`Judicial Review of Deferred Prosecution Agreements

A COMPARATIVE STUDY*

FREDERICK T. DAVIS†

A Deferred Prosecution Agreement is a negotiated criminal procedure that allows individuals—and increasingly, corporations—to avoid a criminal conviction by reaching an agreement with the prosecutor to acknowledge responsibility for their acts, to make appropriate payment in lieu of fines, to modify their behavior and often to cooperate with ongoing investigations, in return for which criminal charges are either dropped or are not brought at all. It has become a mainstay of efforts by the United States Department of Justice to combat corporate crime. The procedure has now been imitated in a few other countries, and is receiving serious legislative attention in several more. While the several versions share many common features, they differ in one key respect: whether the courts have any role in reviewing an agreement reached by a

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† Member of the bars of New York and Paris. B.A. Harvard (1967), J.D. Columbia Law School (1972). Served as law clerk to Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, and to Potter Stewart, Supreme Court of the United States. An elected Fellow of the American College of Trial Lawyers and of the International Academy of Financial Crime Litigators, and a Life Member of the American Law Institute. Named a chevalier of the National Order of Merit of France. Currently a Lecturer in Law at Columbia Law School.

prosecutor and a corporate defendant, and if so, the extent of that review. This article will review corporate Deferred Prosecution Agreement procedures in the countries that have adopted them as well as legislative schemes now being considered, and focuses on the approaches to judicial review adopted by each. The differences explored here may have a real impact on transnational criminal investigations, and this comparative study provides a useful gauge of the respective countries' traditions and principles of separation of the powers.

INTRODUCTION

Corporate Deferred Prosecution Agreements ("DPAs") are a distinctly American phenomenon that has gained considerable traction—and caused significant controversy—in the last two decades. An Assistant Attorney General of the United States has stated that DPAs "have become a mainstay of white collar criminal law enforcement,"[1] and they now constitute the predominant procedure for resolving certain kinds of federal prosecutions of corporations. At their simplest, DPAs and their cousin Non-Prosecution Agreements ("NPAs") are voluntary alternatives to traditional criminal proceedings in which the defendant—whether an individual or a corporation, although this article will focus on the latter—avoids a criminal judgment by reaching an agreement with the prosecutor to perform certain obligations, the successful completion of which will result in charges being dismissed or not even brought.

As discussed below,[2] DPAs have proved to be efficient and are generally considered effective by the parties that agree to them. Clearly in response to the American initiative, a few countries have already adopted DPA procedures and implemented them, while others

1. Lanny A. Breuer, Assistant Att'y General, U.S. Dep't of Just., Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/DJH3-7SB7].

2. *See infra* notes 20–27 and accompanying text.

are exploring possible legislation to adopt them.[3] DPAs outside of the United States function much like the American original, but they all differ in one fundamental respect: While the case law in the United States is clear that judges have virtually no role in reviewing DPAs to which a prosecutor and a corporate defendant have agreed, the principal procedures now in place or under consideration elsewhere call for a judicial role—sometimes a robust one——in reviewing the substance of a proposed DPA. This article will review the history and procedural structure of DPAs and NPAs and the controversies they have generated in the United States with a particular focus on the issue of judicial review. It will then analyze the DPA approaches now in place in other countries as well as those under serious contemplation, with particular attention to whether such review includes an analysis of whether an agreement is "in the public interest." It will conclude by evaluating the functionality of judicial review and will consider what lessons courts, legislators and practitioners may draw from these different approaches.

A. A Short History of DPAs in the United States

When analyzing DPAs negotiated by some of the world's very largest corporations, sometimes involving billions of dollars,[4] more than one commentator has noted the irony that the concept was originally conceived to provide a lifeline to disadvantaged—often poor and

3. In 2019, the Organization of Economic Cooperation and Development (OECD) published a review of procedures for "non-trial agreements" adopted by parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter "OECD Bribery Convention"), which surveys consensual criminal outcomes in force around the world, including DPAs, and notes that "[n]on-trial resolutions have become a prominent way of enforcing serious economic offenses . . . ." RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS 3 (2019), https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf [https://perma.cc/2BHN-HXDG].

4. For an excellent overview of DPAs and NPAs, see Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 THE BUS. LAW. 1, 2–3 (2014). In January 2020, the Department of Justice (hereinafter "DoJ") announced the largest DPA settlement to date: European aircraft giant AirBus SE agreed with the DoJ, the UK's Serious Fraud Office ("SFO") and the National Financial Prosecutor of France ("NFPF") to pay over $3.9 billion to resolve foreign bribery and arms trafficking violations. Press Release, U.S. Dep't of Just., 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 [https://perma.cc/C7DT-N8DA].

young—individuals.[5] Deferred prosecution agreements have historically been a form of "pretrial diversion" where the goal is to permit a criminal defendant, typically a first-offender, a chance to avoid a criminal conviction that could put the defendant on a downward spiral of joblessness and recidivism.[6] While there are many variants, the basic idea is that actual or potential charges against the individual are held in abeyance—deferred—while the defendant demonstrates that he has "turned a page," often with a combination of counseling and supervision. At the successful completion of the agreed-upon period, and if the individual has honored his obligations, the prosecutor dismisses the charges. Such diversion programs have many supporters, who believe that the procedure helps to address the high—many believe grossly excessive—level of incarceration in the United States.[7]

The first corporate DPAs were negotiated by the Department of Justice (DoJ) in the 1990's,[8] but the practice became much more widespread after 2000 when the DoJ began issuing guidelines for their negotiation and implementation. There have now been dozens of corporate DPAs and NPAs. Professor Brandon Garrett, who has written extensively about corporate crime, established a comprehensive public database that identifies all the known negotiated corporate criminal outcomes.[9] As such databases show, negotiated outcomes such as

5. *See, e.g.*, United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 22–23 (D.D.C. 2015) ("[D]eferred-prosecution agreements were originally intended to give prosecutors the ability to defer prosecution of individuals charged with certain non-violent criminal offenses to encourage rehabilitation. At this time . . . deferred-prosecution agreements appear to be offered relatively sparingly to individuals, and instead are used proportionally more frequently to avoid the prosecution of corporations, their officers, and employees."); Jed S. Rakoff, *Justice Deferred is Justice Denied*, N.Y. REV. OF BOOKS, https://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/ [https://perma.cc/M84S-UMES] (Feb. 19, 2015); JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM 103 (2021).

6. *See Saena Tech Corp*., 140 F. Supp. 3d at 22.

7. As noted by one of the leading advocates of alternatives to incarceration, "stemming the flow of people into jail" requires "expanding alternatives to arrest, prosecution, and bail as smart ways to downsize jails." *Ending Mass Incarceration*, VERA INST. OF JUST., https://www.vera.org/ending-mass-incarceration [https://perma.cc/G88H-HFR]. *See also Building Exits off the Highway to Mass Incarceration: Diversion Programs Explained*, PRISON POL'Y INITIATIVE (July 20, 2021), https://www.prisonpolicy.org/reports/diversion.html [https://perma.cc/UL2H-VU8Y]

8. Kaal & Lacine, *supra* note 4, at 63.

9. *Corporate Prosecution Registry*, LEGAL DATA LAB, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html [https://perma.cc/9F34-L3VD]; *see also The FCPA Clearinghouse*, STANFORD L. SCH., http://fcpa.stanford.edu/ [https://perma.cc/L7KS-G5TH].

DPAs far exceed the number of cases where corporations have actually gone to trial on a criminal charge.

B. How DPAs Work

In substance, DPAs and NPAs reached by large corporations with the DoJ[10] have virtually the same practical effects and several common structural elements. They are both carefully negotiated, heavily lawyered documents, which by the time they are made public (and in the case of DPAs, submitted to court for approval as explained in Part 2, *infra*), are clearly considered by the parties that signed them to be "final" and dispositive. An agreement between the DoJ and the corporate defendant is publicly reported only after the parties have formally reached it, and has been signed by officials for the government, by one or more officials of the corporation (and may include a corporate resolution permitting those individuals to sign for the corporation), and by outside counsel for the corporation. Several important additional documents will be attached to the DPA/NPA as Annexes or will appear in the DoJ website, often including a press release.[11]

The basic agreement will include some or all of the following elements:

- In a DPA, the corporation waives grand jury presentation under Fed. R. Crim. P. 7(b) and agrees to the formal filing of an Information accusing it of certain crimes, which will then be filed with the relevant District Court, and appear in the public docket.
- The corporation agrees to the accuracy of, and to take responsibility for, a Statement of Facts, attached as an Annex; and further promises not to "make any public statement, in litigation or otherwise, contradicting the

10. This article will focus on DPAs and NPAs signed by the DoJ. The Securities and Exchange Commission ("SEC") now negotiates its own DPAs, which are similar in structure to DoJ outcomes, and often joins in negotiated outcomes announced by the DoJ. *See, e.g.*, Press Release, Sec. & Exch. Comm., Tenaris to Pay $5.4 Million in SEC's First-ever Deferred Prosecution Agreement (Dec. 22, 2014), https://www.sec.gov/news/press/2011/2011-112.htm [https://perma.cc/KWC8-5VSX].

11. Virtually all the DPAs and NPAs listed in the databases referenced *supra* note 9 follow this pattern. For one example, see the DPA signed by the DoJ with Alstom referenced in the next footnote.

acceptance of responsibility by the Company … or the facts described in the attached Statement of Facts."[12]

- The corporation agrees to make the financial penalty payments set forth in the agreement, which are usually calibrated against the specific parameters of the Sentencing Guidelines that the parties agree are applicable to the case.
- The corporation agrees to implement specific compliance program enhancements, sometimes with a court-appointed (and DoJ approved) monitor, and to make regular reports to the DoJ.
- The corporation may agree to "cooperate" with ongoing and further investigations and prosecutions, often by providing evidence that may incriminate individuals, including officers or employees of the corporation itself, and sometimes by providing individual officers or employees to serve as witnesses.

If at the end of the agreed-upon term—often three years—the corporation has (in the view of the DoJ) satisfied all its obligations under the DPA, the prosecutor will seek the dismissal of the Information under Fed. R. Crim. P. 48(a). Such dismissal will be "with prejudice," thus protecting the corporation against further prosecution by the DoJ.[13] By contrast, under an NPA, no charges are filed at all: An NPA is simply a contract between the prosecutor and a corporation

12. *See* Press Release, U.S. Dep't of Just., Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [https://perma.cc/KWC8-5VSX]. Virtually identical language appears in other DPAs. This language was intended to protect the DoJ against the embarrassment of a company signing a DPA and then trumpeting its innocence, but the phrase has been interpreted by some European observers and one French court to disable a company making this representation from defending itself in other criminal proceedings against it. *See* Frederick T. Davis, GLOBAL ANTICORRUPTION BLOG, *Paris Court Rules that a US FCPA Guilty Plea Precludes Subsequent Prosecution in France* (July 5, 2017), https://globalanticorruptionblog.com/2017/07/05/guest-post-paris-court-rules-that-a-us-fcpa-guilty-plea-precludes-subsequent-prosecution-in-france/#more-9529 [https://perma.cc/6QU8-8GSS].

13. By their terms, DPAs and NPAs do not purport to offer protection against prosecution by offices other than the DoJ. As a practical matter, subsequent and unforeseen prosecution by a state prosecuting office—assuming that it did not join in the global agreement, as is sometimes the case—is infrequent. Subsequent prosecutions by foreign prosecutors, however, do occur and raise complex issues that are sometimes discussed as "international double jeopardy." For a discussion of that topic, see generally Frederick T. Davis, *International Double Jeopardy: U.S. Prosecutions and the Developing Law in Europe*, 31 AM. U. INT'L L. REV. 57, 58 (2017).

in which the prosecutor agrees not to bring any charges if the corporation satisfies its agreed-upon obligations. The protection an NPA offers is purely contractual; in the absence of a dismissal "with prejudice" there is no Double Jeopardy effect.[14]

C. The Controversies

There is a significant and growing catalogue of literature about DPAs and NPAs, much of which is critical of them.[15] Some commentators complain that these agreements are unsatisfying because they allow rich corporations to buy their way out of trouble, and because

14. Confusingly, the DoJ also uses two other procedures to achieve goals like those of DPAs and NPAs. First, the DoJ occasionally engages in a so-called Pretrial Diversion Agreement with a corporation; the Justice Manual published by the DoJ provides at § 9-22.000 that a U.S. Attorney "may divert any individual against whom a prosecutable case exists" if that individual meets certain criteria, in which case the person is put "into a program of supervision and services administered by the U.S. Probation Service." U.S. DEP'T OF JUST. MANUAL § 9-22.000 (Nov. 2019). In a wire fraud case brought in the Western District of Pennsylvania, an indicted corporate defendant and the DoJ entered into a self-styled "Agreement for Pretrial Diversion" which provided for the payment of a monetary penalty and compliance and other commitments very similar to those found in a DPA or NPA. *See* Agreement for Pretrial Diversion 1–6, United States v. Rick Weaver Buick GMC, Inc., No. 16-cr-00030 (W.D. Penn. Jan. 15, 2019), Doc. No. 191-1.

Separately, prosecutors sometimes enter into a so-called "declination." The DoJ has recently defined a declination in the context of Foreign Corrupt Practices Act (FCPA) enforcement: "A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy." U.S. Dep't of Just., Just. Manual § 9-47.120 (2019). The DoJ's emphasis on the "circumstances" necessary to obtain a declination means that declinations are effectively a quid pro quo not formalized by contract, and the DoJ has stated that "declinations awarded under the FCPA Corporate Enforcement Policy will be made public." *Id.* The DoJ, of course, retains the right to resume prosecution after a declination if, for example, it discovers evidence not known at the time of declination, and in fact it has recently done so. *See, e.g.*, Press Release, U.S. Dep't of Just., ., SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case [https://perma.cc/8WPE-9SGT].

15. *See, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2016); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Rakoff, *supra* note 5; Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, 1–2 (NYU Sch. of L. Pub. Law Rsrch. Paper, Working Paper No, 19-30, 2019); Kaal & Lacine, *supra* note 4. All contain excellent summaries of the positions for and against DPAs and NPAs.

they shield individual corporate wrongdoers from justice. Critics also make the following specific points:

- There are a number of instances of corporate recidivism, where a corporation reached a solemn agreement—in essence promising "never to do it again"—and then repeated the conduct.[16]
- There is a serious concern about whether the payment of a corporate financial penalty has any deterrent effect when its impact may most directly fall on a company's shareholders, rather than on the corporate insiders who caused the corporation to misbehave.[17]
- There are some but relatively few instances in which a consensual corporate disposition led to or was accompanied by successful prosecution of individuals. It is frequently pointed out, for example, that virtually no individuals were charged with violation of serious crimes relating to the Great Recession of 2007-08, notwithstanding the fortunes lost, the lives ruined, and the belief that a number of corporations committed outright fraud and other crimes.[18]
- Finally, there is a sense that corporate DPAs/NPAs are lacking in transparency because they are the result of secret negotiations between highly compensated criminal defense lawyers (many of whom used to be prosecutors) and prosecutors (many of whom may be eyeing future jobs in the large, prestigious law firms similar to those of their current adversaries), frequently on the basis of an "internal investigation" conducted by the defense lawyers themselves rather than by any police or public investigative officers.[19]

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16. *See* Rakoff, *supra* note 5; *see also* Press Release, U.S. Dep't of Just., Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation [https://perma.cc/B2ME-VAP2].

17. Sec. & Exch. Comm'n. v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 334 (S.D.N.Y. 2011); *see also infra* note 48 and accompanying text. For a discussion of how to maximize the deterrent effect of corporate prosecutions, see JOHN C. COFFEE, CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 91 (2020).

18. *See, e.g.*, Eisinger, *supra* note 15.

19. This perspective was vigorously expressed in a French book relating to DPAs: DEALS DE JUSTICE: LE MARCHÉ AMÉRICAIN DE L'OBÉISSANCE MONDIALISÉE [JUSTICE DEALS: THE AMERICAN MARKET OF GLOBALIZED OBEDIENCE] (Antoine Garapon and Pierre Servan-Schreiber eds., 2013).

There is probably one principal and practical reason why DPAs and NPAs continue to be used on a frequent basis—and are being adopted or at least considered in countries outside the United States: they are efficient and effective, and achieve clear goals for both the corporations and the prosecutors involved.

From the perspective of a corporation, negotiating a prompt outcome that avoids a criminal conviction offers compelling benefits:

Under some circumstances, a corporate criminal conviction may lead to disbarment, sometimes automatic, from certain markets or businesses. In negotiations to avoid a corporate guilty plea, corporations may thus refer to a "corporate death penalty," sometimes referencing the demise of Arthur Andersen after it was indicted for accounting fraud.[20] This has sometimes been characterized as the "too big to jail" defense.[21]

Even short of a "death penalty," the pendency of a criminal indictment can be a major distraction (and public relations problem)

20. In 2002, the criminal conviction (later overturned) of the then well-regarded accounting firm Arthur Andersen for having aided and abetted Enron in fraudulently obscuring its accounting led to its demise – and the apparent loss of jobs for some 20,000 employees, all but a handful of whom had nothing whatsoever to do with Enron. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 322 (2007), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2562&context=faculty_scholarship ("[DPAs'] popularity with prosecutors has increased since the public opprobrium that followed the Arthur Andersen case, in which the conviction of the accounting firm was ultimately overturned, but not before the stigma of indictment drove it out of business entirely ").

21. *See* Garrett, *supra* note 15, at 254. This defense has its limits. In 2014, the French banking giant BNP Paribas reported that it was under investigation for alleged violations of the Trading With the Enemy Act and other prohibitions on providing financing to so-called "rogue countries" such as Iran, Sudan, and Cuba. *See* Ben Protess & Jessica Silver-Greenberg, *Two Giant Banks, Seen as Immune, Become Targets*, N.Y. TIMES (April 29, 2015, 8:40 PM), https://dealbook.nytimes.com/2014/04/29/u-s-close-to-bringing-criminal-charges-against-big-banks/ [https://perma.cc/979H-K5WY]. In April 2014, when reports indicated that the Department of Justice as well as state and federal regulators were investigating the bank, a news article noted that BNP Paribas had received assurances from state and federal regulators that it would not lose its banking license if it were convicted. *Id.* While it might appear that this was a significant victory for the bank, it was not: the bank could no longer play the "corporate death penalty" or "too big to jail" card, and two months later, the bank entered into a series of agreements that included a "holding level guilty plea," which the Deputy Attorney General emphasized was a particularly strong remedy designed to punish BNP Paribas for failing to cooperate and for allegedly attempting to cover-up its misdeeds. Press Release, Dep't of Just., BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [https://perma.cc/7SFZ-AE5H].

for a company, and may have a negative impact on its publicly traded shares and its operations.[22]

More broadly, under U.S. criminal laws and procedures, corporate entities are particularly easy to prosecute and difficult to defend: the Fifth Amendment does not shield a corporation from having to turn over information or documents that may incriminate it or its officers, and in fact corporations often have affirmative disclosure obligations; corporations are often unsympathetic defendants before a jury; and most importantly, U.S. laws uniquely empower prosecutors to hold a corporation criminally responsible for the acts of virtually any officer, employee or agent acting even vaguely in the interests of the corporation, even when the individual defied a specific corporate policy or rule.[23]

Finally, a negotiated outcome permits a corporation to "take charge" of, and often shorten or forestall, an investigation by "self-reporting" an event, possibly one that inevitably would be discovered by authorities anyway. The corporation can then negotiate a prompt outcome and avoid the costs and reputational impact—including a weight on stock prices—of a long running criminal investigation.

For prosecutors, negotiated outcomes offer many advantages over full-fledged criminal proceedings, to such an extent that actual criminal trials in the federal courts, particularly against corporations, have become a rarity:

To begin, any negotiated outcome by definition avoids a trial that may be resource consuming, risky, or both. Over 97% of federal criminal matters end in a guilty plea or other negotiated outcome,

22. See F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. 121, 129 (2007) ("Empirical studies have shown that the mere announcement of a criminal investigation triggers a significant drop in a company's stock price.")

23. In contrast, many other countries either have no principle of corporate criminal responsibility, or require that the prosecutor show that the individuals whose acts are attributed to the corporation either had a status where he or she could reasonably "bind" the corporation, or where seniors in the corporation—referred to in U.K. parlance as "the directing mind"—knew of and approved the conduct. *See* Arlen, *supra* note 15 at 1 (arguing that French and U.K. DPAs fail to deter corporate wrongdoing because these countries have "excessively restrictive corporate criminal liability laws that let companies profit from many crimes"); *see also* Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/#more-6926 [https://perma.cc/G7V4-3NUG].

thereby allowing prosecutors to expand the number of their investigations using scarce resources.[24]

More positively, prosecutors view DPAs and NPAs as tools to engage in "compliance optimization." By calibrating appropriate "carrots" (prompt and advantageous consensual outcomes) and "sticks" (prohibitively expensive or ruinous effects of an indictment or conviction), prosecutors can use negotiated corporate outcomes as a means of reforming corporate conduct and of obtaining information with which to prosecute individuals. At least since September 2015, when then-Deputy Attorney General Sally Yates introduced the eponymous "Yates Memo" on this subject,[25] the DoJ has emphasized that corporations will not get advantageous negotiated outcomes absent "total cooperation," which must include turning over all evidence available to the corporation to show the complicity of any of its employees. As one commentator has noted, negotiated corporate criminal outcomes provide a mechanism to turn "potential corporate criminals into corporate cops."[26]

The DoJ also emphasizes that its DPA/NPAs require corporate signatories to adopt improved compliance and reporting procedures, sometimes supervised during the pendency of the agreement by a "monitor" reporting to the DoJ.[27] One extended study of such

24. *See* FREDERICK DAVIS, AMERICAN CRIMINAL JUSTICE: AN INTRODUCTION 5 (2019). One commentator has stated that not only are federal prosecutors "too risk adverse," but also that "prosecutors function within understaffed, overworked bureaucracies that cannot normally undertake intensive investigations." Coffee, *supra* note 17, at ix.

25. Sally Yates, Deputy Att'y General, U.S. Dep't of Just., Memorandum from Sally Yates for the Assistant Attorney General: Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download [https://perma.cc/N74N-AKD2]. The DoJ's emphasis on individual accountability was forcefully reaffirmed in October 2021. Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [https://perma.cc/4YA4-BU7R].

26. *See generally* 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 [CORPORATE CRIME AND NEGOTIATED JUSTICE: COMPARING EXPERIENCES], 91 (Camilla Beria di Argentine ed., 2017).

27. In its published (and regularly updated) Principles of Federal Prosecution of Business Organizations, the DoJ claims that NPAs and DPAs promote efficiency and speedy restitution, noting that they "can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches

agreements concluded that "N/DPAs play a significant and increasing role in improving corporate governance in the United States."[28]

Finally, by entering into a DPA or an NPA American prosecutors and defendants also avoid having to explain or justify their acts to a particular audience both may wish to avoid: judges. As the next Part of this Article will show, the few attempts by judges to review the terms of DPAs and gauge whether they are "in the public interest" have been forcefully opposed by prosecutors and corporate defense lawyers—and the appellate courts have backed them up, essentially barring such review going forward. The subsequent Parts of the article will then review the very different ways judicial review has been viewed and implemented in other countries.

II. JUDICIAL REVIEW IN THE UNITED STATES

Judicial review of corporate DPAs in the United States can be succinctly summarized: there is virtually none, and certainly none relating to the basic fairness of DPAs or whether they are in the public interest. The development of the case law on this point is worth reviewing because it reflects uniquely American concepts of the respective roles of the executive and the judicial branches in the administration of criminal justice, and the remarkable extent of unreviewable prosecutorial discretion in the United States.

A. Non-Prosecution Agreements

It may be useful to begin with Non-Prosecution Agreements (NPAs). As noted in Part 1(B), *supra*, NPAs are nothing more than contracts between a prosecutor and a potential (but not formally accused) defendant, with nothing whatsoever filed in court. There is a consensus that there is—and can be—no judicial review of these contracts, for the simple reason that nothing is ever presented to a court, and thus there is nothing on which a judge could rule. As one judge

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the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims." U.S. Dep't of Just., Just. Manual § 9-28.1100 2020). The DoJ adds that DPAs and NPAs should be "designed, among other things, to promote compliance with applicable law and to prevent recidivism." *Id.*

28. Kaal and Lacine, *supra* note 4, at 2–3; *see also* June Rhee, The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance, HARV. L. SCH. FORUM ON CORP. GOV. (Sept. 23, 2014), https://corpgov.law.harvard.edu/2014/09/23/the-effect-of-deferred-and-non-prosecution-agreements-on-corporate-governance/ [https://perma.cc/85L5-QEMJ].

has noted, "[e]ven a formal, written agreement [setting conditions for non-prosecution] is not the business of the courts."[29]

B. Deferred Prosecution Agreements—Potential Bases for Review

An exploration of the possible bases for judicial review of a corporate DPA starts with the fact that there is no legislative or rule-based standard by which to evaluate them.[30] Rather, as noted, they were invented and have been energetically developed by prosecutors and corporations because they achieve useful results for both. Upon what grounds, then, could any judge even claim a basis upon which to review a DPA, or the procedural power to do so? And what standards could a judge apply?

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29. United States v. HSBC Bank USA, No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013); *see also* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 33 (D.D.C. 2015) (noting that "the Court would have little authority, if any, to review an out-of-court non-prosecution agreement between the government and a defendant"). A separate question is whether there are any restraints on their enforceability: What would happen, for example, if before the expiration of the agreed-upon period, the prosecutor filed criminal charges which the (now accused) defendant believes are not consistent with the prosecutor's promises in the NPA? Enforcing a contractual right by a motion to dismiss formal criminal charges would be difficult because publicly available NPAs are notably one-sided, leaving it to the unfettered discretion of the prosecutor to determine whether the signing corporation has met all its contractual obligations (such as total disclosure, enhancing its compliance profile, etc.), and a corporation claiming a contractual right not to be prosecuted would face difficulties sustaining such a claim. The DoJ has on several occasions used similar language in DPAs to extend a DPA's term if it felt that the agreement had not been respected by the signing corporation. *See, e.g.*, Leslie R. Caldwell, Assistant Att'y General, U.S. Dep't of Just., Assistant Attorney General Leslie R. Caldwell Delivers Remarks at a Press Conference on Foreign Exchange Spot Market Manipulation (May 20, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-press-conference-foreign [https://perma.cc/4XA8-9BGG]. Caldwell stated that "NPAs and DPAs are valuable tools, and we will continue to use them in appropriate circumstances. And we will require that the parties who enter into those agreements live up to their terms." *Id. See also* Amended Deferred Prosecution Agreement ¶ 20, United States v. Standard Chartered Bank, No. 12-cr-262 (D.D.C. Apr. 9, 2019). For a useful discussion of judicial review of breaches of DPAs and NPAs, see generally Jacob Stock, *Judicial Review of Corporate Non-Prosecution and Deferred Prosecution Agreements: A Narrow Road to Checking Prosecutorial Discretion*, 3 CORP. & BUS. L.J. 212 (2022).

30. Several judges, noting the absence of any legislative input into DPAs and NPAs, have called "for Congress to consider implementing legislation" to provide standards for the review. United States v. HSBC Bank USA, N.A., 863 F.3d 125, 143 (2d Cir. 2017) (Pooler, J., concurring); *see also* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 30 n.9 (D.D.C. 2015) (calling for "congressional action to clarify the standards a court should apply when confronted with a corporate deferred-prosecution agreement").

The Federal Rules of Criminal Procedure offer no explicit basis for review because they do not even mention DPAs—although, as will be argued below,[31] the Rules appear to contemplate a judicial role in negotiated outcomes like DPAs. Rule 11 of the Federal Rules of Criminal Procedure provides detailed procedures for guilty (or, rarely, *nolo contendere*) pleas, which result in a judgment of conviction.[32] Since the essence of a DPA is that the company does not plead guilty or *nolo contendere* (and no judgment of conviction is entered), Rule 11 does not by its terms apply to them.[33]

Separately, Rule 48(a) provides as follows:

> The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.[34]

Rule 48(a) is intrinsic to a DPA: after a DPA has been negotiated, and simultaneously with its public announcement and the issuance of a press release by the Department of Justice, the prosecutor typically files an Information with the Court pursuant to Fed. R. Crim. P. Rule 7(b). This has the same effect as an indictment although a Grand Jury does not vote on it.[35] Key to the DPA, then, is the prosecutor's agreement to "dismiss" the Information under Rule 48(a) at the end of the agreed-upon period, assuming that she is satisfied with the corporation's performance of its obligations.

While the "leave of court" provision might seem to give the court a voice on whether to dismiss an indictment or information when requested by a prosecutor, it has been generally interpreted to give the government "near-absolute power to extinguish a case that it has brought."[36] The Supreme Court has explained that the "principal object of the 'leave of court' requirement" has been understood to be a narrow one: "to protect a defendant against prosecutorial harassment

31. *See infra* note 97 and accompanying text.

32. Fed. R. Crim. P. 11.

33. United States v. HSBC, 863 F.3d 125, 131 (2d Cir. 2017). For further discussion of the relevance of F. R. Crim. P. 11 to judicial review of DPAs, see *infra* note 97 and accompanying text.

34. Fed. R. Crim. P. 48(a) (emphasis added).

35. Fed. R. Crim. P. 7(b) permits a defendant to "waive[] prosecution by indictment," thereby allowing the prosecutor to proceed by filing an Information. The package of documents submitted to court in support of a corporate DPA will typically include a formal waiver of indictment signed by a representative of the corporation, as well as a copy of the Information to be filed against it.

36. United States v. HSBC Bank USA, No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013).

. . . when the [g]overnment moves to dismiss an indictment over the defendant's objection."[37] Under this reasoning, Rule 48(a) is inherently inapplicable to negotiated outcomes where the defendant does not "object" to but actively seeks the dismissal. In fact, dismissals under Rule 48(a) after the completion of a DPA are generally routine matters, handled on paperwork without discussion. In any event, the prosecutor's filing of a Rule 48(a) dismissal comes at the end of a multi-year period, when the prosecutor is by definition satisfied not only that the defendant corporation has long since paid the penalties due under the DPA, but also that the corporation has behaved appropriately under the terms of the agreement. Since the DPA is thus in an important and literal sense "history" by the time of a Rule 48(a) dismissal application, if a court even attempted to question its basis at that time, it would achieve nothing of practical value.

In the absence of any provision in the Federal Rules of Criminal Procedure even addressing the handling of DPAs, judges who have asserted a supervisory role in reviewing DPAs have turned to two other sources for their authority.

The source most frequently cited has been the Speedy Trial Act of 1974 ("STA").[38] The core principle of the STA is that once federal criminal charges are filed, the case must proceed to trial on a schedule set forth in the legislation; absent statutory extensions or exclusions of time made pursuant to its terms, a prosecution must be dismissed if a trial does not occur within the mandatory time limits.[39] The formal filing of an Information pursuant to a DPA appears to trigger the running of the STA,[40] exposing prosecutors to the risk of early dismissal unless the court formally agrees that the DPA fits under one of the specified bases for an extension of STA deadlines. Further, the legislative history of the STA makes it clear that Congress did not intend to allow the parties to a criminal prosecution—that is, the prosecutor and a defendant—to agree between themselves to waive the Act's

37. Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). However, *see* discussion *infra* Section II.D.2, summarizing new research published in the context of the attempted dismissal of the charges against former National Security Adviser Michael Flynn, which may not have been presented to the *Rinaldi* court.

38. 18 U.S.C. §§ 3161–74.

39. The applicable time periods and their possible exclusions and extensions are set forth in 18 U.S.C. § 3161. 18 U.S.C. § 3162(a)(2) provides that "[i]f a defendant is not brought to trial within the time limit required by [the Act,] the information or indictment shall be dismissed on motion of the defendant."

40. As noted below, *see* text accompanying note 80, the DOJ has argued that in at least some instances, the filing of an Information, for technical reasons, does not trigger the running of an STA period.

provisions; speedy trials are an important matter of public interest that cannot be left to the convenience of the parties.[41] As a result, even if the prosecution and the defense agree to an exclusion for the duration of the DPA, they must present their request to the court, which can base an exclusion only upon one of the permissible bases specifically listed in the Act.[42] While DPAs and similar agreements often contain a provision that the defendant "waives" its rights under the STA, prosecutors know that there is a distinct risk that such a waiver might be found ineffective, and that the case could soon be dismissed unless the court has approved an exclusion for the pendency of the DPA under one of the specific terms of the STA.[43]

One of the listed bases for a permissible exclusion "in computing the time within which the trial of [an] offense must commence" appears in 18 U.S.C. § 3161(h)(2) as follows:

> Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

This provision was drafted to create a humane alternative for individuals, typically young first-offenders, which would permit them to avoid the effects of a criminal conviction by showing their "good conduct" during an agreed-upon period, often under the supervision of a social services agency.[44] While the legislative history is replete with references to such "diversion programs" for individuals,[45] it does not appear to have occurred to any of the legislators that this provision would later be aggressively used by large corporations. However, since the terms of the statute neatly apply to corporate DPAs, it has

41. For a useful review of the legislative history of the STA, *see* the opinion of Judge Emmet Sullivan in United States v. Saena Tech Corp., 140 F. Supp. 3d 11 (D.D.C. 2015), discussed further *infra* in text accompanying note 63.

42. 18 U.S.C. § 3161(h) lists the permitted bases for an exclusion of time.

43. United States v. HSBC Bank USA, N.A., 863 F.3d 125, 142 (2d Cir. 2017) (Pooler, J., concurring): "Without [an STA] exception, the filing of the criminal information would trigger the running of the speedy trial clock."

44. *See supra* text accompanying note 5.

45. United States v. HSBC Bank USA, N.A., 863 F.3d 125, 143 (2d Cir. 2017) (Pooler, J., concurring) ("The two programs mentioned in the legislative history [of the STA], Project Crossroads and the Manhattan Court Employment Project, were pretrial diversion programs aimed at helping individual defendants avoid the collateral consequences of a criminal conviction through programs that included education, job training, and substance abuse treatment."

become customary for DPA agreements to provide that the parties will jointly apply to the Court for an exclusion of time under its terms.

Separately, some judges have also based a power to review a DPA on the concept of the "supervisory powers" of the court. The notion of judicial supervisory powers is an anomaly in federal criminal jurisprudence in the United States. It is not based on any specific legislation giving judges a general supervisory role over criminal procedures, and in fact there is no such legislation. An oft-recited summary is that "[t]he supervisory power . . . permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar."[46] Courts have invoked this principle on occasion when needing to establish a rule or procedure where none has been provided by Congress, on the ground that the power to create "civilized standards of procedure and evidence" applicable to federal criminal proceedings is inherent in the judicial function.[47]

In the vast majority of filed DPAs, judges grant the joint request for an exclusion under 18 U.S.C. § 3161(h)(2) without any discussion of either the STA or their supervisory powers, or even argument about the merits of the request. In a very few instances discussed below, however, some notably active judges have insisted on a right to review the substance of a DPA. Noting that § 3161(h)(2) itself provides that such an extension can only be granted "with the approval of the court," these judges have conditioned or withheld their approval based upon their review of the DPA and its provisions. Both the prosecution and the defense generally oppose such judicial activism. This is not surprising; by definition, any publicly released DPA represents a deal that the parties have concluded is in their respective best interests, and thus having a judge question or potentially block that deal threatens the interests of both parties. As a result, when trial and appellate courts review such cases, they faced the procedural anomaly of having all the parties in agreement, thus depriving the courts of an adversarial dynamic and an independent point of view. As shown here, the appellate courts that have addressed this issue have, to-date, rigorously restricted—and in fact have virtually eliminated—judicial review of DPAs.

46. United States v. Payner, 447 U.S. 727, 735 n.7 (1980) (quoting McNabb v. United States, 318 U.S. 332, 340 (1943)).

47. *McNabb*, 318 U.S. at 340; *see, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (establishing procedures for accepting guilty plea). For a general review of this power, *see* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

C. The Cases

1. The Citibank Case

Although not a DPA case, the Court's decision in *Securities & Exchange Commission v. Citigroup Global Markets, Inc.*[48] prefigured the analysis applied to DPAs. *Citibank* involved an agreement between the Securities & Exchange Commission ("SEC") and Citibank to settle serious fraud charges against the bank by agreeing to a proposed Consent Judgment. Although the parties undoubtedly believed that the District Court would approve the settlement as a matter of course, they were surprised to be faced by numerous questions about the factual and policy basis for it and a demand from the judge for submissions on why he should accept it.[49] Ultimately the trial judge, Jed S. Rakoff of the United States District Court for the Southern District of New York, resolved: "In the end, the Court concludes that it cannot approve [the proposed Consent Judgment], because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment."[50]

The Court emphasized that Citibank entered into the Consent Judgment without formally admitting the charges against it and, in fact, continued to deny them in significant part. Comparing the proffered settlement against the charges made by the SEC (including the allegation that Citibank was, in essence, a recidivist), Judge Rakoff observed that the settlement amount was remarkably small—"pocket change to any entity as large as Citigroup."[51] Rejecting the SEC's argument that it, not the Court, was charged with ascertaining the "public interest" in matters subject to its jurisdiction, Judge Rakoff concluded that the record before him did not suffice to serve—as he felt it must before giving the agreement his approval—the public's interest, noting:

> The point, however, is not that certain narrow interests of the parties might not be served by the Consent

48. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011).

49. As one commentator notes, "[u]sually, when a settlement such as this goes to court, the judge will approve it, and if not, it's usually over a fixable procedural matter. However, Judge Rakoff delivered a surprising verdict when he rejected the settlement because it lacked an official admission of wrongdoing on Citigroup's part." Steven Jacobson, *Overturning SEC v. Citicorp: Why the Original Decisions Still Matters*, PENN UNDERGRADUATE L.J. LAW JOURNAL, https://www.pulj.org/the-roundtable/overturning-sec-v-citigroup-why-the-original-decision-still-matters [https://perma.cc/5AGK-HLP3].

50. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d at 330.

51. *Id*. at 334.

> Judgment, but rather that the parties' successful resolution of their competing interests cannot be automatically equated with the public interest, especially in the absence of a factual base on which to assess whether the resolution was fair, adequate, and reasonable.[52]

Both Citibank and the SEC appealed to the Second Circuit. In the absence of any lawyer opposing the position unanimously presented by the parties before it, and in response to a request from Judge Rakoff, the Court appointed New York attorney John R. Wing to defend the District Court opinion.[53] Ultimately, the Second Circuit reversed.[54] While it rejected the SEC's broadest claim—which was essentially that the District Court should entirely defer to the SEC's position as to whether the settlement was "in the public interest"—the Circuit concluded that the trial court had abused its discretion by giving insufficient deference to the SEC. Noting that "[t]he job of determining whether the proposed S.E.C. consent decree best serves the public interest . . . rests squarely with the S.E.C., and its decision merits significant deference,"[55] the Court stated the relevant test as follows:

> Today we clarify that the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the "public interest would not be disserved," in the event that the consent decree includes injunctive relief. Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order.[56]

By stating that a court could only reject a consent decree on a finding that it "disserved" the public interest, the Court set a high

52. *Id*. at 335.

53. *See* SEC v. Citigroup Glob. Mkts. Inc., 673 F.3d 158, 169 (2d. Cir. 2012); *see also* Jonathan Stempel, *Rakoff turns to ex-colleague for SEC-Citi appeal*, REUTERS, Mar. 16, 2012, https://www.reuters.com/article/citigroup-sec-lawyer/update-4-rakoff-turns-to-ex-colleague-for-sec-citi-appeal-idUSL2E8EF44020120316 [https://perma.cc/Y44B-QUB8]. By way of disclosure, the author of this article is a friend, former colleague, and admirer of both Judge Rakoff and Mr. Wing.

54. SEC v. Citigroup Glob. Mkts. Inc., 752 F.3d 285, 298 (2d. Cir. 2014).

55. *Id*. at 296.

56. *Id*. at 294 (citation omitted).

burden on courts reviewing decisions subject to SEC jurisdiction.[57] It thus vacated Judge Rakoff's disapproval of the consent decree. With stated reluctance, Judge Rakoff subsequently approved the decree.[58]

While not a DPA case, the Court's strong support of the executive branch's power to set the terms for a corporate agreement to settle significant claims without any judicial review of its appropriateness set the stage for application of the same reasoning in the context of DPAs.

2. The DPA Decisions

With one partial exception, the relatively few instances where trial judges have denied or conditioned the acceptance of DPAs have encountered similar rejection by the appellate courts.

The partial exception is *United States v. WakeMed.*[59] In that case, a court was asked to approve an SPA time exclusion to allow a corporate defendant to perform its contractual obligations under a DPA. After discussing the matter with the parties in two hearings, the court reviewed the circumstances, including the risk that the corporate defendant might go out of business if convicted and that "the needs of the underprivileged in the surrounding area would be drastically and inhumanely curtailed" if they could not benefit from a prompt settlement.[60] The Court concluded, "[a]fter weighing the seriousness of defendant's offense against the potential harm to innocent parties that could result should this prosecution go forward a deferred prosecution is appropriate in this matter."[61] It also noted that, because the parties to the agreement had agreed to periodic review by the Court, "any reports relating to defendant's compliance with the agreement shall be filed with the Court for its review."[62] The judge in *WakeMed* appeared to assume—but did not address the extent of—his power to review the substance of a DPA as a component of the needed sign-off under the STA. The prosecutor apparently did not contest the limited review quoted here and sought no appeal or further review of the matter.

57. *Id.*

58. SEC v. Citigroup Glob. Mkts. Inc., 34 F. Supp. 3d 379, 380 (S.D.N.Y. 2014).

59. 2013 WL 501784, No. 5:12–CR–398–BO (E.D.N.C. Feb. 8, 2013).

60. *Id.* at *2.

61. *Id.*

62. *Id.*

In *United States v. Saena Tech Corp.*,[63] Judge Emmet G. Sullivan of the United States District Court for the District of Columbia was asked to approve an STA time exclusion to permit the execution of a complex DPA submitted by the Department of Justice and Saena, a technology company accused of bribing a public official under 18 U.S.C. § 201. Noting that all the parties before him were in agreement that the time exclusion should be approved, but nonetheless seeing potential problems with it, Judge Sullivan openly mused:

> [I]t's not a traditional adversarial proceedings [sic]. There is no one else on the other side—there's no one else in the courtroom raising concerns I can raise these issues, but I can't be an advocate. I can't argue the other side. I can administer justice and decide controversies, but I can't and should not be the principal advocate for legitimate concerns that the Court has raised.[64]

To get a point of view independent of the parties, the Court appointed University of Virginia law professor Brandon Garrett[65]—a noted critic of DPAs, particularly as set forth in his book, *Too Big to Jail: How Prosecutors Compromise with Corporations*[66] – as *amicus curiae* "to respond to the parties' arguments and provide the Court with advocacy in favor of broader court authority, vel non, to consider issues including the fairness and reasonableness of a deferred-prosecution agreement in deciding whether to accept or reject a deferred prosecution-agreement."[67] The prosecutor did not oppose this appointment.[68]

After a thorough review of the facts and procedural history and a careful analysis of the STA, and after considering the recent District Court decisions in *United States v. Fokker* and *United States v. HSBC*—both of which were later reversed by the respective Courts of

63. 140 F. Supp. 3d 11 (D.D.C. 2015).

64. United States v. Saena Tech Corp., No. 14 CR 066 (D.D.C. July 17, 2014), ECF No. 38, at 26.

65. Professor Garrett is now the L. Neil Williams Professor of Law at Duke Law School.

66. BRANDON GARRETT, TOO BIG TO JAIL (2014). The article by Judge Rakoff referenced in note 5, *supra*, while expressing the judge's own views, was also an admiring review of *Too Big to Jail*.

67. *Saena*, 140 F. Supp at 19 (internal quotations and footnote omitted).

68. "If the Court wants just sort of an independent party on the other side to play devil's advocate or something, I think we have less problem with that." United States v. Saena Tech Corp., No. 14 CR 066 (D.D.C. July 17, 2014), ECF No. 38, at 37.

Appeal, as will be discussed below[69]—Judge Sullivan engaged in an extensive and thoughtful analysis of his power to review the merits of the proffered DPA. Rejecting both the prosecutor's "hands off" argument as well as Professor Garrett's position, which he summarized as proposing "largely plenary court review" of the merits of the DPA,[70] Judge Sullivan concluded that the court's review was essential but limited. Judge Sullivan first reasoned that the court's "authority under the Speedy Trial Act is limited to assessing whether the agreement is truly about diversion."[71] Applying this provision, which he explained was designed to avoid "collusion" between the prosecutor and the defendant to avoid the STA time deadlines by concocting an exception without factual basis,[72] he concluded that the structure and content of the DPA before him showed that it was entered in good faith to permit Saena to avoid conviction by demonstrating its commitment to good conduct. Among other things, Judge Sullivan noted that Saena agreed to pay a hefty fine and to submit to review of its revised compliance programs.[73] With respect to the court's supervisory powers, Judge Sullivan reasoned they only empowered the court to "deny approval where a deferred-prosecution agreement would involve the court in illegal or especially problematic agreements."[74] Since he found that the joint request to defer prosecution was made in good faith and that the agreement did not involve "potential collateral consequences" that the court might find "inappropriate," such as requiring a charitable contribution to a third party,[75] Judge Sullivan unconditionally approved the DPAs, obviating the need (or any opportunity) for appellate review. In fact, his reasoning largely anticipated the appellate decisions now discussed.

Appellate review did take place in the *Fokker* and the *HSBC* cases, two District Court decisions that Judge Sullivan carefully considered before their respective appeals. Those appellate decisions essentially state the current law with respect to judicial review of DPAs and, taken together, emphasize the restrictive limits of judicial power to review DPAs in the United States.

69. *See infra* notes 79–93 and accompanying text.

70. *Saena*, 140 F. Supp at 34.

71. *Id.* at 30 (footnote omitted).

72. *Id.* at 36.

73. *Id.* at 17.

74. *Id.* at 31.

75. *Id.* at 35.

In *United States v. Fokker Services, B.V.*,[76] a European aerospace company reached a DPA with the DoJ on charges relating to the alleged illegal exportation of goods in violation of federal sanctions and export control laws, and sought an STA extension. In a lengthy opinion, District Judge Richard Leon of the District Court for the District of Columbia first reviewed the scope of his authority to review a DPA. While mostly relying on the STA, he also emphasized his inherent supervisory powers:

> [T]he government has charged Fokker Services with criminal activity. And it does not propose to dismiss the case at this point; rather, under the proposed resolution, this criminal case would remain on this Court's docket for the duration of the agreement's term.
>
> The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA. In effect, the Court itself would 'become an instrument of law enforcement.' The parties also seek to retain the possibility of using the full range of the Court's power in the future should Fokker Services fail to comply with the agreed upon terms. To put it bluntly, the Court is thus being asked to serve as the leverage over the head of the company.
>
> When, as here, the mechanism chosen by the parties to resolve charged criminal activity requires Court approval, it is the Court's duty to consider carefully whether that approval should be given.[77]

After reviewing the terms of the DPA in detail and in the context of the charges that they were designed to resolve, Judge Leon concluded as follows:

> While I do not discount Fokker Services' cooperation and voluntary disclosure or, for that matter, its precarious financial situation, after looking at the DPA in its totality, I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct . . . . In my judgment, it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a

76. United States v. Fokker Services, B.V., 79 F. Supp. 3d 160 (D.D.C. 2015).

77. *Id.* at 165 (internal citations omitted).

> sustained period of time and for the benefit of one of our country's worst enemies. . . . As such, the Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form.[78]

Both parties appealed, and, as in *Citibank*, the Court appointed a law firm to submit a brief as *amicus curiae* to defend the trial court's reasoning.[79] The DoJ made several arguments that the STA either did not apply, or could easily be made not to apply.[80] It also noted that the parties could always agree to proceed by an NPA rather than a DPA, which would avoid any judicial involvement at all.[81] Its primary argument, however, focused on the principle of separation of powers, arguing that the courts should have no role in reviewing DPAs because the determination whether DPAs satisfy the public interest is allocated by the Constitution to the executive rather than the judicial branch.

It was on this argument that the Department of Justice prevailed. The D.C. Circuit Court first reviewed separation of powers decisions in the area of criminal justice, and concluded that "judicial authority is . . . at its most limited when reviewing the Executive's exercise of discretion over charging determinations."[82] Interpreting the position of the amicus (the only voice supporting Judge Leon's decision) to be that the "district courts [have] substantial authority to second-guess the prosecution's charging decisions,"[83] the Court concluded that a DPA was closely analogous to a charging decision because "the entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law."[84] The court thus held that a trial court's only obligation (and authority) under the STA is to determine whether "the parties entered into the DPA to evade speedy trial limits rather than to enable [the defendant] to demonstrate its good conduct and

78. *Id.* at 167.

79. United States v. Fokker Servs. B.V., 818 F.3d 733, 740 (D.C. Cir. 2016).

80. It claimed that "the government in many districts may file a criminal information without an in-court appearance," which it argued would mean that the filing of a DPA (at least in some districts) would not start an STA "clock" triggered by such an appearance. Opening Brief for the United States at 4, United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016).

81. *Id.* at 7.

82. *Fokker Servs. B.V.*, 818 F.3d at 741 (citations and quotation marks omitted).

83. *Id.* at 745.

84. *Id.* at 746 (emphasis in the original).

compliance with the law."[85] Since this was manifestly not the case, it followed that the District Court had abused its discretion and exceeded its powers by rejecting the deal. To avoid any possible question about the court's appellate jurisdiction, the Circuit Court issued an unusual writ of mandamus vacating the District Court's order and remanding to the District Court to permit filing of the DPA.[86]

The outcome in *United States v. HSBC Bank USA, N.A.*[87] further emphasized strict limits on judicial review of DPAs. The case involved a DPA to resolve charges of illegal transactions with sanctioned countries in violation of the Trading with the Enemy Act and other statutes. When asked to approve a time exclusion under the STA, Judge John Gleeson of the United States District Court for the Eastern District of New York concluded that his role under the STA was limited to determining whether the proposed "deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date."[88] Accordingly, he found that the DPA was clearly appropriate and "that much of what might have been accomplished by a criminal conviction ha[d] been agreed to by the DPA," on the basis of which he "approve[d] without hesitation both the DPA and the manner in which it ha[d] been implemented thus far."[89] This conclusion was quite consistent with Judge Sullivan's conclusion in *Saena* and the appellate outcome in *Fokker*. What Judge Gleeson did not approve, however, was the parties' insistence on the opacity of their implementation of the DPA. While acknowledging that, in one sense, all that was before him was the approval of a time exclusion under the STA, he highlighted how judicial approval must apply to the DPA itself since its key operative provision – ultimate dismissal of the charges – would not take place until years later, when it would be too late to review the parties' behavior. Relying primarily on his supervisory powers, Judge Gleeson conditioned his approval of the DPA on the parties' filing "quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA."[90] To the even greater chagrin of the parties (particularly HSBC), in a

85. *Id.*

86. *Id*. at 738. For an extensive critique of the appellate decision in *Fokker* and a thorough discussion of the separation of powers precedent that it addressed, see Reilly, *Corporate Deferred Prosecution as Discretionary Injustice*, 2017 UTAH L. REV. 839 (2017). *See also* discussion in text accompanying note 94 *et seq*., *infra*.

87. United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 U.S. Dist. LEXIS 92438 (E.D.N.Y. July 1, 2013)

88. *Id.* at *10.

89. *Id.* at *38.

90. *Id.*

subsequent order on an application brought by a mortgage customer of HSBC, Judge Gleeson ordered that significant parts of the reports filed by a monitor appointed under the DPA to supervise HSBC's compliance efforts be made public.[91] On appeal by both the prosecutor and HSBC, a panel of the Second Circuit reversed and vacated Judge Gleeson's orders relating to the release of the monitor reports even in redacted form.[92] Rejecting the argument of the mortgage customer seeking access to the monitor reports, as well as arguments filed by Professor Garrett, who again appeared as an *amicus curiae*, the Court concluded that not only the terms of the DPA but also its implementation were left to the discretionary power of the executive branch, and thus that Judge Gleeson lacked the authority to order release of documents relating to the implementation of the DPA without the consent of the parties.[93]

D. Analysis of the Courts' Decisions

Judge Leon's decision in *Fokker* was the first, and now is likely to be the only, instance where a court substantively reviewed the terms of a DPA and refused to accept them because they did not serve the "public interest." Given the emphatic reversal of his ruling and the Second Circuit's refusal to countenance even the much more modest exercise of judicial oversight proposed by Judge Gleeson in *HSBC*, the message is clear: In the United States, judicial review or supervision of corporate DPAs is essentially non-existent.[94] The D. C. Circuit's reasoning in *Fokker*, however, fits uncomfortably in the overall architecture of the Federal Rules of Criminal Procedure, and subsequent scholarship has unearthed historical information apparently not known to the Court which casts doubt on some of its analysis.

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91. United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2016 U.S. Dist. LEXIS 11137, at *2 (E.D.N.Y. Jan. 28, 2016).

92. United States v. HSBC Bank USA, N.A., 863 F.3d 125, 129 (2d Cir. 2017). Judge Gleeson's direction of quarterly reports was not challenged on appeal.

93. *Id.* at 138.

94. A bill initially introduced in the House of Representatives in 2009 entitled the "Accountability in Deferred Prosecution Act of 2009" proposed that both DPAs and NPAs be subject to judicial review, and that a reviewing court should approve them "if the court determines the agreement is consistent with the guidelines for such agreements [to be promulgated by the DoJ in order to 'promote uniformity' in DPAs and NPAs] and is in the interest of justice." H.R. 1947, 111th Cong. (2009), https://www.congress.gov/bill/111th-congress/house-bill/1947/text [https://perma.cc/23LB-2QGW]; *see also* Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014). No legislative action has been taken on this or any similar bill.

1. Federal Rules of Criminal Procedure 11 and 48

The *Fokker* Court's analysis consisted in significant part of its interpretation of Rules 11 and 48. It began by addressing the contention of the *amicus curiae* (filed in support of Judge Leon's decision in the District Court)[95] that it should "analogize a court's review of a DPA . . . to a court's review of a proposed plea agreement under Rule 11 of the Federal Rules of Criminal Procedure."[96] While not elaborated in the opinion, applicability of Rule 11 would strongly imply the appropriateness of judicial review. Rule 11 generally allows parties full freedom to enter into plea agreements, but specifically provides that only the Court can determine the sentence that will be imposed on the basis of a plea.[97] The Court concluded that "[t]hat argument fails" because it viewed a court's power to review a plea agreement under Rule 11 as "rooted in the Judiciary's traditional power over criminal *sentencing*,"[98] whereas "[t]he context of a DPA is markedly different . . . and more like a dismissal under Rule 48(a)."[99] The Court reasoned that the agreement before it did not result in a "sentence" because a court approving a DPA "never exercises its coercive power by entering a judgment of conviction or imposing a sentence."[100]

This distinction – crucial to the Court's decision – oddly misconceives the purpose and effect of a DPA. While not a formal "sentence," payments made under DPAs are routinely described by the Department of Justice in their press releases as a "penalty,"[101] and DPA agreements themselves routinely justify the amounts so paid by detailed calculations under the Sentencing Guidelines. The obligation to

95. See *supra* note 80 and accompanying text.

96. United States v. Fokker Servs. B.V., 818 F.3d 733, 745 (D.C. Cir. 2016).

97. Rule 11(c)(1)(B) provides that the prosecutor may reach an agreement that the prosecutor will "recommend, or agree not to oppose" the defendant's sentencing request but provides that "such a recommendation or request does not bind the court," while Rule 11(c)(1)(C) provides that the parties may agree on a "specific sentence or sentencing range" but that such an agreement "binds the court" only if it is "accepted," which, under F. R. Crim. P. 11(c)(3)(A), a court may elect to do after it "has reviewed the presentence report." Under the latter provision, the decision whether or not to "accept" the agreement in essence is folded into the court's exercise of sentencing discretion.

98. Fokker Servs. B.V., 818 F.3d at 745 (emphasis in the original).

99. *Id.* at 746.

100. *Id.*

101. *See, e.g.*, Press Release, Dep't of Just., Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt [https://perma.cc/Z5XD-M7GL] (noting that the company and its subsidiaries "have agreed to pay a combined $92 million penalty").

pay results from an agreement approved by a court rather than from a judgment issued by a court, but the effect on the corporation, and more importantly the reflection of prosecutorial power that it represents, are essentially the same.

The *Fokker* Court emphasized its reliance on a prosecutor's power to dismiss charges under Rule 48(a) by drawing a distinction between a guilty plea based upon a "charge bargain" ("in which a defendant agrees to plead guilty to certain charges in exchange for the dismissal of other charges") and a "sentence bargain" (in which "the parties agree upon a sentence, which the prosecution then recommends to the sentencing court").[102] It then noted that "some of our sister circuits have concluded that district courts have more limited authority" to review "charge bargains" than "sentence bargains."[103] This distinction, however, ignores the fact that "charge" and "sentence" bargains are inextricably entwined when they are negotiated together as a package. It is the package as a whole – that is, the combination of "charge dismissals" and "sentence recommendations" – that a court either approves by imposing the agreed upon sentence, or rejects by imposing a different sentence (or, under F. R. Crim. P. 11(c)(1)(C) by refusing to "accept" the plea at all). The most recent periodic review of federal Sentencing Guidelines by the United States Sentencing Commission is strikingly clear on this point. In its discussion of guilty pleas,[104] the Commission observed that under Rule 11, a court may be asked to accept a "charge bargain" agreement that calls for the dismissal of existing charges, or the non-prosecution of potential ones. Acknowledging that under Rule 48(a) "the judge should defer to the government's position except under extraordinary circumstances," the Manual nonetheless emphasized that "when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines."[105]

The *Fokker* Court's rejection of Rule 11 as an appropriate source of guideposts for its analysis is also inconsistent with the provisions relating to a plea of *nolo contendere*. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's

102. 818 F.3d at 745–46.

103. *Id.* at 746.

104. U.S. SENT'G GUIDELINES MANUAL ch. 6 (U.S. SENT'G COMM'N 2021).

105. *Id.* § 6B1.2 end cmt. The Manual also emphasizes that while the parties are encouraged to enter into a "written stipulation of facts relevant to sentencing," the court "cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence." *Id.* § 6B1.4(d) explanatory cmt.

consent) *nolo contendere*." It then specifies that "[b]efore accepting a plea of *nolo contendere*, the court must consider the parties' views and the public interest in the effective administration of justice."[106] This provision tells us two things. First, the drafters of the Federal Rules of Criminal Procedure clearly showed that, by requiring a judge to make such a finding, they believed courts were not lacking the tools needed to make an independent decision whether a proffered outcome satisfies "the public interest in effective administration of justice," even if both parties agree to it. And second, while little used (and in fact disfavored by the Department of Justice[107]), a *nolo* plea is inherently similar to a DPA. A *nolo* plea permits an imposition of punishment without a formal admission of guilt that might have collateral consequences for the defendant[108] – which, of course, is exactly what a DPA accomplishes. In fact, the *Fokker* Court's analysis that, in contradistinction to a guilty plea, "the entire object of a DPA is to enable the defendant to *avoid* criminal conviction . . . ."[109] exactly describes a party's interest in a *nolo* plea. In short, when dealing with *nolo* pleas the Rule mandates not only judicial control over sentencing (just as with a guilty plea) but requires judicial permission even to enter into this form of an agreement at all, after considering the circumstances of the specific case.[110] This strongly suggests that judicial review of DPAs is not something that the architects of the Federal Rules of Criminal Procedure would have considered improper or impractical.

2. The Flynn Case and New Insight into Rule 48(a)

For several months in 2020, an intense flurry of motion practice in a criminal case not involving DPA/NPAs erupted in federal

106. Fed. R. Crim. P. 11(a)(3).

107. *See* U.S. Dep't of Just., Just. Manual § 9-27.500 (2018) ("The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas.").

108. As one court noted, in words that would aptly describe a DPA, "[w]hile a plea of nolo contendere, for all practical purposes from the standpoint of punishment, is comparable to a plea of guilty, there is, however, a material difference when considering the fact that a nolo contendere plea may not be used against a defendant as an admission in any subsequent civil or criminal proceeding; nor does the plea affect the civil rights or impose any civil disqualification upon the defendant." United States v. Bolinger, No. 12-CR-102, 2013 U.S. Dist. LEXIS 125228, at *4 (S. D. Ind., Sept. 3, 2013).

109. United States v. Fokker Servs. B.V., 818 F.3d 733, 746 (D.C. Cir. 2016) (emphasis in the original).

110. Another court notes, in language perfectly applicable to a DPA, that "nolo pleas come with various costs and benefits, and the court must ensure that in the case before it the benefits outweigh the costs." United States v. Mancinas-Flores, 588 F.3d 677, 682 (9th Cir. 2009).

courts in Washington, D.C. The case explored the separation of powers and other principles discussed here, and it analyzed the *Fokker* decision at length. Particularly since new research has surfaced on the crucially important "leave of court" provision of F. R. Crim. P. 48(a) and its implications for judicial review of prosecutorial discretion, the episode merits brief discussion here.

The case involved Michael T. Flynn, a retired Army general who briefly served as National Security Adviser under President Trump. In February 2017, Flynn resigned his post after it was disclosed that he had lied to Vice President Pence about conversations he had had with emissaries of Russia. In December 2017 he entered a guilty plea to a federal charge under 18 U.S.C. § 1001 that he had lied to Federal Bureau of Investigation agents about his discussions with Russian officials,[111] and in December 2018 he reaffirmed his guilty plea in a court session at which his sentencing was postponed so that he could demonstrate his cooperation with the Department of Justice.[112] He then had a change of heart. With new counsel, he bitterly attacked the prosecution against him on the ground that it was politically motivated, and in January 2020 he moved under Fed. R. Crim. P. 11(d) to withdraw his guilty plea.[113] Before the Court could address that motion, in May 2020 the United States Attorney for the District of Columbia moved under Rule 48(a) of the Federal Rules of Criminal Procedure to dismiss the Information to which Flynn had pleaded guilty, and thus to eliminate all pending charges against him.[114]

Eight months later, in December 2020, the matter was pretermitted, without a final resolution of the prosecutor's Rule 48(a) motion, when President Trump issued Flynn a pardon; the case against him was then "dismissed as moot."[115] During that interval, the federal District Court and the United States Court of Appeals for the District of Columbia Circuit considered intense and highly contentious arguments about the extent of the prosecutor's power to dismiss charges under Rule 48(a), and about the Court's power to review a Rule 48(a) motion. The core question was whether a court could inquire into the bona fides of a Rule 48(a) dismissal motion under circumstances suggesting to some that the motion was based on inappropriate and purely

111. Transcript of Plea Hearing, United States v. Flynn, No. 17-CR-232 (D.D.C. Dec. 1, 2017) [hereinafter "Flynn District Court"], ECF 16.

112. Transcript of Sent'g Proc., Flynn District Court, ECF 103 (Dec. 18, 2018).

113. Mr. Flynn's Motion to Withdraw Plea of Guilty, Flynn District Court, ECF 151 (Jan. 14, 2020).

114. Gov't's Motion to Dismiss the Crim. Information Against the Def., Flynn District Court, ECF 198 (May 7, 2020).

115. Order Dismissing Case, Flynn District Court, ECF 310 at 1 (Dec. 8, 2020).

"political" motives, possibly to reward a potential witness against the President for refusing to cooperate with investigations of the President's conduct. The DoJ and Flynn, and the *amici* supporting them, heavily relied on the D. C. Circuit's holding in *Fokker* for the proposition that when the parties agreed, the court lacked power to review a dismissal sought by the prosecutor – which is, of course, one of the exact arguments used to oppose judicial review of DPAs.

In May 2020, while the argumentation on the Flynn Rule 48(a) motion was gathering steam, Thomas W. Frampton, a Lecturer in Law at Harvard Law School, published an essay entitled *Why Do Rule 48(a) Dismissals Require 'Leave of Court'?*[116] Expressly addressed to the arguments submitted by the DoJ in the *Flynn* case, it argued that "the Government's position—and the Supreme Court language upon which it is based—is simply wrong."[117] The essay specifically took aim at Supreme Court dictum in *Rinaldi v. United States,*[118] quoted above[119] and heavily relied upon in *Fokker,* that Rule 48(a)'s "principal object" was "to protect a defendant against prosecutorial harassment," on the basis of which the courts had generally ruled that the "leave of court" provision has no applicability to situations where both parties had agreed on an outcome that included a Rule 48(a) dismissal.[120] Mr. Frampton carefully analyzed the legislative history of Rule 48(a) (which he demonstrated had not been brought to the attention of the Supreme Court when it decided *Rinaldi* without full briefing or argument), and determined that the drafters of the provision inserted the "leave of the court" condition not to protect an objecting defendant from harassment, but to combat the perception that some dismissals of criminal charges had been reached on the basis of "improper influence and corruption."[121] Mr. Frampton concluded that the "leave of court" language was inserted to "arm[] the district judge with a powerful tool to halt corrupt or politically motivated dismissals of cases," and "to give district judges a modest means of safeguarding the public interest" when considering a Rule 48(a) motion.[122]

The *Flynn* saga involved the same separation of powers issues at the core of the decisions relating to judicial review of DPAs: if a

116. Thomas Ward Frampton, *Why Do Rule 48(a) Dismissals Require 'Leave of Court'?*, 73 STAN. L. REV. ONLINE 28 (2020).

117. *Id.* at 119.

118. 434 U.S. 22 (1977) (*per curiam*).

119. See *supra* note 37 and accompanying text.

120. Frampton, *supra* note 116, at 29.

121. *Id.* at 36, 37.

122. *Id.* at 29.

federal prosecutor has unreviewable power to dismiss a case under Rule 48(a), as the DoJ argued in both *Fokker* and in *Flynn*, it might logically follow that the courts should not review an agreement setting forth the conditions for such a dismissal, which is the procedural end-point of a DPA. Because of the pardon, the *Flynn* case ended without a definitive court ruling on the extent of a court's appropriate role in reviewing a Rule 48(a) dismissal motion by a federal prosecutor. The publication of the Frampton research provided startling new information about the intent of the drafters of Rule 48(a) that is at variance with the position generally taken by the DoJ in support of DPAs. The applicability of this significant research in the area of DPAs will nonetheless be limited. Mr. Frampton did not conclude that the drafters of Rule 48(a) envisioned a wide judicial review of the "public interest" served by a Rule 48(a) motion, such as that undertaken by Judge Leon in *Fokker* (and by Judge Rakoff, in a non-Rule 48 context, in *Citibank*). Rather, he concluded the drafters were focused on cases in which undue influence or corruption may have influenced the result. But it is not difficult to imagine circumstances – perhaps involving publicly aired criticisms of a DPA as being the result of an overly cozy relationship between a prosecutor and the defendant or its counsel – when Mr. Frampton's revised view of judges' powers under Rule 48(a) might apply.

***

The net effect of the decisions reviewed here is simple: the terms of a DPA and an NPA can be freely negotiated by the DoJ and a corporate defendant, and absent extreme circumstances the terms will not be disturbed by a judge, nor reviewed as to whether the agreement is in the public interest.

The remaining parts of this article will show that while several other countries have found it useful to adopt DPA look-alikes that are obviously inspired by – and imitative of – the American model, none has given prosecutors the freedom from review they enjoy in the United States.

III. UNITED KINGDOM

Deferred prosecution agreements are a relatively recent phenomenon in the United Kingdom (or, more particularly, in England and Wales because the applicable legislation does not apply to

Scotland or Northern Island[123]). To date, ten DPAs have been fully reported.[124] These DPAs present an interesting study. In contrast to the U.S. model, the UK's DPA regime is the product of specific and detailed legislation that responds to some uniquely British challenges, and the agreements have been the subject of extended judicial scrutiny.

A. Background: The United Kingdom Bribery Act of 2010 and the Crime and Courts Act 2013

As a signatory of the enormously important Convention on Combating Bribery of Foreign Public Officials, adopted by the Organization for Economic Co-operation and Development ("OECD") in 1997 ("OECD Bribery Convention")[125], the UK was obligated to join the fight against overseas corruption by adopting and enforcing appropriate legislation. However, it was slow in achieving results. As late as 2008, the Working Group on Bribery of the OECD, tasked with reviewing the energy and effectiveness of its members' anti-corruption efforts, "sharply criticised" the UK record.[126]

One well-known inhibition affecting British enforcement efforts against corporate crime has been its approach to corporate criminal responsibility—that is, the requirements necessary to convict a corporation of a crime. The applicable principle in the United States, at least in federal courts, is notably broad: Since 1909, the governing principle has been *respondeat superior*, a principle derived from tort

123. Crime and Courts Act, § 61 (13)(g), 2013. The House of Lords noted in a 2019 report that "the [DPA] procedure cannot therefore be used where the conduct which constitutes the offence is confined to Scotland or Northern Ireland." SELECT COMMITTEE ON THE BRIBERY ACT 2010, THE BRIBERY ACT OF 2010: POST-LEGISLATIVE SCRUTINY, 2017-19, HL 303, at 69 (UK), https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf [https://perma.cc/F7UQ-357P]

124. In July 2021, the Serious Fraud Office announced that the High Court had approved DPAs with two further companies, but that "for legal reasons" the companies' names, the details of the agreement other than the total amount paid, and the documents involved have not yet been made public, presumably while proceedings continue against related individuals. Press Release, Serious Fraud Office, SFO Secures Two DPAs with Companies for Bribery Act Offenses (July 20, 2021), https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/ [https://perma.cc/Z453-EHXM]).

125. The text of the OECD Bribery Convention is available on the OECD website. OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, https://www.oecd.org/corruption/oecdantibriberyconvention.htm [https://perma.cc/W3AR-W9A9].

126. OECD, OECD Group demands rapid UK action to enact adequate anti-bribery laws (Oct. 16, 2008), https://www.oecd.org/corruption/anti-bribery/oecdgroupdemandsrapidukactiontoenactadequateanti-briberylaws.htm [https://perma.cc/4QCY-HYZE].

law.[127] This principle holds a corporation criminally responsible for acts of its "agents"—broadly interpreted to include not only officers and employees, but also others acting with it—that tended to benefit the corporation in any way. U. S. law recognizes no "compliance defense," in the sense that a corporation can be found guilty even if its "agent" acted against the expressed policy, or even the specific direction, of the corporation.[128] In contrast, the United Kingdom follows the so-called "directing mind" principle, also known as the "identification principle," which posits that a corporation can be found liable for a crime only if relatively senior corporate officers (the "directing mind") knew of and indicated approval of the offending acts.[129]

The current Director of the UK Serious Fraud Office (SFO)[130] and her predecessor[131] have emphasized that the directing mind principle is a major impediment to corporate law enforcement: Corporations are more difficult to convict, and as a result have fewer incentives to cooperate with criminal investigations. The UK Bribery Act of 2010[132] addressed this problem, at least in part, by creating a new crime. Section 7 of that Act,[133] known as the "corporate offense," provides that in the event of an act of bribery committed by someone "associated" with the corporation, the corporation is automatically guilty

127. New York Cent. & H.R.R. Co v. United States, 212 U. S. 481, 493 (1909). Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, 126 Zeitshrift Für Die Gesamte Strafrechtswissenschaft 27, 28 (2014).

128. *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) ("[A]s a general rule a corporation is liable … for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.")

129. Tesco Supermarkets Ltd. v Nattrass, [1972] AC 153 (Eng.) (restricting corporate liability to acts of "the Board of Directors, the Managing Director and perhaps other superior officers who carry out functions of management and speak and act as the company.") *See generally* AMANDA PINTO AND MARTIN EVANS, CORPORATE CRIMINAL LIABILITY (2008).

130. Lisa Ostrofsky, testifying before the Justice Committee of Parliament in December 2018, said that "the SFO are being 'hamstrung' by the identification principle, which is preventing the corporate 'big boys' from being brought to account." BCL SOLICITORS LLP, *Why is it so hard to prosecute companies in the UK?*, https://www.bcl.com/why-is-it-so-hard-prosecute-companies-in-uk/#_ftn6 [https://perma.cc/NB6A-XNF2].

131. Former SFO director David Green noted that the identification principle "makes prosecuting large companies difficult, which has undermined public confidence and motivated the boards of such organizations to keep their distance." NYU LAW, *David Green, director of UK's Serious Fraud Office, gives keynote at Program for Corporate Compliance and Enforcement conference* (Apr. 29, 2016), https://www.law.nyu.edu/news/David-Green-Serious-Fraud-Office-UK-corporate-compliance-criminal-liability [https://perma.cc/JCU9-QJCC].

132. Bribery Act, 2010, c.23 (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/contents [https://perma.cc/XF9V-4EHM].

133. Bribery Act, 2010, c.23 § 7 (U.K.).

– except that "it is a defence for [the corporation] to prove that [it] had in place adequate procedures designed to prevent persons associated with [the corporation] from undertaking such conduct." The SFO has published (and recently updated) guidelines outlining what it will accept as "adequate procedures" that would suffice to provide a defense under Section 7,[134] although if not resolved through negotiation the defense would need to be raised at trial.

In 2014, and pursuant to the terms of Schedule 17 of the Crime and Courts Act 2013 ("Schedule 17"),[135] the United Kingdom introduced its first-ever form of a corporate deferred prosecution agreement. This was followed by the Deferred Prosecution Agreements Code of Practice (DPA Code of Practice) issued jointly by the SFO and the Crown Prosecution Service (CPS),[136] which provides significant detail concerning the procedures for negotiating a DPA.[137] The Sentencing Council of the UK also issued a "Definitive Guideline" of sentencing parameters for the crimes eligible for DPAs.[138]

While clearly inspired by the American version, the UK deferred prosecution regime is distinctly different.

The British approach is the creation of affirmative and specific legislation, which establishes detailed procedures and standards. As noted above, no legislation or rule in the United States has addressed corporate DPAs (or NPAs); they are purely the invention of prosecutors and defense counsel who have found them effective and useful.[139] Further, only a corporation can negotiate a DPA in the United Kingdom. Even as prosecutors in the United States have increasingly embraced DPAs and NPAs as useful tools for corporations, the

134. SERIOUS FRAUD OFF., *Evaluating a Compliance Program* (Jan. 2020), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/ [https://perma.cc/PR38-5T84].

135. The Crime and Courts Act, 2013, c.22 (U.K.), http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted [https://perma.cc/84X2-SLQM]. The DPA provisions appear in Schedule 17 to the Act. *Id.* § 17, http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted [https://perma.cc/9NKS-4RVK].

136. SERIOUS FRAUD OFF., DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE 1 (2013), https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf [https://perma.cc/Y2TF-EBZ8].

137. The Director of the SFO and the Director of Public Prosecutions (who heads the CPS) are the only prosecutors authorized to enter into DPAs. *Id.* at 2.

138. SENTENCING COUNCIL, FRAUD, BRIBERY, AND MONEY LAUNDERING OFFENCES: DEFINITIVE GUIDELINE (2014), https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf [https://perma.cc/8YEL-82M2].

139. *See supra* Part II.

agreements were originally envisioned—and continue to serve—as a lifeline for disadvantaged individuals caught up in the criminal justice system.[140] Schedule 17, and particularly the DPA Code of Practice issued by the SFO and the CPS, offer a detailed and principle-based framework for analysis of whether to offer, and ultimately approve, a DPA. The role of the respective prosecutors' offices is, of course, central. The DPA Code of Practice notes at the outset that "The SFO and the CPS are first and foremost prosecutors and it will only be in specific circumstances deemed by their Directors to be appropriate that they will decide to offer a DPA instead of pursuing the full prosecution of the alleged conduct."[141]

It then specifies that—as in any prosecution[142]—each case must be evaluated at an "evidential stage" to determine whether the evidence is sufficient to demonstrate a "likelihood of conviction," and then a "public interest" stage to determine whether a prosecution is in the public interest.

B. The Role of the Courts in approving a DPA

Perhaps the most notable departure from the U.S. model is the UK's provision for judicial supervision of the procedure and scrutiny of the result. Schedule 17 requires that a prosecutor who contemplates negotiating a DPA (whether the Director of the SFO or the Director of Public Prosecutions)[143] seek and obtain judicial approval at two distinct steps. First, a prosecutor cannot even engage in definitive negotiations with a corporate defendant's counsel without judicial authorization pursuant to Paragraph 7 of Schedule 17. The prosecutor must first make an initial evaluation whether to pursue a negotiated DPA at

140. *See supra* note 5 and accompanying text.

141. SERIOUS FRAUD OFF., DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE ¶ 2.1 (2013), https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf [https://perma.cc/Y2TF-EBZ8].

142. The Joint Prosecution Guidance on Corporate Prosecutions (U.K.), https://www.sfo.gov.uk/?wpdmdl=1457 [https://perma.cc/Q6N9-74RJ], and CROWN PROSECUTION SERV., Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions (Sept. 2019), https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and [https://perma.cc/5VZ6-GERZ] set forth the general guidelines that prosecutors must follow in determining whether to prosecute corporate criminal offenses.

143. *See supra* note 137.

all, and then "invite" a corporation to determine whether it would consider negotiating one.[144] Paragraph 7 provides:

> After the commencement of negotiations between a prosecutor and [a corporation] in respect of a DPA but before the terms of the DPA are agreed, the prosecutor must apply to the Crown Court for a declaration that—
>
> (a) entering into a DPA with [the corporation] is likely to be in the interests of justice, and
>
> (b) the proposed terms of the DPA are fair, reasonable and proportionate.[145]

The paragraph also obligates the court to "give reasons for its decision whether or not to make a declaration" requested by the parties. Since the parties may not ultimately reach a definitive agreement, and principally to protect the corporation's right to defend itself, both the hearing and the court's "reasons" at the preliminary approval stage under Paragraph 7 must "be given in private," to be made public only if (and when) a final approval is given.[146]

If the parties reach a definitive agreement after receiving "preliminary" approval pursuant to Paragraph 7 the parties, the DPA cannot go into effect without "Court approval … [at a] final hearing" pursuant to Paragraph 8, which provides in pertinent part:

> (1) When a prosecutor and [the corporation] have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that—
>
> (a) the DPA is in the interests of justice, and
>
> (b) the terms of the DPA are fair, reasonable and proportionate.
>
> (2) But the prosecutor may not make an application under sub-paragraph (1) unless the court has made a declaration under paragraph 7(1) (declaration on preliminary hearing).

144. Crime and Courts Act, 2013, c. 22, sch. 17 ¶ 7 (U.K.). While the DPA Guidelines provide that the "invitation" can only come from a prosecutor, in practice such an invitation can be "suggested" by a corporation.

145. *Id.*

146. *Id.*

> (3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).
>
> (4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).
>
> (5) A hearing at which an application under this paragraph is determined may be held in private.
>
> (6) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons, in open court.[147]

Schedule 17 provides that after approval "the prosecutor must publish" the entire DPA itself, as well as the court's declarations under both Paragraphs 7 and 8.[148] Schedule 17 also sets out procedures for later determining if a corporation has breached a DPA, which can only be established by a court.[149]

While these provisions give reviewing judges considerable latitude, they do not allow a judge to resolve factual disputes, which must be agreed upon by the parties as a condition to applying for approval. Article 6.2 of the DPA Code of Practice provides:

> The parties should resolve any factual issues necessary to allow the court to agree terms of the DPA on a clear, fair and accurate basis. The court does not have the power to adjudicate upon factual differences in DPA proceedings.

C. Judicial Scrutiny of the DPAs to Date

All of the ten DPAs published to date were successful in obtaining court approval, absent which they would have remained

147. *Id.* ¶ 8 (emphasis added).

148. The second publicly approved DPA concerned a company that could not "currently be named due to ongoing, related legal proceedings," and thus was published in redacted form under the name "XYZ Limited." *See* Press Release, Serious Fraud Office, SFO Secures Second DPA (July 8, 2016), https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/ [https://perma.cc/L9BA-89KS]. Three years later, after three individuals implicated in the matter had been acquitted, the company was identified as Sarclad Ltd. and the relevant documents published in unredacted form. *Sarclad Ltd.*, SERIOUS FRAUD OFFICE (July 28, 2021), https://www.sfo.gov.uk/cases/sarclad-ltd/ [https://perma.cc/7YXC-EGDZ].

149. Crime and Courts Act, 2013, c. 22, sch. 17, ¶ 9 (U.K.).

"private"—in principle, forever. This leaves open the possibility that in cases that are still "private," the prosecutor and a corporate defendant reached a preliminary or even a final agreement, but the agreement was not approved pursuant to Paragraph 7 or 8, respectively. Common sense suggests that any such judicial non-approval would more likely take place at the "preliminary" approval phase under Paragraph 7 rather than when submitted for "final approval" under Paragraph 8, simply because preliminary approval requires a judicial finding of "likelihood" that the parties were on track to negotiate an appropriate agreement.[150]

Of the ten DPAs that are known and public as of this writing, the first four were scrutinized and ultimately approved (both preliminarily and finally) by Sir Brian Leveson, a now-retired, well regarded former President of the Queen's Bench Division of the High Court. Judge Leveson was presumably aware that his decisions would be carefully analyzed, and would establish notable precedent as the first of their kind. His four "final" judgments under Paragraph 8 average thirty pages in length. Each goes into the relevant facts in considerable detail, and provides the thoroughly developed "reasons for [his] decision," within the meaning of Paragraph 8, based on the specific facts of each case.

In the very first case, involving Standard Bank PLC,[151] Judge Leveson established a few key themes that persist through all of the DPAs to date. He began by noting that the UK DPA system, while modeled on the American one, was distinctly different, in particular because of the role required of him as the reviewing judge.[152] In the rather lengthy discussion that followed, Judge Leveson made it clear that neither of the two possible prosecutors, nor the corporations that

150. Judge Leveson testified in the House of Lords "that in one of the four cases to date he had not approved the application on the first occasion: 'I made a number of points to the SFO and to the company concerned. In effect, I told them to go away and think again . . . They did think again. Then the parties came back and I was prepared to be satisfied.' Since the hearing was in private, we do not know the reason why Sir Brian did not approve the application on the first occasion . . . ." SELECT COMMITTEE ON THE BRIBERY ACT 2010, *supra* note 123, ¶ 82 (internal citations omitted).

151. Links to the Deferred Prosecution Agreement and related judicial declarations can be found at SERIOUS FRAUD OFF., *Standard Bank PLC*, https://www.sfo.gov.uk/cases/standard-bank-plc/ [https://perma.cc/ESG9-EPVD].

152. *See, e.g.*, Approved Judgement ¶ 2, Serious Fraud Office and Standard Bank PLC, No. U20150854 (Royal Cts. of Just., Nov. 30 2015), https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf [https://perma.cc/42SB-9DP3].

"In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA."

reach an agreement with them, should consider the reviewing judge to be a rubber stamp. Instead, any applications for approval would need to persuade the judge that based on the specific facts of the case, the proposed agreement was in fact in the public interest, and that the agreed-upon sanctions were proportionate.

Judge Leveson delineated the factors in favor of finding that the proposed Standard Bank agreement was in the public interest. Among them were that the Bank was not accused of bribery itself but only the Section 7 violation of not having prevented one. He also emphasized that "[o]f particular significance was the promptness of the self-report, the fully disclosed internal investigation and cooperation of Standard Bank [,….t]he agreement for an independent review of anti-corruption policies and the fact that Standard Bank is now differently owned, a majority shareholding having been acquired by [a different company]."[153] Turning to the issue of proportionality, he noted "The most difficult assessment was as to the appropriate financial penalty which para. 5(4) of Schedule 17 mandates must be 'broadly comparable to the fine that a court would have imposed' following conviction after a guilty plea."[154] He then scrutinized the proposed penalty and concluded that it in fact was proportionate.[155]

Judge Leveson concluded with these remarks:

> Although these proceedings have been required to validate a proposal and, then, a concluded agreement …, it is important to emphasise that the 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. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial

153. *Id.* ¶ 14.

154. *Id.* ¶ 16.

155. In his preliminary approval judgment pursuant to Paragraph 7, although not in his final judgment, Judge Leveson noted that in determining proportionality he had taken into consideration what the outcome would have been had Standard Bank reached an agreement with the United States Department of Justice:

> [A] useful check is to be obtained by considering the approach that would have been adopted by the US authorities had the Department of Justice taken the lead in the investigation and pursuit of this wrongdoing [T]he Department of Justice has confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States and has intimated that if the matter is resolved in the UK, it will close its inquiry.

Id. ¶ 58.

> consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement.[156]

The three subsequent DPA approvals by Judge Leveson, as well as the further ones conducted by other judges, basically followed the pattern established in *Standard Bank*, certainly with respect to the close scrutiny given by the reviewing judge to the respective proposed agreements. The judgments are not entirely consistent and in fact show some evolution in the importance given to the gravity of the offense[157] and the significance of a "first report."[158] In later testimony before the House of Lords, Judge Leveson acknowledged that his judgments did not lay down strict rules but rather involved a process of "balancing"[159] the "circumstances" of each case. Critically, none of the judgments suggests that the reviewing judge took at face value, or

156. *Id.* ¶ 21.

157. Judge Leveson noted in his preliminary approval of a DPA with Standard Bank that "The first consideration must be the seriousness of the conduct for the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice." *Id.* ¶ 25. He emphasized that the bank had only been implicated in having failed to maintain an "adequate" compliance program, but that none of the officers of the bank had been shown to be complicit in actual bribes. *Id.* ¶ 26. A year later, however, in the XYZ Limited Case (later revealed to be Sarclad Ltd., *see supra* note 148), he concluded that the company itself "was involved, through its controlling minds, in the offer and/or payment of bribes to secure contracts in foreign jurisdictions," and thus could have been prosecuted for the much more serious offense of bribery. *See supra* note 148. He nonetheless approved the DPA, finding that under "all the circumstances," the case met the requirements of the "public interest" requirement. Approved Judgement ¶¶ 1, 24, Serious Fraud Office v. Sarclad Ltd., U20150856 (Crown Court at Southwark, July 11, 2016).

158. As the House of Lords commented, "Thus in the space of 14 months we moved from a full one third discount being 'entirely justified and appropriate' in a case of self-reporting (Standard Bank, November 2015), to a 50% discount being appropriate in a case of self-reporting "not least to encourage others how to conduct themselves when confronting criminality" (XYZ, June 2016), to a 50% discount being appropriate where the company, though it did not self-report, demonstrated "extraordinary co-operation" (Rolls-Royce, January 2017)." *See* SELECT COMMITTEE ON THE BRIBERY ACT 2010, *supra*, note 123, ¶ 294.

159. "The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word 'extraordinary' to describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset." *Id.* ¶ 273.

declined to challenge, the proposals jointly made by the prosecution and defense.

In at least two of the judgments, the reviewing judges emphasized that the judicial role was limited to the scrutiny mandated by Schedule 17, and did not extend to functions allocated to another branch of government. In his review of a DPA with Serco Geographix Limited (SGL),[160] Justice William Davis inquired whether his approval would control whether or not the company would be barred from subsequent public service contracts, an issue he viewed as "political":

> If the effective consequence of approval of the proposed DPA were to be that SGL could continue to supply services to government departments whereas the company would not be able to do so in the event of a conviction, I doubt whether I would give approval. Public concern over the way in which public services are provided by private companies is real. For me to take a course which would amount to a favourable determination of the position of a private company vis-a-vis public procurement would involve me in a quasi-political decision. That is not the function of a judge in any context and certainly not in the context of the approval of a course which leads to a company not being prosecuted for serious fraud.[161]

Justice Davis ultimately concluded that "my approval of this DPA will not be the determining factor in what is a political decision,"[162] and approved the agreement.[163]

The UK DPA regime has received extensive criticism for the failure of the prosecuting authorities to successfully prosecute individuals associated with the corporate events involved in the DPAs, since to date not a single individual associated with published DPAs has been convicted for the offenses outlined, often in detail, in the

160. Judgement, Serious Fraud Office and Serco Geografix Ltd., U20190414 (Crown Court at Southwark, July 4, 2019), https://www.judiciary.uk/wp-content/uploads/2019/07/serco-dpa-4.07.19-2.pdf [https://perma.cc/C45L-7NTY].

161. *Id.* ¶ 27.

162. *Id.* ¶ 28.

163. See also Approved Judgment, Airbus SE, https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/ [https://perma.cc/JT82-KKQ2], ¶ 86 n.1 (noting that "[w]hether discretionary debarment follows from the facts giving rise to a DPA, remains a discretionary decision of HMGovernment.").

published documents;[164] there has also been some concern about the fairness of a DPA being published that might imply the guilt of individuals in violation of their presumption of innocence until personally charged and convicted.[165] But there has been little controversy over the importance of judicial scrutiny and publication. In 2019, the House of Lords conducted an inquiry into the effectiveness of the Bribery Act, and issued a report. With respect to the issue of judicial involvement in approving DPAs, the Lords heard the testimony of Judge Leveson who remarked:

> I think [judicial oversight] is absolutely critical, because we do not do plea bargains in this country, as others do. This has to be conducted in public, so that, in other words, everybody can see what is being done in their name. Therefore, there is no private deal between a prosecutor and a company that nobody ever hears

164. *See, e.g.*, Susan Hawley, *Guralp receives UK DPA, individuals acquitted*, FCPA BLOG (Dec. 23, 2019, 7:48 AM), https://fcpablog.com/2019/12/23/guralp-receives-uk-dpa-individuals-acquitted/ [https://perma.cc/8Q59-DJH6] (noting that "[t]his is the third DPA in the UK where individuals charged with the wrongdoing that formed the basis of the DPA have been acquitted by a court."). For a general review of the relative success of the English/Welsh DPA regime in comparison with its United States counterpart, *see* Qingxiu Bu, *The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance*, European Bus. Org. L. Rev. (2021), https://link.springer.com/article/10.1007/s40804-021-00203-5 [https://perma.cc/64N2-XHDL]. For a more general disagreement with the UK approach, *see* Vladimir Kruglyak, *The Regulatory Criminal Law in the UK: Analyzing Dissenting Factors of the Deferred Prosecution Agreements*, SSRN (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559286 [https://perma.cc/SPS5-BE2K].

165. In the most recently published judgment approving a DPA, Lord Justice Andrew Edis opened his discussion with language not found in earlier DPAs:

> As I explain below, the court does not make findings of fact in the present exercise. It is necessary to assess the culpability of the behaviour of a company but no process has taken place by which the culpability of individual people has been determined or assessed. Companies act through individuals, and it is necessary to consider some conduct for that reason, but the court has not heard from any individuals or called upon them for their side of the story. This judgment deals with the culpability of the company Amec Foster Wheeler Energy Limited (AFWEL) and not that of any individual person. That culpability is determined by reference to agreements reached between AFWEL and the SFO and documents supplied by those parties. No individual has agreed any of these facts, or supplied any document to the court about them. I make no findings of any kind against any individual, and my comments below are to be read in that context.

Amec Foster Wheeler Energy Ltd. – Deferred Prosecution Agreement Judgment, SERIOUS FRAUD OFFICE (July 1, 2021), https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/ [https://perma.cc/5TYK-DZS7] [last accessed on January 23, 2022].

> anything about … The disinfectant of transparency in this area is absolutely critical.[166]

The Lords then noted "We entirely agree."[167] They ultimately concluded that "[i]n our call for written evidence we asked for views on whether the introduction of DPAs had been a positive development in relation to offences under the Bribery Act. From all sides of the spectrum, the answer has been a resounding 'yes.'"[168]

IV. FRANCE

The French version of a Deferred Prosecution Agreement provides a particularly interesting study: it was manifestly adopted in response to the United States model in order to give French prosecutors procedural flexibility commensurate with their American counterparts, but it was grafted onto a distinctively different criminal justice system based on "civil law" rather than "common law" principles. The French DPA has already been used on several occasions, and for reasons developed below, may well provide prosecutors with a much-needed tool – in significant part because it helps them avoid one specific (and characteristically French) form of judicial review when criminal investigations are conducted by an investigating magistrate.

A. Background: French Efforts to Combat International Corruption, Traditional French Investigation Procedures, and the Loi Sapin II.

France signed the OECD Bribery Convention, and pursuant to its obligations thereunder it amended its Criminal Code in 2000 to include provisions criminalizing overseas bribery.[169] Its efforts to prosecute violations of the new law, however, got off to a very slow start. As late as 2018, not a single French corporation had been convicted of

166. SELECT COMMITTEE ON THE BRIBERY ACT 2010, *supra* note 123, at ¶ 268.

167. *Id.* ¶ 269.

168. *Id.* ¶ 325.

169. The overseas corruption provisions of the French Penal Code are found at art. 435-3 *et seq*., https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20060701 [https://perma.cc/S6HP-FWMD]. An official English version of the Penal Code has been published by the French Ministry of Justice and can be found at https://www.legislationline.org/documents/action/popup/id/8888 [https://perma.cc/B6Q5-MR2B]. The English version, however, is not regularly updated and may at any point be out of date; in the opinion of the author, its translations are sometimes unreliable.

overseas bribery.[170] During that period, the U.S. Department of Justice prosecuted four large, well-known French companies under the U.S. Foreign Corrupt Practices Act even though the defendants had far greater contacts with France than with the United States. The negotiated outcomes in those cases – a mixture of guilty pleas, DPAs and NPAs – netted more than $2 billion in payments to United States treasuries, and not a penny to French authorities.[171]

There has been much discussion about why French efforts were so unproductive. Among many potential factors are the limits imposed by French criminal law in establishing the criminal responsibility of corporations for acts of its officers, employees or agents—limits which were far more restrictive in France than in the United States.[172] But the relative success of U.S. prosecutors in pursuing French companies also suggests that American procedures simply gave U.S. prosecutors a flexibility and power that their French counterparts lacked. Chief among the American tools were the "sticks" of potentially huge fines (as well as the relative ease of prosecuting corporations) and the "carrots" of negotiated outcomes with results that often were considered more favorable, and certainly were more predictable, than might otherwise be obtained.[173] Under those circumstances, it was logical for multinational corporations faced with possible criminal investigation by authorities in both the United States and France to negotiate first with the United States.[174]

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170. French technology company Safran was originally convicted of overseas bribery in 2012, but it was acquitted on appeal at the request of the prosecutor. See Frederick T. Davis, Sean Hecker & Charlotte Gunka, *France Takes Steps to Implement Its Anti-Corruption Laws – or Does It?*, DEBEVOISE & PLIMPTON, https://www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016 [https://perma.cc/WD56-YJ7L].

171. The four cases are discussed in Frederick T. Davis, *Where Are We Today In The International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward*, 23 ILSA J. OF INT'L & COMP. L. 337 (2017), which provides links to the Department of Justice websites on each of the cases.

172. Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/#more-6926 [https://perma.cc/DK74-ZQYX].

173. *See supra* note 171.

174. Davis, *supra* note 171, at 342 (footnote omitted):

"As a result, my strong sense from speaking with prosecutors, defense lawyers, and corporate counsel in France is that if a company feels it faces the risk of U.S. as well as French prosecution, it will focus its efforts on dealing with the U.S. risk in the first instance, and assume that French prosecutors will fall into place later. In essence, as I have put it elsewhere, the

Clearly stung by this situation, French legislators adopted several changes to French criminal procedures and administration. In 2013, France established a National Financial Prosecutor's office (NFPF), which has nationwide authority to investigate and prosecute economic and financial crimes.[175] This office has developed an experienced group of investigators and prosecutors, who have already shown that they are capable of taking big financial cases to court against large companies represented by excellent lawyers, and winning.[176] In December 2016, after extensive debate and grudging approval by France's chief administrative body,[177] the legislature passed a law officially called "Law Relative to Transparency, to the Fight Against Corruption, and to the Modernization of Economic Life," known universally as the "Loi Sapin II" after Michel Sapin, the Minister of Finance who proposed it. The Loi Sapin II made a number of noteworthy changes.[178] It greatly increased the maximum penalty that could be applied to corporations, which instead of having a (rather low) cap now could be based on variable metrics such as annual turnover. It obligated all but very small corporations to adopt internal

U.S. is positioned as the 'ultimate arbiter' on the sufficiency of bribery prosecutions around the world—as well as the recipient of billions of dollars of criminal and administrative fines, and other payments, made on the basis of such prosecutions."

175. The NFPF maintains a public information site, https://www.tribunal-de-paris.justice.fr/75/actualites-parquet-national-financier [https://perma.cc/MN5D-KLGS] [last accessed on January 23, 2022] with occasional pieces in English.

176. In February 2019, a trial court in Paris convicted Swiss banking giant UBS and its French subsidiary of money-laundering relating to tax evasion and issued a sentence of over 4 billion Euros. *See* Frederick T. Davis, *UBS Judgment: Dawn of a New Era?*, 35 INT'L ENFORCEMENT L. REPORTER, Issue 3, at 1 (2019), available at https://freddavisnylaw.com/wp-content/uploads/2020/04/ubs-judgement-dawn-of-a-new-era.pdf. The UBS conviction is now on appeal, which has modified the penalty but confirmed the conviction; a further review in France's Supreme Court (*Cour de Cassation*) may be sought.

177. In March 2016, a non-final version of the Loi Sapin II was reviewed by the Conseil d'Etat, an important administrative body that, among other functions, issues "advice" on certain kinds of proposed legislation. CE Ass., Mar. 24, 2016, 391.262 (translations by author), https://www.economie.gouv.fr/files/files/PDF/20160330_avis_conseil_etat_pjl_sapin2.pdf [https://perma.cc/JE85-FKTT]. The opinion was notably critical of the proposed DPA-equivalent described below, which it found to be inimical to French traditions of "public debate" about guilt and the "search for the truth" because it resulted from private negotiations. *Id.* at 12. It nonetheless found that the "advantages" of the procedure outweighed these disadvantages. *Id.* The particular advantage noted was the "existing procedures and practices in different States to deal with international corruption," clearly referring to U.S. success with its DPA procedure. *Id.* at 10.

178. The text of the Loi Sapin II, as well as its principal legislative history, can be found (in French) at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528 [https://perma.cc/3QYN-4HMN].

compliance measures meeting certain specified criteria. It created a new French Anticorruption Agency, known as the AFA, which unlike its toothless predecessor has proven to be quite active. Among other duties, the AFA supervises internal compliance programs, imposing administrative sanctions for ones that fail to meet required standards. It has also issued "guidelines" on various anti-corruption issues, often working closely with the NFPF.[179]

Two features of French criminal procedure which had previously hindered negotiations bear on the significance of this relatively new form of negotiated outcomes.

First, France has had virtually no tradition of negotiated criminal outcomes.[180] In 2004 the legislature introduced a procedure known as a CRPC, standing for "*comparution sur reconnaissance préalable de culpabilité*" ("appearance on a prior acknowledgement of responsibility").[181] This procedure allowed—but did not require—a judge to enter a criminal conviction upon uncontested facts if requested by both parties. Relatively few CRPCs were issued, and very few for corporations.[182] A major disincentive is that the CRPC results in an immediate criminal conviction. This outcome often appears strategically less inviting than awaiting the outcome of an investigation (which as noted in the next paragraph may take a long while), particularly for a corporation that may claim a "corporate defense" that the corporate entity was not criminally responsible for the acts of its officers or employees.[183] But more broadly, the CRPC procedure did not envision "negotiation" in the sense that United States guilty pleas, DPAs, and NPAs

179. In June 2019, the NFPF and the AFA jointly issued "Guidelines on the Implementation of the Judicial Agreement in the Public Interest," which provides guidance on the elements that the NFPF will take into account in negotiating a CJIP. It is available on the AFA site in English at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf [https://perma.cc/62CA-46TG].

180. *See generally*, Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice* (Warwick School of Law Research Paper No. 2010/15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650571. *See also* Einbinder, *infra* note 188.

181. The CRPC is set forth in articles 495-7 *et seq*. of the French Code of Criminal Procedure, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038312540/ [https://perma.cc/JGC8-CANJ].

182. For a description of one corporate CRPC, see Margot Sève & Michel Perez, *Is the French Approach to International Financial Crime on the Verge of a Paradigm Shift?*, https://www.kramerlevin.com/images/content/2/3/v2/23544/1609-RTDF-Dill-Aliz-e-The-Rise-of-the-American-Deferred-Prosecu.pdf [https://perma.cc/BP7Y-FZBF].

183. The appellate acquittal of Safran was in response to the prosecutor's position that the company should not be held responsible for the acts of two individuals who (the prosecutor maintained) had engaged in illicit payments. *See supra* note 170.

are negotiated, for which there has been no tradition in France. In essence, it amounted to a "take it or leave it" offer from a prosecutor to plead guilty.[184]

Second, and directly linked to the issue of judicial review, most large economic crimes in France have been investigated not by a prosecutor but by a judge through a special procedure known as an "*instruction*."[185] In complex cases, a prosecutor may refer the investigation to a specialized judge known as a *juge d'instruction* (or "investigating magistrate.") While such a referral is in some cases discretionary, prosecutors traditionally have made them in large corporate cases of any significant degree of complexity.[186] The investigating magistrate is not a prosecutor, but rather is a judicial officer viewed as a neutral tasked with establishing what happened, and in particular to assemble both inculpatory and exculpatory evidence.[187] If the investigating magistrate concludes that there is sufficient evidence to hold a person or corporation responsible for a crime, the magistrate will issue an opinion (known in France as an *ordonnance de renvoi*) binding the person or company over to a trial on the merits. While the prosecutor is consulted on that decision (as are counsel for suspects as well as counsel for known victims), the decision whether to proceed to trial is made entirely by the investigating magistrate, who can (and sometimes does) order that a case proceed to trial notwithstanding the negative view of the prosecutor. This procedure has at least two effects that inhibit any form of plea bargaining. First, an *instruction* simply takes a very long time – in complex cases, possibly as long as ten years or even more – and thus puts little pressure on a company to seek a resolution. And second, the decision-makers are judges, whose traditions have been inimical to negotiation of any sort.[188]

184. *See generally* Antoine Kirry, Frederick T. Davis & Alexandre Bisch, *France*, in THE INTERNATIONAL INVESTIGATIONS REVIEW 121 *et seq*. (2020)

185. *Id*. at 122. The procedure is also sometimes known as an "*information judiciaire*." *See generally* art. 79 *et seq.* of the French Code of Criminal Procedure. https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006167421&cidTexte=LEGITEXT000006071154 [https://perma.cc/UY39-H7K3].

186. *Id.*

187. Art. 82 of the French Code of Criminal Procedure, *see supra* note 185 (providing that the investigating magistrate should adopt "all measures appropriate to the discovery of the truth." (Author's translation).

188. For an excellent review of corporate criminal investigations in France, *see* Fred Einbinder, *Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice*, 3 INT'L COMP, POLICY & ETHICS L. REV. 667 (2020), https://www.cardozociclr.com/_files/ugd/bc0e09_a892e608d857413cb0805aa6e4207b9f.pdf [https://perma.cc/F6PL-B66J].

B. The "French DPA" – A "Judicial Agreement in the Public Interest"

Among the most innovative features of the Loi Sapin II was its introduction of a form of Deferred Prosecution Agreement known in France as a "CJIP," standing for *Convention Judiciaire d'Intérêt Publique*" (Judicial Agreement in the Public Interest).[189] In August 2021, the government issued a decree that was designed to "simplify" CJIP procedures in order to facilitate their use.[190]

The CJIP was unquestionably introduced to address the specific perceived problem that United States prosecutors had pursued a number of French corporations for international crimes such as overseas bribery – an affront not only to national pride but also to France's public finances, since in the principal outcomes negotiated by U.S. prosecutors all the fines and other penalties were kept by U.S. treasuries. As noted above, the legislative history of the law focused on the effect of U.S. outcomes;[191] further, the CJIP procedure is strictly limited to corporations (individuals must resort either to a guilty plea under the CRPC procedure, or go to trial), and it applies only to overseas corruption, money-laundering, and other financial crimes typical of international law enforcement – and in which the U.S. authorities had achieved notable successes.

There are two different forms of a CJIP depending on the procedural status of the matter.

In cases where an *instruction* is underway – that is, where an investigating magistrate has been empowered and is in charge of the investigation – the investigating magistrate can, either at the request or with the agreement of the prosecutor, initiate a CJIP procedure. This takes place after the investigating magistrate has identified a corporation against which there is "serious and corroborated" evidence of guilt, at which point the company is in essence informed that it is a

189. A useful explanation in English of the French CJIP, and proposed practices for its implementation, is a set of Guidelines on the Implementation of the Convention Judiciaire d'Intérêt Publique published jointly by the National Financial Prosecutor's Office and the French Anticorruption Agency, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf [https://perma.cc/62CA-46TG].

190. Décret 2021-1045, August 4, 2021, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043914155 [https://perma.cc/T9ZY-U3DP].

191. *See* the "opinion" of the French *Conseil d'Etat*, *supra* note 177, which clearly references U. S. competition as a basis for its grudging endorsement of the Loi Sapin II.

target of the investigation – a procedure known in France as "*mis en examen.*"[192]

If an investigating magistrate has not yet been authorized – a stage of an investigation known as a "preliminary investigation" (*enquête préliminaire*) – the prosecutor can "propose" a CJIP to a corporate entity, and a CJIP can be reached without any investigating magistrate participation at all.[193] In either case, notice must be given to identified victims, who can participate in negotiating a CJIP, and in its outcome. [194] The CJIP must address a number of specific items, including the payment of an agreed-upon penalty and the submission by the company to a period no greater than three years of supervision of its compliance programs by the French Anticorruption Agency. There are a number of procedural requirements, including notice to identified victims and to individuals within the company whose personal responsibility may be examined, but who would not be covered by the CJIP, which applies only to corporations. When agreement is reached, it is submitted to the presiding judge of the local district court (*Tribunal de Grande Instance*) for approval. The presiding judge must hold a hearing in the presence of corporate representatives and any identified victims. The judge can approve the agreement if found to be consistent with the relevant procedures, and that financial provisions are "proportional" relative to the profits or other advantages gained from the illicit activity and to the penalties prescribed by the applicable laws.[195] Notwithstanding the denomination of the procedure as a "judicial" agreement "in the public interest," the legislation does not in so many words require the judge to certify that the agreement is in the public interest. The law provides that the final outcome does not constitute a "declaration of guilt," and has "neither the nature nor the effects of a criminal judgment."[196] While the outcome and its component documents are published on the internet site of the French

192. French Code of Criminal Procedure, *supra* note 185, art. 180-2.

193. *Id.* art. 41-1-2.

194. In French criminal procedure, victims can appear as actual parties to the criminal matter; they may be entitled to notice of various stages of an investigation, may participate in trials and appeals, and typically receive any compensation from a criminal defendant as part of the ultimate judgment rather than through a separate civil proceeding. See Davis, Kirry & Bisch, *supra* note 184, at 122. While separate civil proceedings can take place under certain circumstances, in most situations victims participate in, and receive any compensation from, the criminal matter. In some circumstances where there has been a particularly large, impactful crime, the State may set up a victims' compensation fund to provide quick compensation to victims, in which case the fund becomes subrogated to the rights of the victims and can pursue compensation damages in a criminal matter. *Id.*

195. French Code of Criminal Procedure, *supra* note 185, at 41-1.2.

196. *Id.*

Anticorruption Agency,[197] the result is not entered in what is known as the "*casier judiciaire*," an official list of convicted companies and individuals.[198]

C. The Negotiated Outcomes to Date

As of this writing, thirteen CJIPs have been formally approved and made public.[199] The website link for each provides the agreement itself ("*convention*") and the formal order approving it ("*ordonnance de validation*"). In three of them, the AFA list helpfully provides an English version of the agreement, and five of them include an official press release. One of them notes that the company involved had completed its agreed-upon period of supervision by the AFA, and includes a formal notice called an "*Avis d'Extinction de l'Action Publique*," which effectively serves as the equivalent of a "dismissal with prejudice" under United States procedures,[200] and thus protects the company against further prosecution.

The published judicial opinions reveal relatively little, at least in comparison with the much lengthier and discursive opinions published in England and Wales.[201] The first approved CJIP, entered in November 2017, involved a Swiss subsidiary of banking giant HSBC, which followed an *instruction* that had been commenced in 2013 pursuant to which two investigating magistrates had investigated allegations of money laundering and unauthorized banking activities. The agreement between HSBC and the NFPF[202] recited the relevant history, summarized the factual findings made by the investigating magistrates, and noted that the bank "acknowledges these facts and accepts their legal characterization."[203] It then specified the calculation of payments (totaling 300 million Euros), some of which went to the French

197. The Legal Convention of Public interest, AGENCE FRANÇAISE ANTICORRUPTION, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public [https://perma.cc/SQ9U-C67C].

198. French Code of Criminal Procedure, *supra* note 185, art. 775.

199. The AFA maintains and updates a list of approved CJIPs, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public [https://perma.cc/SQ9U-C67C], which contains links to the documentation of each.

200. *See* text accompanying *supra* note 13.

201. *See supra* Section 3.C.

202. https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/CJIP_HSBC.pdf [https://perma.cc/ZJ3U-WUKH], English version at https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/CJIP_English_version.pdf [https://perma.cc/L6DK-WTPH].

203. *Id.* ¶ 27.

State, which appeared as a "victim" on the basis of lost tax revenues. The four-page approval by the court recited the procedural history and summarized the details of the agreement. [204] The court then confirmed that the calculation of payments appeared consistent with legal requirements, and that the bank had "clearly and unambiguously" accepted responsibility for its acts and committed to specific steps to avoid repetition. The opinion concludes: "It appears that the CJIP is fully justified in its principles and in the amount, and thus is approved."[205]

Judicial reviews of the subsequent CJIPs mostly follow this model: with one exception noted below, the judicial *ordonnance de validation* in each case is between three and five pages long, recites the procedural history and the elements of the deal, and concludes in very general (and nearly identical) terms that the CJIP satisfied the applicable procedural requirements, and was "justified in its principle and its implementation."[206] Several of the companies involved were mid-sized French companies accused of domestic crimes such as bribery, money laundering or tax fraud.

While the judicial approval in each case appears formulaic, particularly in comparison with their English/Welsh counterparts, they do reflect that the parties had been tasked with justifying to a judge the appropriateness ("*bien fondé*") of the agreement in conformity with the legislation and the relevant sentencing parameters, and that these had been verified by the judge. Among these decisions, two evolutions stand out.

First, two of the decisions involved very large European companies with extensive international operations, banking giant Société Générale and aerospace giant Airbus, which were accused of having engaged in overseas bribery payments. Both companies were simultaneously being investigated by the United States Department of Justice, and Airbus by the British Serious Fraud Office as well. The published CJIPs emphasize that the investigations and negotiated outcomes were resolved in coordination with the parallel investigations, and in fact, the CJIPs were announced simultaneously with DPAs negotiated in parallel in the other countries. The Airbus case is particularly noteworthy because the amount of the payments to French authorities was far greater than the amounts paid to American and United Kingdom authorities combined. This, of course, was a far cry

204. Available at https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/ordonnance_validation.pdf [https://perma.cc/LR29-X3U8].

205. *Id.* at 4 (translation by author).

206. From the CJIP approval with SET Environment at 3, (February 23, 2018) https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/ordonnance_validation.pdf [https://perma.cc/LR29-X3U8] (author's translation).

from the several FCPA outcomes summarized above[207] where U.S. authorities forced French companies to enter into DPA and other agreements and kept both the credit and the proceeds. In April 2020 the National Financial Prosecutor Jean-François Bohnert appropriately noted, in a formal and widely published interview,[208] that in the Airbus case his office had acted as the "pivot" in leading the coordinated investigations by his office, the DoJ, and the SFO.

Mr. Bohnert's interview also underscored a second evolution observable from the CJIPs to date: His office now has a much greater degree of independence from judicial supervision and control because the CJIP procedure allows his office to reach outcomes without any participation by an investigating magistrate. The Airbus CJIP was notable in that no *instruction* had been commenced; no investigating magistrate had been involved at all, but rather the matter had been handled, in France, by the NFPF and police investigators in a preliminary investigation (*enquête préliminaire*).[209] Mr. Bohnert noted that in 2019, over 80% of the cases conducted by his office were handled on the basis of such a preliminary investigation (thus without an investigating magistrate), and that companies were free to reach out directly to his office if they wished to enter into discussions leading to a CJIP. This is a major development because if the NFPF and other prosecuting offices in France succeed in encouraging French companies to "self report" to prosecutors with the aim of working out a CJIP and without the need to involve an investigating magistrate, the prosecutors may be able to move far more quickly, decisively, and effectively than in the past.[210]

A recently publicized CJIP differed from its predecessors in two respects. The case involved the French transportation and logistics

207. *See supra* note 171and accompanying text.

208. *« Il m'apparaîtrait abusif de parler dorénavant de justice négociée »* [Jean-Francois Bohnert: "It now seems disrespectful to speak of negotiated justice"], L'Observatoire de la Justice Pénale (Apr. 17, 2020), https://www.justicepenale.net/post/jean-fran%C3%A7ois-bohnert-il-m-appara%C3%AEtrait-abusif-de-parler-dor%C3%A9navant-de-justice-n%C3%A9goci%C3%A9e [https://perma.cc/V2JG-XD9U]. *See also* Frederick T. Davis, How France Is Modernizing Its Criminal Procedure and Streamlining Its Resolution of Corporate Crime Cases, The Global Anticorruption Blog (May 27, 2020), https://globalanticorruptionblog.com/2020/05/27/guest-post-how-france-is-modernizing-its-criminal-procedure-and-streamlining-its-resolution-of-corporate-crime-cases/#more-16002 [https://perma.cc/26YY-97T3] (providing a short summary of the interview in English).

209. *See supra* note 193 and accompanying text. While two of the earlier CJIPs had also involved a preliminary investigation without an investigating magistrate, they were domestic tax investigations conducted in the first instance by tax authorities and, in any event, would likely not have been referred to as an "instruction".

210. *See* Davis, *supra* note 208.

company Bolloré SE and its activities in Togo. After a long investigation conducted mostly by the NFPF, in February 2021 the NFPF and Bolloré SE submitted for judicial approval an agreed-upon CJIP that provided for payment of a fine of 12 million Euros and the adoption of certain preventative measures. Simultaneously, the prosecutor presented for approval guilty pleas (under the CRPC procedure described above[211]) of the company's CEO Vincent Bolloré and two other individuals, who acknowledged responsibility for corruption acts in Togo and agreed to fines of 375,000 Euros. The judicial approval of the Bolloré SE CJIP[212] is seven pages and somewhat longer than the equivalent documents in the other public cases. It goes into significantly greater detail about the acts for which the company accepted responsibility. Even more noteworthy was the refusal of the judge (the same one who simultaneously accepted the corporate CJIP) to accept the CRPC guilty pleas of the individuals, noting that the proposed sentences were "unsuitable" in the context of the facts acknowledged in the CJIP because they had "seriously undermined economic public order" and attacked "the sovereignty of Togo."[213]

Overall, the CJIP procedure offers the French prosecutor an avenue to sideline one form of judicial review or control (the tradition of having complex cases handled by an investigating magistrate), without creating significant judicial constraints on the CJIP process itself, since the judges who have reviewed the CJIPs negotiated to date have not only approved them, but in contrast to their English/Welsh counterparts, have not indicated that they will scrutinize such deals to assure that they are in the "public interest." The incentives to negotiate directly with the prosecutor in corporate cases were undoubtedly enhanced by the UBS conviction after trial in February 2019. After it

211. *See supra* note 181 and accompanying text.

212. Convention judiciaire d'intérêt public entre Le Procureur de la Republique Financier et Bolloré SE et Financière de l'Odet SE [Judicial Public Interest Agreement between the Public Prosecutor and Bolloré SE and Financière de l'Odet SE], Feb. 9, 2021, PNF 12 111 072 209, http://www.justice.gouv.fr/art_pix/CJIP_bollore_20210902.pdf [https://perma.cc/EEH2-XPZ6].

213. *Paris Court Accepts Corporate DPA While Rejecting Plea Deal for Bolloré Executives*, Wilkie Compliance (Mar. 1, 2021), https://complianceconcourse.willkie.com/articles/news-alerts-2021-03-march-20210301-paris-court-accepts-corporate-dpa-while [https://perma.cc/TUS7-PYVF]. No written opinion by the trial judge rejecting the individual guilty plea has been made public. The refusal to accept the CRPC, however, has been widely reported and analyzed in France. *See, e.g.*, Emmanuelle Brunelle et al., *L'affaire Bolloré ou les limites d'une justice pénale négociée* [The Bolloré case or the limits of a negotiated criminal justice system], Dalloz Actualité (Mar. 23, 2021), https://www.dalloz-actualite.fr/node/l-affaire-ibollorei-ou-limites-d-une-justice-penale-negociee#.Yg275N9OlpS [https://perma.cc/U9P6-6HTW] (providing an extensive description and analysis in French).

was publicly reported that the UBS entities had been offered, and declined, a CJIP, the NFPF obtained a judgement against the company and the imposition of penalties totaling 1.8 billion euros—considerably more than what the CJIP would have cost them. [214] In contrast, the rejection of the individual CRPC by Vincent Bolloré[215] has been interpreted in France to create an important disincentive by emphasizing that senior corporate individuals, who are often the key strategists in negotiating a corporate CJIP, may face tougher scrutiny.

V. OTHER COUNTRIES

The deferred prosecution regimes in England/Wales and France have led roughly to roughly a dozen formal outcomes in each country pursuant to the judicial review procedures noted above. Other countries may be following. Two (Canada and Singapore) have adopted DPA regimes but those procedures have not yet been used; two (Australia and Ireland) have developed detailed legislative proposals for DPA regimes that but the laws have not yet been enacted; and two (Brazil and Argentina) have adopted somewhat comparable negotiated corporate outcomes that are not closely modeled on the U.S. DPA.

A. Canada

In late 2018 Canada enacted a comprehensive DPA procedure called the Remediation Agreement Regime ("RAR").[216] Like the U.K. model upon which it is largely based, Canada's regime provides for judicial review at several different steps. A prosecutor may propose a remediation agreement to corporations accused of certain enumerated financial fraud, securities, and corruption offenses;[217] in contradistinction to the U.K. version the prosecutor does not need to obtain judicial approval to enter into such negotiations if she is of the opinion "that there is a reasonable prospect of conviction with respect to the offence"[218] and that "negotiating the agreement is in the public interest and appropriate in the circumstances."[219] The RAR then not only

214. *See* Davis, *supra* note 176.

215. *See supra* note 213.

216. Criminal Code, R.S.C. 1985, c C-46, 715.3 (Can.).

217. Criminal Code, R.S.C. 1985, c C-46, Schedule to Part XXII.1 (Can.).

218. *Id.* ¶ 715.32(1)(a).

219. *Id.* ¶ 715.32(1)(c).

requires that a court approve a remediation agreement in order for it to come into force, [220] but that a remediation agreement can only be modified[221] and terminated[222] with the approval of a court. While the new provision has not yet been publicly used, commentary about it emphasizes the importance of significant judicial participation.[223]

B. Singapore

In March 2018 the Singapore Parliament adopted a DPA regime as part of a broader Criminal Justice Reform Act 2018,[224] which revised the Criminal Procedure Code. It permits the Public Prosecutor to enter into a DPA with a corporate entity that "must contain" two elements, namely, a charge or draft charge (prepared by the Public Prosecutor) relating to the alleged offence; and a statement of facts relating to the alleged offence, which may include admissions made by the subject that enters into the DPA.[225] The enabling legislation provides an expressly non-exhaustive list of the "requirements that a DPA may impose on the subject that enters into the DPA," which may include compensation to victims, implementation of a compliance program, and appointment of a monitor.[226] Interestingly, the legislation does not require the Public Prosecutor to develop a Code of Practice such as exists in the United Kingdom,[227] and it was emphasized during legislative debates that such a Code would only serve as "a tool for

220. *Id.* ¶ 715.37(6). A court must approve the remediation agreement "if it is satisfied that (a) the organization is charged with an offence to which the agreement applies; (b) the agreement is in the public interest; and (c) the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence."

221. *Id.* ¶ 715.38.

222. *Id.* ¶ 715.4(1). A court is directed to terminate the agreement if it is "satisfied that the organization has complied with the agreement."

223. *See, e.g.*, Glen Jennings & Matthew Doak, *Canada Moves Forward With A Remediation Agreement Regime*, Mondaq (Sept. 21, 2018), http://www.mondaq.com/canada/x/738578/White+Collar+Crime+Fraud/Canada+moves+forward+with+a+remediation+agreement+regime [https://perma.cc/X3RH-BPTU]. In one poll, 89% of respondents expressed a preference for a DPA regime that featured some degree of judicial involvement. *Canadians Favour More Tools for Prosecutors to Combat White-Collar Crime and Want to See Legislation That Better Targets Guilty Parties*, Ipsos (June 15, 2016), https://www.ipsos.com/en-ca/canadians-favour-more-tools-prosecutors-combat-white-collar-crime-and-want-see-legislation-better [https://perma.cc/B89G-FCFE].

224. Criminal Justice Reform Act, 2018 (Act No. 12/2018) (Sing.)

225. *Id.* § 149(E)(1).

226. *Id.* § 149(E)(3).

227. *See supra* note 135–138 and accompanying text.

criminals to refer to in manipulating the criminal justice system to escape punishment."[228] Section 149(F) of the Act provides that a DPA does not go into effect until the Public Prosecutor has "appl[ied] by criminal motion to the High Court," and the Court has issued a "declaration" that the DPA is "in the interests of justice," and that the terms of the DPA are "fair, reasonable and proportionate." [229] To date the Singapore DPA regime has not been publicly used, and there is some concern that few corporations may be eager to enter into one in the absence of a strong risk of corporate prosecution under Singapore corporate criminal responsibility provisions.[230]

C. Australia

In December 2019, the Australian Government introduced proposed legislation called the Combatting Corporate Crime Bill,[231] to replace a largely similar proposal that had lapsed. It includes a new strict liability offense for corporations that "fail[] to prevent" a foreign bribery, thus emulating Section 7 of the UK Bribery Act discussed above in Part 3(A). The law would authorize the Commonwealth Director of Public Prosecutions (CDPP) to "negotiate, enter into, and administer" deferred prosecution agreements with corporations but not with individuals[232] accused of certain enumerated offenses—generally foreign

228. Eunice Chua and Benedict Chan Wei Qi, *Deferred Prosecution Agreements in Singapore: What is the Appropriate Standard for Judicial Approval?*, 16 Int'l Comment. on Evidence 1, (2019(quoting Singapore Parl. Deb. Official Report vol 94 (Mar. 19, 2018) (remarks of Indranee Rajah, Senior Minister of State for Law)).

229. Criminal Justice Reform Act, 2018 (Act No. 12/2018) (Sing.), § 149(F). For excellent discussions of the Singapore DPA, see Eunice Chua, *Deferred Prosecution Agreements in Singapore?*, Singapore Law Blog, http://www.singaporelawblog.sg/blog/article/205 [https://perma.cc/LYX4-X8B4]; Eunice Chua & Benedict Chan Wei Qi, *Deferred Prosecution Agreements in Singapore: What is the Appropriate Standard for Judicial Approval?*, 16 INT'L COMMENT on Evidence 1 (2019).

230. "[I]t's worth noting that, at this time, Singapore has not proposed any amendments to the standard for corporate criminal liability, which has closely followed the English common law "identification principle," namely that at least one individual who is sufficiently senior to be considered the company's "directing mind and will" had the relevant criminal intent. That could present a huge hurdle for prosecutors wanting to use the new DPA regime where a company wants to challenge corporate attribution." Sandy Baggett, *Singapore Introduces Deferred Prosecution Agreements*, Freshfields Bruckhaus Deringer (Mar. 22, 2018), https://riskandcompliance.freshfields.com/post/102eszp/singapore-introduces-deferred-prosecution-agreements [https://perma.cc/65RA-PH5B].

231. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) (Austl.).

232. *Id.* sch 2 item 4.

bribery, fraud, money laundering and lesser included offenses,[233] and lists the required components of a DPA.[234] Clearly responding to public demands for some form of judicial review,[235] the legislators were constrained by a separation of powers principle that a true judicial officer cannot review an agreed-upon outcome.[236] As a result, the current bill provides that an agreed-upon DPA be reviewed by a retired judge, who must be "a former judicial officer of a federal court or of a State or Territory…"[237] Once a DPA has been negotiated by the CDPP and a corporation, the CDPP submits the DPA to the approving officer with a written statement indicating that the CDPP is "satisfied that there are reasonable grounds to believe that an offence specified in the DPA has been committed" and that "entering into the DPA is in the public interest."[238] The approving officer then must approve the DPA if satisfied that "the terms of the DPA are in the interests of justice[,]. . . fair, reasonable, and proportionate"[239]—in essence, the same standard applicable to true judicial scrutiny in England and Wales.

D. Ireland

Ireland does not currently have a DPA regime, but the possibility of introducing a statutory scheme has been the subject of recent discussion as part of a broader conversation on corporate crime and

233. *Id.* sch 2 item 17B(1).

234. *See generally Failure to Prevent Foreign Bribery and Deferred Prosecution Agreements: the Latest Reforms Proposed to Australia's Corporate Criminal Regime*, Ahurst (Dec. 5, 2019) https://www.ashurst.com/en/news-and-insights/legal-updates/failure-to-prevent-foreign-bribery-and-deferred-prosecution-agreements/ [https://perma.cc/R9J2-QXFE].

235. *See* Australian Government, *Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*, https://www.ag.gov.au/integrity/consultations/proposed-model-deferred-prosecution-agreement-scheme-australia [https://perma.cc/JB77-SYQ3].

236. The Attorney General has noted that under Australian law, "courts cannot merely 'rubber stamp' administrative processes or penalties that have been 'agreed' in advance by the parties. To do so would not be consistent with the role and function of courts under the Constitution." SENATE ECONOMICS REFERENCES COMMITTEE, REPORT: FOREIGN BRIBERY 16 (2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report/c05 [https://perma.cc/895A-98DD] (quoting Consultation of the Attorney General). *See also* Barbaro v The Queen; Zirilli v The Queen [2014] 253 CLR 58, 33 (Austl.) (emphasizing the distinct and separate "roles" of the court and the prosecutor in determining a sentence).

237. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) (Austl.), sch 2 item 17G(2).

238. *Id.* sch 2, item 17D(1)–(2).

239. *Id.* sch 2 item 17D(4).

financial regulatory reform, which may be the basis for future legislative action.

In January of 2016, the Irish Law Reform Commission (LRC) solicited public comment on the adoption of DPAs.[240] After receiving submissions and consulting with national and foreign experts on economic concerns, in October 2018 the LRC issued an extensive *Report on Regulatory and Corporate Offenses* in which it recommended that Ireland adopt a DPA scheme that closely resembles the UK model.[241] The proposed scheme would allow the Director of Public Prosecutions to offer a DPA to corporations under investigation for certain financial crimes; whether to make such an offer is left to the discretion of the prosecutor and would not itself be subject to judicial review, but the proposed legislation would require the DPP to develop and publish a "Code of Practice" that would set out the standards the DPP will apply in the negotiating a DPA.[242] Emphasizing that "judicial oversight and approval of DPAs is at the very heart of the [proposed] DPA scheme,"[243] the proposed act would require a court to apply the two-prong test found in the UK scheme, and approve the DPA only if it is satisfied "(1) that the DPA as a whole and its individual terms are fair, reasonable and proportionate; and (2) that approval of the DPA is in the interests of justice."[244]

240. LAW REFORM COMMISSION OF IRELAND, ISSUES PAPER ON REGULATORY ENFORCEMENT AND CORPORATE OFFENSES (Jan. 27, 2016), http://www.lawreform.ie/news/issues-paper-on-regulatory-enforcement-and-corporate-offences-.607.html [https://perma.cc/ZH2C-PGMK].

241. LAW REFORM COMMISSION OF IRELAND, 1 REPORT ON REGULATORY AND CORPORATE OFFENSES, ¶¶ 1–2, 24–29 (Oct. 23, 2018), https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf [https://perma.cc/2M6J-HZV9].

242. *Id.* at 270 ¶ R 5.06. "The Commission recommends that the statutory framework for DPAs will provide that the Director of Public Prosecutions (DPP) is to produce and publish a Code of Practice (comparable to the DPP's Guidance for the Cartel Immunity Programme), which will set out the detailed substantive and procedural elements of the DPA scheme, including the role of the DPP, the standards the DPP will apply in the process of negotiating and preliminarily agreeing a DPA and the relationship between the DPP and any relevant regulator in this context." *Id.* The DPP has also published Guidelines for Prosecutors which outlines a non-exhaustive list of factors that prosecutors should consider when deciding whether to prosecute a particular case. *Id.* at 221 ¶¶ 5.11–.13.

243. *Id.* at 266 ¶ 5.176.

244. *Id.* at 267 ¶ R 5.03(1)–(2). The Law Society of Ireland, in supporting the proposed legislation, has emphasized the need for judicial review. "The Law Society emphasized that it would be in favour of DPAs along the lines of the UK model rather than the US model. Judicial and executive oversight is crucial. The preservation of entities and employment is of great importance in a country our size. However, this priority must not operate to damage

E. Argentina

In December 2017 the Argentine Congress adopted a new Corporate Liability Law, Law No. 27.401, which went into effect in March 2018 and made significant amendments to the national Penal Code.[245] Its principal, and most widely discussed, feature is a significant change in the law on corporate criminal liability, which now makes a wide variety of entities strictly liable for act of their agents on their behalf. This provision, adopted in response to recommendations from the OECD, is viewed as an important step forward in Argentina effort to combat transnational corruption.[246]

Less widely discussed is a new procedure for a so-called "effective collaboration agreement," which approximates a U.S.-style DPA or possibly an NPA. As explained by two participants in the legislative drafting process,[247] a corporate defendant may seek a mitigated outcome by making a full disclosure of the relevant facts and cooperate in the recovery of assets as well as in the identification of individual offenders. A prosecutor satisfied with this disclosure can agree to significantly reduced penalties, and may include other

public confidence in our authorities. Thus, a consistent approach to enforcement is crucially important." LAW SOCIETY OF IRELAND, RESPONSE TO LAW REFORM COMMISSION'S ISSUES PAPER ON: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES 7 (July 2016), https://www.lawsociety.ie/globalassets/documents/committees/business/subs/response-lrc-regulatoryenforcement-july2016.pdf [https://perma.cc/Y43N-SMU8].

245. For the text of the legislation in Spanish, *see* Law No. 27401, Dec. 1, 2017, B.O. (Arg.). An unofficial translation into English that had previously been accessible on the internet is no longer active. For a summary of the new provisions, *see* OECD, ARGENTINA: FOLLOW-UP TO THE PHASE 3BIS REPORT & RECOMMENDATIONS (July 2019), https://www.oecd.org/corruption/anti-bribery/OECD-Argentina-3bis-follow-up-report-ENG.pdf [https://perma.cc/XT8Q-3SGL]; Guillermo Jorge & Fernando Basch, *In Argentina, a New Statute on Corporate Criminal Liability*, The FCPA Blog (January 9, 2018),https://fcpablog.com/2018/1/9/jorge-and-basch-in-argentina-a-new-statute-on-corporate-crim/ [https://perma.cc/JAD7-YXSZ]; Guillermo Jorge & Fernando Basch, *Argentina Introduces Deferred Prosecution Agreements*, The FCPA Blog (January 16, 2018), https://fcpablog.com/2018/01/16/jorge-and-basch-argentina-introduces-deferred-prosecution-ag/ [https://perma.cc/3HWD-PSTA].

246. *See* OECD, *supra* note 245.

247. JORGE & BASCH, *supra* note 245. *See also* Espelata et. al., *Argentina in The Global Investigations Review, The Practitioners Guide to Global Investigations*, Global Investigations Review, (Jan. 2020), https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2020/article/argentina [https://perma.cc/69EY-HXET]; Matteson Ellis,*Argentina Introduces Corporate Liability and Compliance Standards in New Anti-Corruption Law*, FCPAméricas (Mar. 2018), https://fcpamericas.com/english/anti-corruption-compliance/argentina-introduces-corporate-liability-compliance-standards-anti-corruption-law/ [https://perma.cc/6D32-LY3H].

provisions such as reparation to victims, community service, and implementation or improvement of a compliance program.

The legislation provides generally for judicial review, and it appears that the ultimate sanctions are decided, or must be approved, by the Court. The legislation does not appear to contain standards for such review, and thus the procedure may essentially be a mechanism to get the case before a court without a trial. There does not yet appear to be any published outcomes under this new provision, and it is not clear from the legislation whether an appeal will lie from a judicial rejection of an agreement.

F. Brazil

Brazil does not have a comprehensive DPA scheme comparable to the U.S., U.K. and some other models, but it offers administrative leniency agreements (ALAs), which originated in enforcement of antitrust offenses and has been extended to certain corruption offenses in an effort to ramp up anti-corruption enforcement by offering negotiated agreements linked to self-reporting and cooperation. These agreements, known as "*acordos de leniência*,"[248] were introduced as part of the Clean Company Act (CCA) in 2013 along with a federal regulating decree, sweeping amendments to its bribery laws to expand the tools available to anti-corruption enforcement agencies.[249] In particular, the CCA does not specifically provide for judicial review but rather relies on the issuance of administrative guidelines and internal administrative reviews.[250] The actual implementation of such agreements is difficult to evaluate in the context of Brazil's notoriously

248. Eduardo Soares, *FALQs: Legal Framework for Fighting Corruption in Brazil (Part II)*, In Custodia Legis Blog (May 11, 2016), https://blogs.loc.gov/law/2016/05/falqs-legal-framework-for-fighting-corruption-in-brazil-part-ii/ [https://perma.cc/7Z7L-999S].

249. Lei No. 12.846, de 1 de Agosto de 2013, (Braz.); Decreto No. 8.420, de 18 de Março de 2015, (Braz.). *See also* Heloisa Barroso Uelze et al., *The Practitioner's Guide to Global Investigations - Sixth Edition: Brazil*, Global Investigations Review (Jan. 14, 2022), https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2022/article/brazil [https://perma.cc/33HN-338P]. In part, this effort was made to comply with international treaty obligations. *See, e.g.*, Caio Marcelo Cordiero Antonietto & Rafael Guedos de Castro, The Criminal Liability of Legal Entities in Brazil in Light of the New Anti-Corruption Law, EUR. SCI. J. 63 (April 2015)

250. Joao Victor Freitas Ferreira, *Brazil's Public Prosecutors' Office Issues Leniency Guidelines*, Mondaq (Oct. 10, 2017), http://www.mondaq.com/brazil/x/635880/White+Collar+Crime+Fraud/Brazils+Public+Prosecutors+Office+Issues+Leniency+Guidelines [https://perma.cc/WT8L-YDUN].

complex anti-corruption architecture, where more than one agency may be simultaneously involved.[251]

CONCLUSION

In just over two decades, Deferred and Non-Prosecution Agreements have become the predominant procedural vehicle for federal prosecution of corporations in the United States, and several countries around the world have implemented them, or are currently considering their implementation.[252] As this review shows, DPAs as practiced in the country that invented them—the United States—are unique in at least two ways.

First, neither legislation nor official rulemaking has formalized the procedures for U.S. DPAs (or NPAs). Instead, they have simply developed through an evolutionary process as they have been negotiated between prosecutors and counsel for large corporations, which are often galvanized by strategic incentives. [253] Every other country discussed in this article that has adopted, or is seriously exploring, DPA-equivalents has done so through legislation and after a thorough public debate.[254]

Second, the U.S. version of DPAs (and even more so NPAs, which do not appear to have a formal equivalent in other countries) are

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251. One observer notes that "[a]core problem is that several public authorities are legally vested with the power (and the duty) to punish wrongdoers but are not legally required to coordinate their actions." Rafael Zabaglia, *Law Enforcement And The Hurdles To The Brazilian Anticorruption Leniency Program*, Mondaq (May 4, 2017), http://www.mondaq.com/brazil/x/591318/White+Collar+Crime+Fraud/Law+Enforcement+And+The+Hurdles+To+The+Brazilian+Anticorruption+Leniency+Program [https://perma.cc/B6RS-E3RF].

252. Another observer comments: "Reform is in the air. Many countries are actively engaged in determining how to reform their laws on corporate liability and non-trial resolutions, such as DPAs." Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES 156, 197 (Tina Søreide & Abiola Makinwa eds., 2020). In November 2021, the OECD issued a long-anticipated amended version of its "Recommendation" for combatting overseas bribery, which includes a recommendation that "member countries consider using a variety of forms of resolutions" including "non-trial resolutions … based on a negotiated agreement." *See* OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 9 (2022), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378 [https://perma.cc/6KTE-JXQE].

253. *See supra* Part II.

254. *See supra* Part V.

distinctive because of the absence of judicial review, scrutiny, or participation of virtually any kind. The absence of legislation or rule is closely linked with the absence of minimal judicial review: Without such a rule or legislation, there are no standards for evaluating a DPA, nor an objective basis upon which a judge could review one. More fundamentally, a fundamental separation of powers principle—that only the executive branch can determine whether to prosecute or not—has been interpreted in the United States to be at the heart of DPAs/NPAs, and thus a basis to shield them from review.[255] As a result, U.S. DPAs and NPAs constitute an exclusive playing field in which prosecutors and corporate lawyers can operate, wielding immense power to achieve consequential results, all while remaining shielded from judicial review or formal public accountability. Part 2 of this article noted the lengths to which both prosecutors and corporate defense counsel have gone to shield their agreements from any form of judicial review in the very few instances where a judge even had the temerity to impose it. These tactics should not be surprising. Prosecutors always have an incentive to maximize their independence and thus their power. Defendants, even if corporate, may not generally be fans of prosecutorial power, but once two theoretically adversarial parties have reached an agreement satisfactory to both, they are inherently resistant to any further influence that could potentially imperil their deal, and have no incentive to have that deal measured against the (possibly vague) standard of "the public interest."[256]

The successful effort to fend off judicial review has accompanied, and contributed to, a culture of compliance optimization as the principal justification for criminal law enforcement. As two writers note, "N/DPAs are making significant and controversial contributions to corporate practices, exemplifying a shift in prosecutorial culture from an ex-post focus on punishment to an ex-ante emphasis on compliance."[257] D/NPAs are realized exclusively through negotiation, without the need to navigate the rules of evidence and other standard prosecutorial complexities, including the need to persuade a neutral trier of fact. Such a system gives federal prosecutors extraordinary latitude and flexibility: They can pursue law enforcement policies

255. *See supra* Section II.C.2.

256. *See supra* 48 and accompanying text.

257. Kaal & Lacine, *supra* note 4, at 59. After a review of empirical evidence, the authors conclude that "corporate governance provisions in N/DPAs significantly increased in the last decade, boosting prosecutors' influence over corporate governance to unprecedented levels." *See also* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007) ("Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries.")

where one of their putative adversaries (large corporations) have become a significant mechanism in achieving change. Not surprisingly, one writer has observed that federal law enforcement policies are "turning corporate defendants into corporate cops."[258]

Despite the absence of oversight, such agreements nevertheless have extensive impacts on third parties—and the public. The amount of the penalties paid under them is often measured in the billions of dollars, and the detailed prospective conduct (and, sometimes, monitoring) obligations to which corporations agree may affect not only shareholders and employees but competitors, consumers, and other members of the public.[259] As one writer concludes, "Plea agreements involving organizations raise issues that individual plea agreements do not . . . ."[260] The question, then, is whether these important, consequential events should take place entirely behind closed doors, negotiated by powerful lawyers and disclosed to the public only through mutually approved press releases, and without any judicial scrutiny or public accountability. As this study shows, such secrecy is not inherent in the DPA procedure: anyone reading the long, detailed, and articulate examinations of English/Welsh DPAs provided pursuant to statute by the High Court of England[261] derives a much more complete, and almost certainly less suspicious, understanding of the

258. Arlen, *supra* note 26.

259. An opinion issued in a criminal prosecution of an individual, *United States v. Connolly*, No. 19-3806-cr(L), 2019 U.S. Dist. LEXIS 76233 (S.D.N.Y. May 2, 2019), sheds light on the potential collateral effects of a successful corporate DPA on corporate employees. In that case, a former bank officer was indicted for federal crimes where the prosecution was based in significant part on an internal investigation and report conducted by his employer's attorneys as part of their DPA negotiation and shared with the prosecutor. The defendant complained about this process, and argued that his statements to the investigating attorneys constituted a form of compelled self-incrimination that should have invalidated the case against him. While she denied this relief, the judge explored in some detail the relationship between the prosecutor's office and the attorneys representing the corporate employer, and concluded that while the corporate attorneys had achieved a "conspicuous success" for their client by negotiating a favorable DPA, it was at the expense of essential fairness to the corporation's employees at the hands of corporate lawyers to whom the prosecutor had, in essence, "outsourced" the investigation. *See* Frederick T. Davis, *Internal Investigations and the Specter of State Action*, 46 American Bar Association Litigation Journal (May 2020). *See also United States v. Stein,* 541 F.3d 130 (2d Cir. 2008), in which the Second Circuit held that by entering into a DPA with by a large accounting firm that limited its obligations to pay attorney's fees for its employees, the DoJ "unjustifiably interfered with the defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment[.]" *Id.* at 136.

260. Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. Rev. 1483, 1497 (2017).

261. *See supra* Part III.

relevant context and whether, in fact, each outcome was a good one. To varying degrees noted in this study, the several countries that have adopted or are considering a DPA-equivalent are opting for some degree to judicial involvement and public accountability, which is simply lacking in the United States.

In part, this disparity reflects differing constitutional principles of separation of the powers between the executive and judicial branches, as well as different law enforcement cultures. Curiously, the widest disparity in the extent of judicial participation in DPAs among the countries studied in this article is not between so-called "common law" and "civil law" countries, but between two countries with close and overlapping traditions, namely the United States and the United Kingdom. As of this writing, the most extensive and robust form of judicial scrutiny of DPAs occurs under legislation providing for High Court review and in the DPA approvals to date in England and Wales.[262] The former English colonies other than the United States that are considering or have adopted DPAs[263] all require at least some degree of judicial participation, and their legislative histories generally reflect a choice of the English rather than the U.S. model, even though they vary in exactly how such review should take place.[264] This policy-based rejection of the U.S. approach suggests that the disparity analyzed here will persist.

The question remains: What is the practical significance and effect of these stark differences? The remainder of this article will address two issues where differences in the existence or extent of judicial participation may be consequential.

A. Does Judicial Review Render Corporate DPAs Less Flexible or Less Certain, and Thus Less Attractive?

It is axiomatic that DPAs under any scenario are consensual agreements. It follows that, to be effective and sufficiently widespread to have any real impact, they must incentivize parties to use them. Does the possibility that a "deal" once reached between prosecutor and

262. *See supra* Section III.C.

263. Namely Canada (Section V.A), Singapore (Section V.B), Australia (Section V.C), and Ireland (Section V.D).

264. As noted in Section V.C, in Australia constitutional principles of separation of the powers would apparently preclude a court as such from reviewing an agreed-upon outcome, so the legislation under consideration will provide for "judicial" review by designated retired judges. *See supra* note 236 and accompanying text.

corporate defendant may be reviewed, and potentially invalidated, by a judge act as a disincentive to a corporation to enter into it?

From a corporation's perspective, entering into negotiations with a prosecutor does not necessarily commit them to reaching an agreement or foreclose a defense, but doing so is not without risk, because merely opening a discussion may provide a prosecutor with useful information or other strategic advantage. Further, as a practical matter, few DPA discussions are opened by a corporation that do not result in some sort of negotiated outcome. Some DPA regimes attempt to address this issue by formally protecting the right of defense in the event of a failed negotiation. The English/Welsh[265] and the French[266] DPA regimes include specific provisions that if an attempted DPA fails to result in a final public outcome, neither a proposed agreement nor the negotiations leading to it can constitute evidence against the corporation. The same general principles apply in the United States: Strong tradition, common law rules of evidence, and the terms of Rule 408 of the Federal Rules of Evidence exclude offensive use of "compromise offers and negotiations" in subsequent proceedings,[267] and counsel often fortify these protections by means of so-called "Queen for a Day" provisions or by making hypothetical proffers. But the protection afforded by this general rule is not total, and may vary from jurisdiction to jurisdiction.[268] As a practical matter, anyone representing or advising a corporation knows that *any* discussion with a

265. *See* Crime and Courts Act of 2013, *supra* note 135, sch 17, ¶ 13. The "Deferred Prosecution Agreements Code of Practice" jointly published by the Serious Fraud Office and the Crown Prosecution Service, see text accompanying *supra* note 136 ("It is recognised that there is a balance to be struck between encouraging all parties to be able to negotiate freely, and the risk that [a corporation] may seek knowingly (or when it should have known) to induce the prosecutor to enter into a DPA on an inaccurate, misleading or incomplete basis." The Code lists, on a "non-exhaustive" basis, circumstances under which the prosecutor may use material obtained or information learned during failed DPA discussions.

266. *See* Code of Criminal Procedure, *supra* note 185, art. 41-1-2 (stating that "if the president of the court does not validate the proposal of an agreement or if the legal person [that is, a corporation] avails itself of its right of retraction, the National Financial Prosecutor may not submit to the investigating judge or to the trial court declarations made or documents passed on by the legal person in the course of the procedure described this article."); Guidelines on the Implementation of the Convention Judiciaire d'Interet Public, *supra* note 179, at 10 (specifying that this limited protection only occurs "after formalization of a proposal for a CJIP….").

267. FED. R. EVID. 408, which basically restates common law, provides that evidence of "conduct of a statement made during compromise negotiations" is not admissible.

268. The risks to transnational criminal investigations posed by differing confidentiality and professional obligations rules are explored in Frederick T. Davis, *How National and Local Professional Rules Can Mess Up an International Criminal Investigation* (June 19, 2019), https://www.financialcrimelitigators.org/node/105 [https://perma.cc/R67J-YNYU].

prosecutor, especially one unaware of the client's wrongdoing, is a consequential step: reaching out[269] to a prosecutor may be necessary to obtain credit for a genuine "self-report," but it inevitably informs a prosecutor that something presumably illegal has happened and may be worthy of investigation under procedures not prohibited by relevant evidentiary provisions. Even when discussions between a prosecutor and corporate counsel are already taking place (such as when a corporation is under investigation), pursuing a possible DPA outcome can be strategically complex.[270] In this variable context, does it make any difference if a deal once struck with a prosecutor may be subject to further review, and possible non-approval?

There is no easy answer to this question. Given the number of variables and the differences in context, an empirical study comparing outcomes in two countries would be difficult. By far the most outspoken and articulate commentators on DPAs, at least in the United States, are members of prosecution teams and defense bars who have participated in them – and who for reasons noted above[271] have every

269. Both the United Kingdom and the French DPA provisions formally provide that DPA negotiations can in theory only be instigated (or "invited") by a prosecutor. As a practical matter, prosecutors in both countries have emphasized that they are at all times open to "self-reports" from corporate representatives as a preliminary step to entering into such discussions leading to a DPA. *See, e.g.*, Serious Fraud Office, *Deferred Prosecution Agreements*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ [https://perma.cc/5RSD-DL4W] ("A company would only be invited to enter DPA negotiations if there was full cooperation with our investigations. The SFO does not take self reports at face value but must separately establish the extent of the criminality."); French Anti-corruption Agency, GUIDELINES ON THE IMPLEMENTATION OF THE CONVENTION JUDICIAIRE D'INTERET PUBLIC 9, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf [https://perma.cc/RQ4P-JECH] ("Voluntary self-reporting of the offenses to prosecutors, if timely made, is taken into account favorably, both as regards the choice of the CJIP [DPA] procedure and as a factor reducing the amount of the public interest fine.")

270. Among other variables in which national regimes and laws differ is whether a corporation can safely conduct or commission an "internal investigation" that may be used as a basis for negotiating a DPA, since in some countries there is the risk that the fruits of such an investigation may not be protected by professional privileges or confidentiality protections. *See* Frederick T. Davis, *By Refusing to Respect Attorney-Client Confidentiality, European Courts Threaten To Undermine Anti-Bribery Enforcement*, Global Anticorruption Blog (Aug. 2, 2018), https://globalanticorruptionblog.com/2018/08/02/guest-post-by-refusing-to-respect-attorney-client-confidentiality-european-courts-threaten-to-undermine-anti-bribery-enforcement/#more-11857 [https://perma.cc/X8NG-F2GY]. *See generally* Frederick T. Davis, Internal Investigations — an Overview, 10 Tijdschrift voor Sanctierecht & Onderneming 140 (2020).

271. *See supra* note 48 and accompanying text.

incentive to close ranks once a deal is cut. But one can imagine two conflicting theories.

One theory is that the possibility of a needed judicial sign-off marks an impediment insofar as it generates uncertainty. This position was advocated by an experienced U.S.-trained lawyer to the House of Lords in 2019 when the House held hearings on DPAs and their implementation, who testified as follows:

> [The lawyer] thought that UK corporate enforcement was "in its adolescence compared to a more mature system in the US." In his view two differences made the US Department of Justice more effective:
>
> "First, the regime offers more certainty. It does that at a certain cost, which is taking power away from judges and giving it to prosecutors. What companies want in resolving these issues is certainty. When you are dealing with DOJ prosecutors, they can give you the deal and that will be the deal."[272]

More recently, a judge in France, simultaneously with approving a DPA for a privately owned company, publicly rejected the individual guilty plea of the company's principal on the ground that the agreed-upon sentence insufficiently recognized the gravity of the offense.[273] This rejection was widely viewed in France as an impediment for the national financial prosecutor because it undercut his ability to negotiate a definitive agreement.[274] More broadly, at least one commentator has opined that such review would inhibit "self-reporting" and thus corporate compliance.[275]

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272. SELECT COMMITTEE ON THE BRIBERY ACT 2010, *supra* note 123, ¶ 322.

273. *See supra* note 181 and accompanying text.

274. Brunelle et al., *supra* note 213.

275. Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the United* States 12 (NYU Sch. of L. Pub. L. & Legal Theory Research Paper Series, Working Paper No. 19-30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428657 [https://perma.cc/66L9-ZBQZ] ("DPAs will not provide adequate incentives to self-report and cooperate—and thus will not enhance deterrence—if the legislation does not target their use at these activities. Thus, countries should not adopt legislation that provides that DPAs can be used whenever a prosecutor or judge concludes that a DPA is in the public interest. This standard introduces uncertainty that lowers companies' incentives to self-report or cooperate.") Professor Arlen also notes that it "is the rare judge who can be expected to have either the expertise or the incentives to intervene to provide genuine oversight" over such agreements. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 Journal of Legal Analysis 191, 34 (2016).

Alternatively, at least some practitioners might find it advantageous to have a body of law – that is, the opinions issued by reviewing judges – to guide discussions with prosecutors, since both would know that any ultimate agreement would need to survive review on the basis of the publicly stated standards. To date, only opinions issued by the High Court in the United Kingdom[276] offer real guidance in such discussions, since those opinions develop each judge's analysis in some depth and detail, and they would permit a negotiating lawyer to argue that a position taken by a prosecutor would not pass review. In France, the fact that each deal cannot go into effect without a judge first certifying its compliance with procedures set forth in legislation likely exerts some influence on negotiation, though less precise guidance than in the United Kingdom since the approvals, to date, have been essentially formulaic.[277]

In lieu of judicial opinions, practitioners in the United States have recourse to two other sources of strategic information – both controlled by the prosecutor. First, "guidelines" offered by the Department of Justice (and administrative agencies such as the Securities & Exchange Commission) purport to set out the principles that they apply in negotiating outcomes.[278] These guidelines are supplemented by the public record (including press releases) issued by the Department of Justice when DPAs/NPAs are reached,[279] which are reviewed in detail by practitioners for indications of evolving DoJ practice. The DoJ provides a public explanation for negotiated "declinations," or situations where they have agreed not to pursue an investigation in response to

276. *See supra* Section III.C.

277. *See supra* Part III.

278. The Department of Justice issues, and occasionally updates, its Principles of Federal Prosecution of Business Organizations, and its officials often make official statements of policy in prepared (and subsequently published) statements. DEP'T OF JUST., PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/RUU2-FESX] (last visited Feb. 26, 2022). *See, e.g.*, Rod Rosenstein, Deputy Attoney General, Remarks at the American Conference Institute (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 [https://perma.cc/Y64T-QPYT]. In 2020, the DoJ and the Securities & Exchange Commission issued the Second Edition of their Resource Guide to the U.S. Foreign Corrupt Practices Act, which provides emphasizes the value of "cooperation." U.S. DEP'T OF JUST. & SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPTION PRACTICES ACT (July 2020), https://www.justice.gov/criminal-fraud/file/1292051/download [https://perma.cc/RX7P-9UR8]

279. The DOJ website links to its many DPA and NPA outcomes can be found in two databases noted *supra* note 9.

information or promises obtained from a corporation.[280] While such indications of policy and practice are useful, the DoJ emphasizes that all such indications of policy are not "binding" and cannot be used as a basis for review in court. They are not the subject or result of public participation.[281] Fundamentally, they do not state the "law" so much as the principles that prosecutors purport to apply, but for which no mechanism exists to hold them accountable.[282]

Ultimately, the countries that build judicial review into their DPA procedures do so because their traditions require it; they are unlikely to care very much about the possibility that such review may complicate the process for prosecutors or defense counsel. This view was very clear in the immediate (and somewhat sardonic) response of the House of Lords, in their report on DPAs, to the position of a former United States prosecutor quoted earlier:

> Plea bargaining has never been part of our criminal law. If the maturity and effectiveness of the US system does indeed come at a cost of taking power from judges and giving it to prosecutors, this is a cost we are not prepared to pay.[283]

B. Should DPAs be "Transparent"?

As noted above, in the U.S. DPAs (and NPAs) transition from being totally secret to a public *fait accompli*: They are negotiated behind closed doors until both the prosecutor and defense counsel (and the corporation itself) are satisfied and affix their signatures. A DPA is then more or less simultaneously submitted to a court for Speedy

280. *See* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 Journal of Crime and Criminology 477 (2020)

281. See Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. Rev. 1483, 936 (2017) ("The DOJ has pushed for more consistency in its process of investigating and charging corporations, both civilly and criminally. These internal procedural changes, however, lack any acknowledgement of role for the public interest in these prosecutions. Guidelines internal to the DOJ have been adopted but without notice and comment or participation by the public.")

282. See Arlen, *Prosecuting Beyond the Rule of Law*, *supra* note 275, at 34 (urging the development of a "framework" for bringing prosecutor-negotiated "mandates" "within the rule of law.")

283. SELECT COMMITTEE ON THE BRIBERY ACT 2010, *supra* note 123, ¶ 323. The Lords added that "We do not believe that the adoption of non-prosecution agreements along the lines of the United States model would add anything of value to the current law on DPAs." *Id.* ¶ 324.

Trial Act validation[284] and will appear on the website of the Department of Justice under a section maintained by the Office of Public Affairs. The website entry for each DPA will include links to the DPA itself and to its related or constituent documents, typically including, for example, the Information accusing the corporation of the relevant crimes for which it is acknowledging responsibility, as well as a carefully drafted, inevitably self-congratulatory Press Release. The corporation will often issue its own press release, conveying remorse for the conduct for which it has accepted responsibility, committing to avoid such conduct in the future, and expressing relief that the criminal investigation is over. The corporation may also reassure shareholders and the public that the negotiated outcome will not have an untoward or unmanageable effect on the company's fortunes.

Both exercises of public relations are carefully controlled by the parties making them and are clearly coordinated: To avoid causing any dissatisfaction with prosecutors, companies generally pre-clear any release they plan to make before the deal is finalized, and many DPAs contain provisions limiting statements that the corporation may make that might contradict its position in the DPA itself, under threat that any such statement would be a violation of the DPA and could lead to its breach.[285]

The point is *not* that these sanitized statements are devoid of great value and interest, since the public, the press and practicing lawyers read them with great care, and analyze the specifics of the outcomes to update their understandings of the negotiating dynamics and the lessons to be learned from them. An experienced practitioner can generally reconstruct from the publicly available details of an outcome the "bid/ask" negotiating dynamics of the case, and include that learning in his/her experience databank informing strategic analysis used to advise clients. Occasionally the procedural background of a particular case may become public through collateral procedures, which could anecdotally reveal background information not made public through the carefully scrubbed public disclosures.[286] The existence of such occasional revelations underscores the fact that American DPA/NPAs are fundamentally not transparent but disclose only what the parties who reach them decide— or, occasionally, are forced to disclose. In this they are simply worlds apart from their English/Welsh counterparts, and to a lesser degree their French ones, and markedly different from outcomes that may come in other countries that have adopted or

284. *See supra* note 38 and accompanying text.

285. *See supra* note 12 and accompanying text for an example of such a restriction. As noted there, such a "muzzling clause" is viewed unfavorably in other countries.

286. *See supra* note 259 and accompanying text.

may adopt a DPA regime. A reader of the extensive opinions by Judge Leveson and his colleagues on the High Court of London may or may not agree that the DPAs in question were in fact in the public interest – but such an opinion would be an informed one precisely because that important question was explored by a neutral observer (a judge) without an interest in the outcome.

In stark contrast, in the United States the near-total absence of any formal evaluation of the "public interest" other than by the parties inherently invested in justifying the outcome is not "transparent," raising serious questions about whether such opaque procedures really respect the rule of law.[287] The exclusion of any significant judicial role is particularly striking when compared with other aspects of the federal criminal justice system, in which many outcomes – even negotiated ones – must be reviewed, and approved, by a court.[288]

Controversies about the social value and essential fairness of DPAs remain prevalent in the United States,[289] but they are largely lacking elsewhere. More transparency may be forthcoming in the United States: While legislative attempts to provide for judicial review of DPAs and NPAs have stalled,[290] Congress recently adopted a provision applicable to the Anti-Money Laundering Act that requires the DoJ to report annually to Congress a list of the DPAs and NPAs that the DoJ has made in any case relating to money laundering, including its "justification" for entering into each agreement and the "list of factors" that were "taken into account" by the Department in determining to agree to each agreement.[291] The first such report is scheduled to be filed in January 2022, and may provide insight into DPA and NPA parameters that have, in the absence of neutral review, been lacking.

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287. The absence of transparency in U.S. DPAs has been a frequent point made by foreign commentators opining on the possibility of a local version. *See, e.g.*, Connor Bildfell, *Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases*, 20 CAN. CRIM. L. REV. 161, 180 (2016) ("[T]he [U.S.] DPA process does not include any outside parties; it is a negotiation behind closed doors, to which only the prosecutor and company are invited. This leaves employees, community representatives, shareholders, and others out in the cold.").

288. *See supra* Section II.D.1.

289. *See supra* Section I.C.

290. *See supra* note 94.

291. Anti-Money Laundering Act of 2020, H. R. 6395, 11th Cong. § 6311 (2021). *See* Elkan Abramowitz & Jonathan S. Sack, *Congress Requires DOJ To Report on Deferred Prosecution Agreements*, N.Y. L.J. (July 8, 2021), https://www.maglaw.com/publications/articles/2021-07-08-congress-requires-doj-to-report-on-deferred-prosecution-agreements/_res/id=Attachments/index=0/NYLJ07082021498369Morvillo.pdf [https://perma.cc/246R-QBMD].