.9 billion in fines that BNP Paribas had to pay pursuant to a “Consent Agreement,” basically a guilty plea, entered into on June 30, 2014. In addition, as corporate entities can be sued cumulatively under several criminal or civil procedures, and settlements frequently mandate costly changes in governance, the financial impact on an entity sued by the DOJ or other US authorities could be well in excess of the NPA/DPA monetary fines. As some settlements, mostly NPAs, remain confidential, official consolidated figures are not available.



Source: Gibson Dunn – <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/>.

2.4. New policies and coordinated investigations

US prosecutors now frequently use NPAs and DPAs as procedures to resolve corporate and, sometimes individual, crimes. Since 2006, the annual number of settlements achieved through these measures has been at least in the twenties. Thus, it became necessary to better define the conditions of use for these procedures and their possible outcomes to avoid any impression of unfair or preferential treatment. While some scholars complained that settlements amount to a denial of justice because of the absence (in the case of NPAs) or minimal (in the case of DPAs) role of judicial supervision, several control mechanisms are in place.

The first is the US Sentencing Commission,²³ an independent agency in the judicial branch that was created as part of the Sentencing Reform Act of 1984. Commissioners are nominated by the President and confirmed by the Senate. The Attorney General, or the Attorney General’s designee, and the Chair of the US Parole Commission serve as *ex officio*, non-voting members of the

Commission. The main objectives of the Commission are:

- a) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;
- b) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and
- c) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as a public information resource.

The policies of the DOJ and other agencies tasked with fighting back against corruption and other economic crimes have evolved, and gradually their framework became defined more precisely by a series of published administrative texts. The priorities and approaches in enforcement also changed, taking into account not only directives from the executive branch but also guidance from the Congress, public opinion and reactions, and advice from legal

23 See *About, U.S. Sentencing Comm’n*, <https://www.uscc.gov/about-page> (last visited Apr. 18, 2020).

professionals. Thus, broad policies, which are in fact instructions to prosecutors and district attorneys, are articulated in a series of memoranda outlining the types of crimes to be investigated, the key aspects and priorities of the investigations, under what circumstances settlements should be used, and remedies to be sought. These memoranda are usually issued by the Deputy Attorney General in charge of policy at the time. Thus, the memorandum recommending a large use of negotiated settlements in some defined circumstances is known as the “Thompson memorandum” of 2003, as it was issued by Deputy Attorney General Thompson. More recently, the “Yates memorandum” of 2015 focuses on the need to investigate and hold accountable individuals as well as corporations. It states that: “One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”²⁴ However, the actual implementation of the Yates memo is often questioned, as practically no executive has been held accountable for the frauds that led to the 2008 financial crisis.

In recent years, the DOJ has encouraged a policy of cooperation in exchange for leniency with corporations and began to closely coordinate with other agencies and non-US jurisdictions.

An example of this can be seen with regard to the FCPA. The “FCPA Pilot Program” aims to encourage the voluntary disclosure of companies involved in corporate malfeasance at an early stage. In November 2017, Deputy Attorney General Rod Rosenstein announced a new policy creating a presumption that companies will receive a declination of charges for FCPA misconduct if they satisfy certain standards, including self-disclosure, full cooperation, and timely remediation. Dozens of companies are known to have filed with the DOJ under this program, which since has been expanded to other types of infractions. However, reliable statistics are unavailable, and, therefore, it is not possible to assess the degree to which the program may be used as a substitute in cases that would normally have led to a DPA or whether the program will increase or reduce the amount of yearly fines normally collected under “old” procedures.

Another cooperative tool has been the “Non-Piling Policy.” The implementation of the DOJ’s “Non-Piling Policy” promoted cooperation between the USA and other sovereign jurisdictions. Both American and foreign companies are affected by non-trial resolutions, and prosecutors around the world recognized that international cooperation is necessary to effectively tackle corporate crimes, which are often transnational in nature. Thus, a trend developed to settle cases through multi-jurisdictional agreements. It started in 2008, with the joint “parallel” prosecution

of Siemens in the USA and Germany, and joint investigations and coordinated resolutions have become more prevalent since 2016. Many multi-jurisdictional cases have been settled through a combination of guilty pleas and DPAs. Notable cases of multi-jurisdictional cooperation over the last few years include:

- The prosecution of Netherlands-based VimpelCom,²⁵ one of the largest telecom companies in the world, resulted in a global \$800 million resolution in February 2016; the resolution encompassed a guilty plea by VimpelCom’s Uzbek subsidiary, a DPA with VimpelCom, and settlements with the Public Prosecution Service of the Netherlands.
- Telia Company AB,²⁶ a Stockholm-based international telecommunications company and its Uzbek subsidiary, Coscom LLC, entered into a global foreign bribery resolution with Swedish, Dutch, Uzbek, and US regulators in December 2017, and agreed to pay a combined total penalty of \$965 million to resolve charges arising out of a scheme to pay bribes in Uzbekistan.
- Embraer²⁷ entered into a three-year DPA and admitted to its involvement in a conspiracy to violate FCPA’s anti-bribery provisions in October 2016. In a resolution reached jointly with US and Brazilian prosecutors, the company agreed to penalties of \$107 million and a three-year monitorship.
- Rolls-Royce²⁸ entered into two separate but coordinated DPAs in the USA and the UK in January 2017. It was the first time the USA and the UK’s Serious Fraud Office (SFO) entered into such a coordinated resolution. The global resolution of the Rolls-Royce case ultimately involved three jurisdictions – the USA, UK, and Brazil – and the payment of \$800 million in penalties.
- Société Générale of France²⁹ and its related affiliates were under investigation in the USA, UK, and France. The settlement it agreed to created a new dawn in Franco-American cooperation.³⁰ On June 5, 2018, the French bank entered into a DPA for violation of the FCPA and agreed to pay a penalty of \$585 million to be divided equally between the USA and the French prosecutors. Separately, the bank also paid \$475 million in fines, penalties, and disgorgement for violation of LIBOR rules.
- Ericsson, a Swedish company, agreed to a DPA involving both the DOJ and the SEC on December 8, 2019, which involved a three-year monitorship and paying record fines in an aggregate of \$1.06 billion to settle FCPA-related violations in Djibouti, China, Vietnam, Indonesia, and Kuwait. While the settlement was only with one jurisdiction, the USA, the official communiqué “praised the investigative efforts of [...] law enforcement authorities in Sweden.”³¹

24 Sally Quillian Yates, Deputy Attorney General, U.S. Dep’t of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.

25 See Press Release, U.S. Dep’t of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), available at <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.

26 See Press Release, U.S. Dep’t of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than \$965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), available at <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>.

27 See Press Release, U.S. Dep’t of Justice, Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), available at <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

28 See Press Release, U.S. Dep’t of Justice, Rolls-Royce PLC Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

29 See Press Release, U.S. Dep’t of Justice, Societe Generale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), available at <https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan> [hereinafter Societe Generale Press Release].

30 The investigation in the U.S. of BNP Paribas—which ended in June 2014 with a guilty plea, financial penalties of \$8.9 billion, and strict monitoring—created a diplomatic incident at the time.

31 See Press Release, U.S. Dep’t of Justice, Ericsson Agrees to Pay More than \$1 Billion to Resolve Foreign Corrupt Practice Act Case (Dec. 6, 2019), available at <https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case>.

- Most recently, in January 2020, Airbus agreed to an American DPA, a British DPA, and a French CJIP, which entailed aggregate penalties of over \$4 billion and a three-year monitorship. The case created a potentially interesting precedent because the US prosecutors agreed to receive a relatively small part of the monetary penalty (“only” \$582 million) and tacitly accepted the French “blocking mechanism” because the monitorship will be under the supervision of the French anti-corruption agency (AFA).

The above cases illustrate that corruption is a transnational problem that transcends the framework of the traditional national jurisdiction, rendering the coordination and harmonization of investigations and enforcement procedures a necessity.

3. THE GLOBALIZATION OF NEGOTIATED SETTLEMENTS

As an increasing number of large companies, both US-based and foreign, became parties to DPA/NPA agreements, these companies had to pay large fines and were forced to substantially change their business practices. This was not only the case for their US operations; on a worldwide basis, other jurisdictions started to introduce similar procedures that called for pretrial settlements. In an effort to promote standardized and compatible procedures, international organizations, and the OECD in particular, played a leading and coordinating role. The introduction of the new procedures was relatively smooth in countries with a common law legal system, but was more difficult to implement in countries rooted in the civil law tradition because of its incompatibility with the traditional concepts of “equality” and “contradictory justice” that assume only a judge (not a prosecutor) can render proper justice. Overcoming the disparity of jurisdictional systems among its members, Europe is now spearheading joint prosecutions at the regional level.

3.1. International coordination

Leaders of many countries have proclaimed their desire to fight corporate corruption. The USA used its international clout to encourage other jurisdictions to impose on their companies rules inspired by the FCPA since its 1988 revision to create an international-level field. If American corporations are penalized for engaging in the use of corruption and bribery to win contracts overseas, companies from other countries should also be subjected to the same rules to preserve fair global competition.

During the last three decades, a number of international organizations were set up and conventions, more or less a legal instrument equivalent to treaties, were signed with the aim of eradicating corruption, money laundering, bribery, and other corporate malfeasances. Some of these initiatives entail a global approach, while others have a regional, mostly European, scope. The best known include:

- The Merida Convention or UNCAC (United Nations Convention Against Crime) is a charter against corruption that was established by the UNODC (United Nations Office on Drugs and Crime) and became effective in 2005.
- The FATF/GAFI (Financial Action Task Force/GAFI is a French acronym) was created by the G7 (USA, UK, France, Italy, Canada, Japan, and Germany) in 1999, “for combating money laundering, terrorist financing and other related threats to ...

the international financial system.” As of 2020, it has 39 member states. The FATF issues recommendations, which were last updated in 2012, that the member states must incorporate in their national legislations and regulations. The FATF also has a peer-review mechanism system that evaluates the status of AML CFT (Anti-Money Laundering and Combating the Financing of Terrorism) policies of its members and their implementation. However, its scope is limited to AML CFT policies.

- Eurojust was established in 2000 and supports coordination among European Union (EU) member state nationals investigating and prosecuting authorities. It also has cooperation agreements with twelve third-party states: Albania, North Macedonia, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, Norway, Serbia, Switzerland, Ukraine, and the USA. It works closely with Europol, OLAF, Frontex, and other EU entities.
- GRECO (Group of European Countries against Corruption) was created by the Council of Europe in 1999. As of 2020, it has fifty members, mostly European countries plus the USA and Kazakhstan. It monitors the compliance of its members with the organization’s anti-corruption standards and works in cycles (*evaluation rounds*) to produce evaluation reports that are generally published and scrutinized by financial supervisors, legislators, and the public at large.

However, for our purposes, the international body mostly engaged in the study and promotion of negotiated settlements is the OECD. It was officially established in 1961. It is a successor of the OECE, an organization initially created after World War II to channel and administer funds from the US Marshall Plan in a collegial way. Initially established by eighteen European countries plus the USA and Canada, OECD membership has grown to forty-four members, mostly developed countries, as of 2019. It is dedicated to economic cooperation and also functions as a think tank and monitoring system.

Established in 1994, the OECD Working Group on Bribery in International Business Transactions (Working Group) is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention of 2009 and its related instruments.³² The organization established a peer-review monitoring system, which is considered by Transparency International to be the “gold standard” of monitoring. The 2009 Convention states in Article 3 that “bribery of a foreign public official shall be punishable by **effective, proportionate and dissuasive** criminal penalties” but does not define the mechanisms to do so. While respecting the sovereignty and legal organization of each member, the Working Group advocates for common standards in enforcement and harmonization in sanctions. Each country, in line with its traditions and legal system, should develop its own procedures for “settlements” and “non-trial resolutions.” The Working Group considers guilty pleas or equivalent procedures as “non-trial settlements,” and has thus adopted a wider scope than the one proposed in this research for “negotiated settlements” (which includes NPA/DPA procedures but excludes guilty plea types of resolutions); nevertheless, the upward trend for the use of settlements is striking.

In its study published on March 20, 2019, the OECD asserts that “non-trial resolutions have become a prominent means for resolving economic crimes, including corruption and bribery of

³² See OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2017), available at https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

foreign public officials or other related offences.”³³ According to the OECD database of 890 concluded foreign bribery cases from 1999 to 2018, 695 (78%) were concluded through non-trial resolutions.

During the last twelve years, DPA-type corporate settlements for bribery came with very hefty penalty amounts. Most large cases involved several jurisdictions, with the USA occupying a preeminent role³⁴ as shown in chart 3.

Chart 3: Parallel or Joint Settlements Involving Several Jurisdictions

Company	Total penalties	Jurisdictions involved	Year imposed
Airbus	\$4 billion	France, UK, USA	2020
Odebrecht/Braskem	\$3.5 billion	Brazil, Switzerland, USA	2016
Siemens	\$1.6 billion	Germany, USA	2008
Ericsson	\$1.06 billion	USA (support from Sweden)	2019
Telia Company AB	\$965 million	Netherlands, Sweden, USA	2017
VimpelCom	\$835 million	Netherlands, USA	2016
Rolls-Royce	\$800 million	Brazil, UK, USA	2017
Alstom	\$772 million	USA *	2014
Société Générale	\$585 million	France, USA	2018
KBR/Halliburton	\$579 million	USA *	2009
Teva Pharmaceutical	\$541 million	USA, Israel	2016, 2018
Keppel Offshore & Marine Ltd	\$422 million	Brazil, Singapore, USA	2017

*with the assistance of other jurisdictions in the discovery process

The study also outlines the reasons why negotiated settlements became internationally prevalent:

“One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty...The factors explaining the increasing use of non-trial resolutions to resolve foreign bribery matters are mainly of a practical nature. In general, governments have limited resources available to devote to corporate criminal enforcement. Investigating and prosecuting foreign bribery requires tremendous time and financial resources. Collecting evidence is complex and resource-intensive. As the offences typically involve several jurisdictions, investigation often requires mutual legal assistance (MLA) from foreign jurisdictions. Obtaining MLA can sometimes take months, if not years, before assistance is provided, thus creating a risk that the evidence may become less valuable over time or even, in certain jurisdictions, the case may become time-barred or otherwise less viable. Bribery schemes are increasingly complex and their investigation requires the support of highly specialised professionals, including forensic accounting experts. The investigation is all the more challenging that both the bribe giver and the bribe taker have a shared interest in concealing the crime from law enforcement authorities and these crimes often lack a direct victim eager to bring evidence to the authorities.”³⁵

The OECD praises the merits of settlement agreements and notes that “the business community is increasingly in favor of non-trial resolutions.”³⁶ However, it also acknowledges the stark differences between jurisdictions in the principles, use, implementation, and outcomes of the procedures.³⁷ Given these differences, it is useful to study the implementation of DPA-like procedures in the respective civil and common law legal systems. As a country-by-country review would be fastidious, this analysis focuses on, aside from the USA, leading jurisdictions that include the UK and some commonwealth countries, France (as it created a new paradigm in 2016), and the new landscape in the EU.

3.2. The UK DPA and initiatives in Singapore, Canada, and Australia

Like the USA, the UK is a common law country and, given the historic, economic, and financial ties between the two nations, the creation of an English version of the American DPA has been seriously considered since the beginning of this century. The cornerstone of the current British legislation to fight corruption is the UK Bribery Act of 2010 and its related instruments. Its key enforcer, the SFO, was already formed in 1987 by the Criminal Justice Act. The “British Deferred Prosecution Agreement” was established under the provisions of Schedule 17 of the Crime and Courts Act of 2013.³⁸ It is supplemented by a Code of Practice,³⁹ and can be used by the SFO as well as the prosecutors of the Crown Prosecution. This is a significant change to the enforcement of criminal law in a country where legislators, courts, and prosecutors

33 OECD, *supra* note 3.

34 *Id.* at 119 tbl. 2 (updated as of Mar. 31, 2020, to include the Airbus and Ericsson cases). The OECD table did not include a \$1.78 billion Petrobras settlement with the SEC, DOJ and Brazilian prosecutors reached in November 2018, mostly for accounting fraud.

35 *Id.* at 14 et seq.

36 *Id.* at 80.

37 See Quentin Alexandre, *Non-Trial Resolutions of Transnational Corporate Crimes have Become the Norm According to the OECD, but Principles and Procedures Need Further Clarification*, 2 *Revue Trimestrielle de Droit Financier*, 2019.

38 Crime and Courts Act, sched. 17, ¶ 1 (2013) (U.K.).

39 U.K. Serious Fraud Office & Crown Prosecution Serv., *Deferred Prosecution Agreement Code of Practice*, Crime and Courts Act 2013 (2013), available at https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

alike have long exhibited skepticism about consensual arrangements as a means to resolve criminal investigations and prosecutions.

In the UK, the prosecutor brings charges against an alleged wrongdoer – a corporate body, a partnership, or an unincorporated association, but not an individual⁴⁰ – for a criminal offense before entering into the DPA. The prosecution is not required to offer a DPA, nor is the alleged wrongdoer required to accept one.

The DPA terms may include, but are not limited to, the payment of a financial penalty to the prosecutor; the payment of compensation to the victims; the donation of money to a charity or other third party; the disgorgement of any profits from the alleged offense; the implementation of a compliance program, or changes to the current compliance program; the cooperation in any investigation; and payment of the prosecutor's reasonable costs.

Furthermore, if the DPA is to only apply in relation to the prosecution for the alleged offense referred to in the statement of facts, this statement of facts may (but is not required to) include admission by the defendant. While parties must agree upon a set of facts, there is no formal requirement for an admission of guilt. This is illustrated in the Standard Bank DPA, the first DPA entered into in the UK, which simply held that "Standard Bank agrees that the Statement of Facts is true and accurate." In fact, the bank did not admit the failure of the commercial organization to prevent bribery (referred to in the "statement of offence") that constituted the basis for the agreement reached.⁴¹

Judicial oversight is a hallmark of the British DPA. The UK has adopted a "hybrid form of DPA," as it includes mandatory judicial oversight. It also refers to the fundamental principles of fair trial and to the interests of justice and the public. Indeed, once the principle of an agreement is reached between the parties, the proposed DPA has to go through two stages of judicial review: one for an approval to proceed; and the other for an approval of the final agreement reached by the parties.⁴² The prosecutor shall apply to the Crown Court at a preliminary hearing, and declare that entering into the DPA is "likely to be in the interests of justice" and that the proposed terms of the agreement are "fair, reasonable and proportionate."⁴³ The amount of any financial penalty agreed upon between the prosecutor and the alleged wrongdoer must be broadly comparable to the fine that a court would have imposed on conviction for the alleged offense following a guilty plea. The court may then allow the agreement or refuse the negotiations to go further, and shall give the reasons for its decision. If the court approves the application to enter into the DPA, the prosecutor and the alleged wrongdoer proceed to further negotiations and present the agreed terms to the court for approval. In this second hearing, the court also gives its reasons for approving or refusing the agreement, once again referring to the interests of justice, fairness, reasonableness, and proportionality of the punishment.

The judicial oversight takes place in private until the application for approval of the DPA is successful. Thus, the role of the court is crucial in this process. For instance, in the approved Standard

Bank DPA mentioned above, the President of the Queen's Bench Division held that:

"[T]he court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. (...) Suffice to say I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime".⁴⁴

As in the USA, if the alleged wrongdoer has fully complied with the conditions of the DPA at the end of its term, the charges will be withdrawn in court unless it is found that inaccurate, misleading, or incomplete information was provided to the prosecution when entering the agreement. If the conditions of the DPA have been met, the alleged wrongdoer will not be prosecuted for the same offense.

Conversely, if the alleged wrongdoer fails to comply with its terms of the DPA, the prosecution may apply to the Court to ascertain that, on the balance of probabilities, the terms of the agreement have been breached and this determination allows the original proceedings to be resumed. The statement of facts contained in the DPA will then be treated as an admission (proof by formal admission) in relation to those facts in any criminal proceedings.⁴⁵

The use of the British DPA procedure has been much sparser than in the USA in fighting corporate criminality. Although the UK established a DPA program in February 2014, as of March 2020, after six years of existence, the SFO had only secured seven cases: "Standard Bank" in 2015; "Sarclad Ltd" in 2016; Tesco and Rolls-Royce in 2017; none in 2018; "Serco Geografix Ltd" and Gurlap Systems Ltd in 2019; and Airbus in 2020.

The British DPA, in the seven procedures since its inception, brought an aggregate of £1.53 billion to the coffers of H.M. Treasury and the resolution of some complex cases in cooperation notably with American, Tanzanian, Brazilian, and French authorities. However, the SFO has been criticized for its inability to hold accountable individuals who were connected to entities suspected to be involved in bribery or other financial crimes. The first DPA, which was concluded in November 2015, required Standard Bank to pay nearly \$26 million in fines and disgorgement of profits, and to pay \$6 million in compensation to the Government of Tanzania which was considered to be the victim of the fraud. Subsequently, the bank fully cooperated with the SFO and changed its compliance procedures, but the DPA was formally lifted on November 30, 2018, without any individual being sued. In the case of Sarclad, the company "agreed to pay financial orders of £6,553,085, comprised of a £6,201,085 disgorgement of gross profits and a £352,000 financial penalty. £1,953,085 was paid by Sarclad's US registered parent company."⁴⁶ The company also fulfilled the agreed-upon compliance reforms. Yet, the SFO brought charges against three executives who went to trial and were acquitted by the court on July 16, 2019.

40 Crime and Courts Act, sched. 17, ¶ 4.

41 See Wendy Wysong et al., *First UK Deferred Prosecution Agreement Provides Important Lessons for APAC Corporates*, Clifford Chance (Dec. 3, 2015), http://www.cliffordchance.com/briefings/2015/12/first_uk_deferredprosecutionagreementprovide.html; T. Lewis & N. Quinlivan, *Deferred Prosecution Agreements Come of Age*, Field Fisher (Dec. 8, 2015), <http://www.fieldfisher.com/publications/2015/12/deferred-prosecution-agreements-come-of-age>. For further details and to get access to the DPA and the Statement of Facts, see <https://www.sfo.gov.uk/cases/standard-bank-plc/>.

42 Crime and Courts Act, sched. 17, ¶¶ 7-8.

43 *Id.* ¶ 7(i).

44 *Serious Fraud Office v. Standard Bank PLC*, Case no. U20150854 (Nov. 30, 2015).

45 Crime and Courts Act, sched. 17, ¶ 13(2) (see *Provisional Dispensing with Court Action; Provisional Termination of Proceedings*).

46 See *Sarclad Ltd*, Serious Frauds Office (Dec. 23, 2019), <https://www.sfo.gov.uk/cases/sarclad-ltd/>.

The fine imposed on Tesco Plc was £129 million, and the three individuals prosecuted stood trial in September 2017. However, the trial was abandoned in February 2018, owing to the ill health of one of the defendants. The retrial of the two remaining defendants began in October 2018, but collapsed a month later after a judge ruled that there was no case to answer. In January 2019, the SFO offered no evidence against the remaining defendant (whose trial had been abandoned due to ill health), and he was formally acquitted.

Rolls-Royce was fined £497 million under its DPA, which was the result of a coordinated investigation with American and Brazilian authorities. However, on February 22, 2019, after two years of additional investigations, the new Director of the SFO declared that she “concluded that there is either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution.”⁴⁷

In accordance with its DPA, Serco Geographix agreed to a three-year probation period and paid a financial penalty of £19.2 million plus the full amount of the SFO’s investigative costs (£3.7 million), but no prosecution of executives was announced. In the other 2019 DPA against Gurlap Systems Ltd, the company accused of bribery in connection with a sale in South Korea, agreed to a three-year probation period and monetary fines of £2 million, and the three individuals who were charged for the misdeed were tried and acquitted by a jury.

Finally, the SFO announced on January 31, 2020, that it entered into a three-year €991 million DPA with Airbus SE as part of a €3.6 billion global resolution with France and the USA, but did not indicate whether it intended to press charges against individuals.

Following the UK, other jurisdictions steeped in English legal culture developed their own versions of the DPA procedure. For example, in Singapore, legislation was passed on March 19, 2018, introducing the concept of the deferred prosecution agreement (DPA) to the jurisdiction for the first time. Under the new law, corporations (but not individuals) facing prosecution for offenses of corruption, money laundering, or receipt of stolen property may attempt to negotiate the terms of a DPA with prosecuting authorities, under which they would avoid prosecution, in return for adherence to various conditions imposed upon them for a set period of time. The Singaporean Parliament reviewed various international models and settled on adopting a framework very similar to that introduced by the UK. As with the British scheme, the terms of any Singaporean DPA must be court-approved (in this case, by the Singaporean High Court), with a judge satisfied that the DPA is “in the interests of justice” and that the terms are “fair, reasonable, and proportionate.” Similar to the features of other international corporate criminal resolutions, these terms may include financial penalties, disgorgement of profits, compensation to victims, imposition of a compliance monitor, requirements to implement enhanced internal controls and other compliance measures, and a prohibition against further offenses during the DPA’s term. Also, as with the UK scheme, the court’s approval of a DPA is a matter of public record, as are the terms of the agreement and the facts of the underlying conduct. As of June 2018, the legislation has been enacted, but no cases have been announced as of the end of 2019.

In Canada, after an elaborate consultation process and parliamentary debates, a new legislation inspired by the British model came into effect on September 18, 2018. The Canadian DPA, called a Remediation Agreement, refers to an agreement under Part XXII.1 of the Criminal Code that was amended by the new law. The agreement is made between the Crown prosecutor and an organization alleged to have committed certain types of criminal offenses, usually in the context of fraud or corruption, with the consent of the relevant Attorney General and under the supervision of a judge. The Crown prosecutor can agree to defer bringing a prosecution for the alleged offenses if the organization takes steps to improve its conduct, makes restitution, and establishes internal controls to avoid a repetition of the conduct. However, the implementation of the new procedure was the cause of controversy and created a political scandal.

SNC-Lavalin, a large construction company registered in Quebec, was suspected of bribery and sought to settle the charges, but the federal Public Prosecution Service of Canada refused to settle on a remediation agreement on the basis that SNC-Lavalin did not meet the conditions prescribed by the law. Subsequently, a report issued on August 14, 2019, by the Office of the Conflict of Interest and Ethics Commissioner (CIEC) found that Prime Minister Trudeau had contravened the Conflict of Interest Act by applying direct and indirect pressure on the Attorney General and the prosecutors. The case ended on December 18, 2019, when Lavalin agreed to a guilty plea with a fine of CAD \$280 million (an unusually high amount in Canada) and a three-year probation period.

In Australia, the Minister of Justice officially released a public consultation paper on a proposed model for a DPA scheme on March 31, 2017,⁴⁸ and on December 2, 2019, the Federal Government presented the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 in the Senate. The 2019 Bill⁴⁹ broadens the definitions of economic crimes, in particular bribery and dishonesty, which were included in the Combatting Corporate Crime Bill of 2017. The Amendment also introduces a Commonwealth DPA. This procedure is available for a range of serious corporate crimes, including foreign bribery, money laundering, fraud, breaches of sanctions laws, and various criminal breaches of the Corporations Act. However, a DPA will only be accepted if the Commonwealth Director of Public Prosecutions (CDPP) is satisfied that it is in the public interest, it is approved by a retired judicial officer appointed for that purpose, and it contains at least the following elements:

- a statement of facts relating to each offense specified in the DPA (but not an admission of guilt);
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of any financial penalty to be paid by the person to the Commonwealth; and
- the circumstances that constitute a material contravention of the DPA.

As of March 15, 2020, the proposed procedure in Australia has not yet been enacted.

In all of the above common law jurisdictions, the adoption of a DPA-like procedure came with lengthy debates, and sometimes

47 *Id.*; Press Release, Serious Frauds Office, SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals (Feb. 22, 2019), <https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/>.

48 See Attorney-General’s Dep’t, Australian Gov’t, *Proposed Model for a Deferred Prosecution Scheme in Australia* (May 1, 2017), <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx>.

49 See Rani John et al., *Analysing the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019*, Ashurst (Dec. 5, 2019), <https://www.ashurst.com/en/news-and-insights/legal-updates/failure-to-prevent-foreign-bribery-and-deferred-prosecution-agreements/>

vigorous parliamentary insistence, to preserve the role and independence of the judiciary. As we have seen, the number of agreements reached is relatively small compared to the USA.

If we now consider jurisdictions of the civil law tradition, there are additional doctrinal issues to be overcome. A study of each legal and jurisdictional system of countries influenced by the Napoleonic code would show many nuances, but for the purposes of this study the analysis will focus on the case of France, which substantially modernized its system, and the future of negotiated settlement procedures in the EU framework.

3.3. The French CJIP (*Convention Judiciaire d'Interet Public*)

On the European continent, several countries, including Austria, Italy, Germany, the Netherlands, Norway, Poland, and Switzerland, have implemented or are looking into the implementation of pretrial agreements similar to the DPA.⁵⁰ Of course, each country has to take into account the characteristics of its own legal system when attempting to put new procedures in place.⁵¹ The case of France is particularly significant because it engaged in significant reforms that led to a new paradigm and well-publicized resolutions.

On December 9, 2016, France enacted a new Law on Transparency, the Fight against Corruption and Modernization of Economic Life (*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*), commonly referred to as the "Sapin II Law." The law is named after Finance Minister Michel Sapin, who introduced the legislation that resulted in protracted and sometimes heated debates among legal scholars and in Parliament before its enactment. Sapin II is considered to create a new paradigm in the prosecution of white-collar crimes.⁵² Among other dispositions, it created a new prosecutorial tool, the *convention judiciaire d'intérêt public* (CJIP), allowing for the pretrial settlement of corporate criminal cases. As the procedure could only be used for corporate entities (not individuals) and includes an obligation of publicity and judicial supervision, it is in fact closer to the UK procedure than to the American version of the DPA.⁵³ Its main features are:

- The use of the CJIP is restricted to certain specified offenses. In the original text, these included corruption, influence peddling, and laundering tax fraud proceeds. Its scope was subsequently enlarged to cover other crimes, including tax fraud.
- CJIPs must be approved by a judge who reviews both the substantive and procedural aspects of the settlement. The approving judge must issue a public statement explaining his/her decision. In addition, companies can withdraw from a CJIP settlement within ten days of the judge's approval. Upon withdrawal, the CJIP would become null and void, and none of the statements or documents provided by the company to the prosecutor during the CJIP process can be used by the prosecutor as part of subsequent proceedings against the company.
- CJIPs must specify the company's obligations, including paying damages to victims, paying fines, and implementing or

enhancing a compliance program under the supervision of the French Anti-Corruption Agency (AFA – *Agence Française Anticorruption*), which was also created by the Sapin II Law. Each CJIP order, amount, and settlement agreement must be published on the agency's website.

In the French system, either the prosecutor or an investigative judge (*juge d'instruction*) who is already assigned to the case may suggest a CJIP to the defendant. The CJIP does not require an admission of guilt, thereby avoiding the effects of a conviction. In particular, the CJIP does not disqualify the defendant from participating in public markets bidding in France or the EU. Potential fines can be significant; the amount must be fixed "in proportion to the benefits derived from the reported breaches" and could reach up to "30% of the average annual sales calculated based on the last three known years of sales on the date these breaches were reported." However, even if the payment of the agreed upon penalty is tantamount to canceling the criminal proceedings for the company in question, its executives and other legal representatives remain criminally liable as natural persons.

As of March 2020, the CJIP procedure has been used ten times, and in most cases (6 out of 10), the prosecution was represented by the *Parquet National Financier* (PNF). Created in 2013 and staffed with outstanding investigators, the PNF is a specialized prosecution office dedicated to large and complex financial crimes.

In the first case, HSBC Private Bank (Suisse) SA (HSBC PB)⁵⁴ had been under investigation by French authorities for laundering tax fraud proceeds since 2008, among other allegations. On November 14, 2017, the PNF announced that it had settled the case through a CJIP that was approved by the Paris High Court. The CJIP's statement of facts set forth allegations describing how the bank and its employees assisted clients in concealing assets and evading tax payments in France. The HSBC Group also acknowledged past weaknesses in controls at its Swiss private bank and stated that it had enhanced its anti-money laundering and tax compliance procedures. The total financial settlement amounted to €300 million, consisting of compensation to the French state (€142 million), disgorgement of profits (€86 million), and a financial penalty (€72 million). The last two elements, totaling €158 million, equal to about 30% of HSBC PB's average annual revenue over the preceding three-year period, which is the maximum fine allowed under Sapin II.

Another significant settlement was signed on May 24, 2018, with Société Générale. The case involved not only French but also American and British prosecutors. Under the coordinated settlement agreements, the bank paid penalties of €250,170,755 (about \$290 million). It also agreed to implement a reinforced compliance program and pay €3 million to cover the costs of a two-year monitorship to be supervised by the AFA. As required by French law, the CJIP was judicially approved⁵⁵ and made public on June 4, 2018. At the same time, the American DOJ announced a parallel settlement in the USA. In their separate but coordinated press releases, prosecutors on both sides of the Atlantic

50 See F. Joseph Warin et al., Gibson Dunn, 2019 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (2018), available at <https://www.gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf>.

51 See Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 U.S.C. L. Rev. (forthcoming 2020), available at <https://ssrn.com/abstract=3478298>.

52 For example, Margot Seve has a dedicated chronicle, "White Collar Crime and Compliance", to covering these matters in *Revue Trimestrielle de Droit Financier*.

53 See Michel A. Perez & Kossi Amouzou, *L'introduction de la Compliance et de la Justice Negociee en France (2/2): Du DPA Americain a la CJIP Francaise*, 189 Banque et Droit, Jan.-Feb. 2020, available at <http://www.revue-banque.fr/risques-reglementations/article/dpa-americain-cjip-francaise>.

54 Jamie L. Boucher et al., *France Announces Its First Deferred Prosecution Agreement*, Skadden (Dec. 8, 2017), https://www.skadden.com/insights/publications/2017/12/france_announces_deferred_prosecution_agreement (reviewing the HSBC PB case).

55 The law was approved by the President of Tribunal de Grande Instance de Paris (Paris High Court).

congratulated each other for their cooperation. The DOJ stated that:

“Today’s resolution – which marks the first coordinated resolution with France in a foreign bribery case – sends a strong message that transnational corruption and manipulation of our markets will be met with a global and coordinated law enforcement response⁵⁶. This was echoed by the French authorities who thanked their American counterparts for their trust and cooperation. This first coordinated resolution agreement is a significant progress in the fight against international corruption.”⁵⁷

Four CJIPs were concluded in 2018 and 2019 with mid-size entities. An innovative use of the procedure for tax-related matters was enacted on September 12, 2019, in a settlement between the PNF and Google France Sarl and Google Ireland Ltd, which agreed to pay a fine of €500 million for tax evasion in line with a ruling from the French tax authorities that insist that goods sold via the Internet to French residents, even if the transactions are booked in a different jurisdiction, are subject to French taxes. In January 2020, a CJIP was signed with the Bank of China, which was investigated for money laundering and deficient compliance systems. It agreed to pay a fine of €3 million, representing the benefit derived from the violations, plus €900,000 to cover the costs of the investigation and the loss of tax income to the public coffers.

The \$4 billion settlement of the Airbus case announced on January 31, 2020 was a landmark event for numerous reasons: it serves as a model of cooperation among jurisdictions; demonstrated self-reporting from the target; imposed a significant penalty amount; and arguably created tacit recognition of the French blocking mechanism by the other two countries involved. Separate but coordinated press releases were issued by the PNF for France, the SFO for the UK, and the DOJ for the USA, each of them praising the prosecutors from the two other countries for their cooperation. In fact, a joint investigation team (JIT), including members of the SFO and the PNF, was formed in January 2017, and they later brought in American investigators.

The considerable number of documents collected by Airbus as part of its internal investigation (more than 30.5 million from more than 200 custodians) led to the development of new procedures to filter out classified information or information covered by attorney client confidentiality... Throughout this investigation, Airbus kept the JIT informed of the results of its internal investigations via numerous presentations and the production of documents.⁵⁸

The JIT investigated more than 1,750 entities. The PNF focused its investigations more particularly on the conduct of Airbus, its divisions and/or its subsidiaries in the UAE, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait, Colombia. The SFO focused on... South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana and Mexico... The company offered exemplary cooperation with the JIT.⁵⁹

The coordinated DPA/CJIP fines and other penalties required the company to pay a global amount of €3.9 billion, making it the largest settlement in a foreign bribery case to date. The fines are split between the PNF receiving close to €2.1 billion, the SFO €984 million, and the DOJ €526 million. As in the Société Générale case, the company agreed to implement an enhanced compliance program to be supervised by the French Anti-Corruption Agency. The DOJ press release also states that:

“The US resolution recognizes the strength of France’s and the United Kingdom’s interests over the Company’s corruption-related conduct, as well as the compelling equities of France and the United Kingdom to vindicate their respective interests as those countries deem appropriate, and the department has taken into account these countries’ determination of the appropriate resolution into all aspects of the US resolution.”⁶⁰

This statement appears to be a tacit admission that France may use the “blocking mechanism” mandated by a 1968 French law (*loi de blocage*), which prevents the communication of sensitive information or data to foreign (i.e. non-French) authorities.

In the traditional French judicial system derived from the Napoleonic code of 1804, only a judge after an impartial trial could punish a person, individual, or corporation by issuing a sentence. The introduction of negotiated settlements and the CJIP was considered by some as an American Trojan horse and nearly sparked a revolution in judicial practices. In 2013, two lawyers, Francois Garapon and Pierre Servan Schreiber, published a best-selling book, in fact a pamphlet, *Deals de Justice* with the subtitle “The American market of worldwide obedience.”⁶¹ Later in 2016, the Conseil d’Etat, one of the country’s highest courts, considered the procedure contrary to the principle of equality enshrined in the French constitution. However, it later changed its position and successful resolutions, especially in well-publicized cases such as Société Générale and Airbus, have showcased the merits of the new approach.

3.4. The European Union seeking a model for a transnational procedure

At the EU level, while, by definition, each country jurisdiction will need to legislate and implement its own version of the DPA equivalent, some limited procedures to enforce competition regulations were put in place and a number of discussions had to establish some basic common principles that would promote the development of transnational enforcement procedures. The Court of Justice of the European Union, one of the seven EU institutions, constitutes the EU’s judicial authority, which ensures the uniform application and interpretation of EU law in cooperation with the courts and tribunals of the member states. After years in the shadows, the Luxembourg-based, two-tier European court system – the Court of Justice of the European Union and the General Court (previously called the Court of First Instance), as distinct from the European Courts of Human Rights in Strasbourg – has emerged as what Lord Mance, a leading British judge, calls “a

56 Societe Generale Press Release, *supra* note 29.

57 Press Release, PNF (June 4, 2018), https://www.economie.gouv.fr/files/files/directions_services/afa/Communique_CJIP_SG_LIA_-_4_juin_2018.pdf.

58 France v. Airbus SE, PNF-16 159 000 839, Convention Judiciaire d’Intérêt Public n° 41 (Jan. 29, 2020), available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20AIRBUS_English%20version.pdf.

59 *Id.* n° 43, 52.

60 Press Release, U.S. Dep’t of Justice, Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>.

61 Antoine Garapon & Pierre Servan Schreiber, *Deals de Justice, le Marche Americain de l’Obeissance Mondialisee* (2013).

central achievement of the EU, a court with unparalleled transnational power.”⁶² The European court system has not expressly ruled on the use of settlement agreements, however, it has tacitly agreed to them, in principle, by accepting their validity.

The EU has set up an extrajudicial settlement procedure to handle anti-competition cases under what it calls its leniency policy.⁶³ Article 101 of the Treaty on the Functioning of the European Union (TFEU or Treaty of Lisbon of 2009) prohibits agreements between companies that prevent, restrict, or distort competition in the EU. Prohibited activities include engaging in price-fixing or market-sharing cartels. The penalties for such activities follow strict guidelines⁶⁴ and can be severe. The largest fine imposed on a single company was over €896 million; the largest fine imposed on all members of a single cartel was over €1.3 billion. The Commission and its staff act as *de facto* investigators and prosecutors. Since 2008, companies that the Commission finds out to have participated in a cartel can use the settlement procedure. In essence, the leniency policy offers companies involved in a cartel that self-report and hand over evidence either total immunity from fines or a reduction of the fines that the Commission would have otherwise imposed on them. It also benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. Only the first company or individual to self-report can receive immunity. Other entities or individuals that self-report and cooperate with the investigation may benefit from a reduction of fines if they provide evidence that represents “significant added value” to that already in the Commission’s possession and they have terminated their participation in the cartel. The first company to meet these conditions is granted 30–50% reduction, the second 20–30%, and subsequent companies up to 20%. The Commission may reject the settlement route for cases it considers not suitable. Otherwise, it presents parties with the evidence and notifies them of its conclusions as to duration, seriousness, liability, and an estimated fine. The parties must make an oral or written submission acknowledging their liability and stating that they accept the Commission’s statement of objections. There is strict judicial supervision as all final decisions are subject to a judicial review. In particular, Article 31 of Regulation (EC) No. 1/2003 states that the Court of Justice will “have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.”

Since the first settlement in 2010, the leniency procedure has been used in at least thirty cases. Its effectiveness was further reinforced with the development of a policy protecting whistleblowers and the creation of a tool allowing them to report anonymously in 2017. Some cases received significant publicity and served as a cautionary tale. For instance, in May 2019, five banks – Barclays, RBS, Citigroup, JPMorgan, and MUFG – were

fined €1.07 billion in two separate but coordinated settlements for participating in foreign exchange spot trading cartels. However, UBS received full immunity for revealing the existence of the cartels and avoided fines that would have amounted to €285 million under the 2016 guidelines.⁶⁵

Currently, the leniency policy and related procedures are restricted to matters related to the enforcement of competition regulations. However, they are part of a series of judicial innovations with the dual objective of streamlining existing procedures and allowing the transnational prosecution of criminals. Another example is the Convention of May 29, 2000, on Mutual Assistance among Member States that provides for direct communications between magistrates from different countries. Another landmark was the EU Decision of June 13, 2002, that created the European Arrest Warrant (EAW), which has revolutionized the traditional extradition system by adopting innovative rules, including: limited grounds for refusal of execution; shifting decision-making from political to judicial authorities; the possibility of surrendering nationals of the executing state; the abolition of the dual criminality requirement for thirty-two listed offenses; and clear time limits for the execution of each EAW.

A directive that entered into force on May 17, 2017, created a simplified procedure for replacing the traditional and cumbersome letter of request (rogatory letter) system. It introduced the European Investigation Order (EIO), which enables judicial authorities in one EU country (the issuing state) to request that evidence be gathered in and transferred from another EU country (the executing state). The EIO reduced paperwork by introducing a single standard form for authorities to use to request help when seeking evidence. It also set strict deadlines for gathering the evidence requested and limited the grounds for refusing such requests.

Another major change in criminal prosecution is expected to come from the European Public Prosecutor Office (EPPO), the creation of which was approved by the European Parliament on October 12, 2017,⁶⁶ and will become operative by the end of 2020. The EPPO is structured as a supranational prosecution office for twenty-two countries.⁶⁷ It is an independent and decentralized prosecutorial body headed by a European Chief Prosecutor assisted by two deputies and run by a college of twenty-two European prosecutors (one representing each member country). Headquartered in Luxembourg, the EPPO will work closely with European Delegated Prosecutors located in each member state. The relatively broad scope of criminal offenses falling within the EPPO’s competence allows it to prosecute a large array of financial crimes, including tax evasion, money laundering, and embezzlement. Its staff of over 100 includes experienced investigators familiar and comfortable with pretrial mechanisms similar to the American or British DPA or the French CJIP. Furthermore, it can be expected that they will promote the use of such procedures within the European legal framework and respect the laws of each country.

62 See Roland Flamini, *Judicial Reach: The Ever Expanding European Court of Justice*, World Affairs (2012), <http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice>.

63 See *Leniency*, Eur. Union, <https://ec.europa.eu/competition/cartels/leniency/leniency.html> (last visited Apr. 4, 2020).

64 See Communication from the Commission, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (45) 7.

65 See Press Release, Eur. Union Comm’n, Antitrust: Commission Fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 Billion for Participating in Foreign Exchange Spot Trading Cartel (May 16, 2019), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2568.

66 On EPPO, see Francois Falletti, *Recent Developments in International Cooperation in Criminal Justice: A Brief Overview*, 2 Revue Trimestrielle de Droit Financier (2018).

67 Out of the 27 EU countries, Denmark, Hungary, Poland, Ireland, Sweden are not members, but could join at a later date

4. CONCLUSION

The implementation of corporate DPAs in the USA on a large scale since the early 2000s, and more recently in other countries, has raised certain challenges. However, the benefits of these procedures compared to the lengthy and costly methods of “traditional” justice became apparent as a way for governments with limited resources. The use of what scholars have termed “negotiated justice” allows a government to more efficiently resolve matters with corporations.⁶⁸ The multiplicity of legal systems and jurisdictions makes it impossible to design a “one size fits all” model, as pointed out in the March 2019 OECD study.

As such, the American pretrial diversion and other negotiated settlement procedures have their critics. In 2011, Anthony and Rachel Barkow identified and studied a number of abuses in their work *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*.⁶⁹ Historically, there were glitches in the earlier implementation of the American DPA when the application of this procedure to large corporate cases was relatively new. For example, Chris Christie who was District Attorney for New Jersey from 2002 to 2008 convicted or obtained guilty pleas from 130 officials accused of corruption but at least seven of the DPAs he concluded were contested. In one case, his office deferred criminal prosecution of pharmaceutical company Bristol Myers in a deal that required the company to dedicate \$5 million for a business ethics chair at Christie’s alma mater.

However, as procedures in the USA have become more codified and Congress has undertaken to regularly review sentencing guidelines, such shortcomings have become, if not impossible, at a minimum, very rare. A related implementation problem is that, in many jurisdictions, the role and necessary qualifications of the monitor are ill-defined. The monitor is the person or entity that supervises and ensures that the settlement provisions, in particular those regarding compliance, are effectively put in place. Yet, some rightfully ask “who is monitoring the monitor?” About one-third of US PDA cases demand the appointment of an independent monitor. In March 2008, the DOJ issued a memorandum (the “Morford Memo”) to provide guidance with respect to the monitor’s accountability and oversight. Additional guidelines from the DOJ are regularly issued, but the costs, impartiality, and efficiency of monitors remain open to questions. Lively discussions on this issue occurred when the UK DPA and the French CJIP procedures were enacted. The solution in those countries was to provide for oversight by both the judiciary and special government appointed agencies, namely the SFO in the UK and the AFA in France.

The need for judicial supervision has been widely debated and remains a major issue. “Justice Deferred is Justice Denied: We Must End our Failed Experiment in Deferring Corporate Criminal Prosecution”⁷⁰ was the title of a 2015 paper by Peter R. Reilly,

Associate Professor of Law at Texas A&M University. His article posits “that this alternative dispute resolution vehicle makes a mockery of the criminal justice system by serving as a disturbing wellspring of unfairness, double standards, and potential abuse of power.” In Europe, some legal scholars, mostly in civil law jurisdictions, consider that justice must be “contradictory”⁷¹ – there must be at least two parties presenting arguments to an “impartial” judge. Others point out that the very high risk of “capture,” a sociological phenomenon in which the regulator or prosecutor is captured – led to share the same point of view and values – by the regulated entities he is supposed to supervise. In a nutshell, those critics have a doctrinal opposition to the concept of “out of trial” justice as they believe only judges, not prosecutors, can guarantee the impartiality of the process.⁷²

While we may sympathize with the philosophical argument, it seems doubtful that, in our current globalized and complex economy, most regular judges have the training to understand fully the situations that they are to adjudicate. If they have to rely on technical experts, who would guarantee their qualifications and impartiality? In other words, in the complex corporate situations that are the norm in most large corporate prosecutions, there is no certainty that justice could only be served by a judge. In addition, “traditional” justice in corporate cases has often failed because the sentences available to the judges were inadequate and the defendants could use all sorts of dilatory tactics and drag out the process from appeal to appeal.⁷³ A balanced solution came with the procedures put in place for the British DPA and the French CJIP, which enshrine a supervisory and mandatory role for the judiciary but still encourage fair and relatively speedy settlements.

The assessment of individual, as opposed to or in addition to corporate, responsibilities is a recurrent challenge. In the USA, both corporations and individuals can be parties to a negotiated settlement, but in the UK, France, and the majority of jurisdictions, expedited procedures are reserved for legal entities and are not available to individuals. Some observers noted that negotiated settlements have sometimes been used to give an appearance of justice while the individual culprits, especially top executives, go scot-free.⁷⁴ On September 9, 2015, a well-publicized memo “Individual Accountability for Corporate Wrongdoing” from Sally Yates, the then Deputy Attorney General, specifically addressed this issue. It states that:

“Attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct.... we [thus] maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.... Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.”⁷⁵

68 See Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops*, in *Criminalità D’impresa e Giustizia Negoziata: Esperienze a Confronto* 91 (Stefano Manacorda & F. Centonze eds., Giuffrè 2018).

69 Anthony Barkow & Rachel Barkow, *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (2011).

70 Reilly, *supra* note 10.

71 See Marie Anne Frison Roche, *Generalites Sur le Principe du Contradictoire* (doctoral thesis, 1988), in *Anthologie du Droit* (LGD) 2014).

72 For a review of doctrinal arguments against PDAs, see Alizee Dill & Michel Perez, *The Rise of the American DPA and its European Avatars*, 2 *Revue Trimestrielle de Droit Financier* (2016).

73 For instance, the French oil company Total was accused of bribery. On May 29, 2013, it settled its charges with the U.S. Department of Justice by paying a \$245 million monetary penalty. Total was also prosecuted in France, but after years of appeals, Total was only charged by the French tribunal with a €500,000 fine on December 18, 2018. See *All About the Law # Sapin2*, *Republique Francaise* (Mar. 29, 2016), <https://www.economie.gouv.fr/transparence-lutte-contre-corruption-modernisation>.

74 See, e.g., Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014).

75 See Yates, *supra* note 24.

76 See Press Release, U.S. Dep’t of Justice, *Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce PLC and Its U.S. Subsidiary* (Nov. 7, 2017), available at <https://www>.

While it was noted that, in the USA, few executives were sued for their roles in the 2008 financial crisis, individuals, particularly in the UK, were prosecuted in parallel investigations to recent DPAs. For instance, there were five individual prosecutions of executives in parallel with the Rolls-Royce 2017 settlement.⁷⁶

The *ne bis in idem* argument is a particularly sensitive issue with European regulators, corporate executives, and scholars. They claim that American prosecutors, at their discretion, reserve the right to sue corporations who have already reached a settlement in Europe when there is mutual recognition of finality among European jurisdictions. While US courts may not consider themselves bound by judicial decisions supervised by the European court system, in practice, US investigators and courts have given credit to defendants for penalties and other sanctions reached in non-US jurisdictions in most recent cases. This approach became policy with issuance of the DOJ directive against “Piling On.” In a May 9, 2018, speech, Deputy Attorney General Rosenstein stated that the “aim...is to enhance relationships with our law enforcement partners in the USA and abroad, while avoiding unfair duplicative penalties.” In an implementation memorandum, he instructed DOJ personnel to “endeavor, as appropriate, to consider the amount of fines, penalties and/or forfeiture paid to [other] foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”⁷⁷

In the present environment, it is unlikely that the USA will agree to any international convention or treaty that would bind American courts to settlements reached in other jurisdictions. However, it is very likely that any specific reference in a DPA to a parallel settlement in a non-US jurisdiction will *de facto* protect the defendant against double jeopardy.

As the transnational use of negotiated settlements becomes more widespread, the OECD in its March 2019 listed three “Good Practices in Coordinated Multi-Jurisdictional Resolutions”:

- Cooperate early: prosecuting authorities that learn about conduct that may be prosecuted in multiple jurisdictions should consider sharing information early in order to better understand the facts, as well as to consider whether a global resolution is possible.
- Determine what issues must be addressed if a multi-jurisdictional resolution is possible: for example, an efficient method for information sharing, the jurisdictions best suited to prosecute certain conduct, the necessity for a defendant’s continuing cooperation in other jurisdictions, how the terms of a resolution in one country may impact other jurisdictions, whether a monitor is necessary, whether a jurisdiction may agree not to prosecute a defendant under certain circumstances, and the timing of releasing information publicly.
- Prioritize fairness: consider the sanctions imposed by other jurisdictions when determining any penalties and fines.⁷⁸

However, these are only guidelines. They do not have force of law and are expressed in general terms that can have various interpretations by investigators from different countries. Still, based on recent experiences and available specialized literature, we can posit that negotiated settlements are more effective and serve as better deterrents if they follow some key principles:

- *Transparency*: procedures and settlement outcomes (but not negotiations which could remain confidential) must be made public and the relevant documentation easily accessible.
- *Proportionality*: the penalties imposed through a settlement must be proportional to the crime and not be a way for corporations and individuals to avoid being held accountable for their behavior. The granting of immunity should be exceptional; reduced penalties and sentences are better options.
- *Fairness*: victims, when they can be identified, should be compensated first. The right of the prosecuted entity to a reasonably speedy and fair process must also be respected. It is essential to avoid “forum shopping” or the practice of corporations to self-report their misdeeds in a soft or lenient jurisdiction with the expectation that they may avoid harsher penalties in other countries. To mitigate this risk, coordination among investigators and prosecutors of different jurisdictions, for instance through Eurojust or the OECD Working Group and/or personal professional contact, must be encouraged.

Judicial supervision is a way to ensure that the above principles are respected.

In practice, to be efficient and fulfill their deterrence function, negotiated settlements must be accompanied by the requirement of full and willful cooperation with the investigating authorities in each jurisdiction in which they are used. This implies reduced penalties for individuals and corporations who cooperate but harsher punishments for those who do not. The positive effects of the procedure, measured by the number of resolutions obtained and by the reduction of occurrence of future criminal offenses, are also enhanced by the existence of easy to access a program that protects whistleblowers.

Negotiated settlements in their various forms are not a panacea for efficient justice. They are only one element in the tool kit available to magistrates, prosecutors, and investigators. The prosecutors always have the option of declination – deciding to not pursue a case – either because it is deemed too benign or because there is lack of tangible evidence. Conversely, for offenses considered particularly serious, prosecutors can pursue a trial and seek an exemplary punishment.

Both the development of coordinated prosecutions among agencies in different jurisdictions and the creation of supranational prosecutorial bodies and procedures are signs of the emergence of a transnational judicial system. Such a system is expected to be more efficient than “traditional justice” in rooting out international corporate crimes and will provide more certainty to corporate executives, encouraging them to cooperate with rather than fight supervising agencies. While procedures, including various forms of pretrial diversions, do not need to be identical from country to country, they should at least be compatible with each other to allow cross-border enforcement. Streamlined procedures that can be enforced across jurisdictions are clearly a better solution to prevent crime. Magistrates, prosecutors, lawyers, and scholars can also learn from each other – “[a]s European and other nations continue down the path of modernizing their approaches to combatting corporate crime, a highly fruitful research agenda –

[justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us](https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us).

77 Rod J. Rosenstein, Deputy Attorney General, Remarks at the American Conference Institute’s 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes>.

78 OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions 39 (2019).

79 Arlen & Buell, *supra* note 51.

teaching much more about corporate enforcement both abroad and within the USA – is sure to follow.”⁷⁹

In 1764, Cesare Beccaria, an Italian lawyer considered to be the father of modern criminology, wrote that “[i]t is essential that [sentences] should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law.”⁸⁰ In modern language, we would say that for justice to be efficient it must be reasonably quick (no lengthy delays from cumbersome procedures and appeals); logical and certain (once the infraction is established, the punishment

could be deducted); as lenient as possible while remaining a deterrent (including leniency granted for cooperation); and any punishment should be proportional to the gravity of the crime and within the limits clearly stipulated by law. Beccaria would certainly have considered in a positive way the ongoing and increasing cooperation among specialized governmental entities with quasi-prosecutorial powers such as the British SFO, the French AFA, and specialized US agencies such as the SEC and CFTC (the Commodity Futures Trading Commission). International cooperation is certainly the only effective way to fight transnational crime.

⁸⁰ See *supra* note 1.