The New Canadian DPA Regime: An International Comparative Analysis

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1. Introduction

Deferred Prosecution Agreements ("DPA") have become a global trend in white collar, business and corporate crime law enforcement. DPAs have been available to prosecutors in the United States since 1914.[1] They have only been used in the corporate context since the 1990s.[2] Since then, there has been a remarkable growth in their use as an enforcement tool for corporate crime, especially by the Department of Justice ("DOJ") in the area of bribing foreign government officials, under the *Foreign Corrupt Practices Act*[3] ("*FCPA*").[4] The United Kingdom implemented its DPA regime in 2014 under the provisions of Schedule 17 of the *Crime and Courts Act*.[5] In 2017, France developed a DPA mechanism to resolve anti-corruption investigations, known as judicial public interest agreements (*convention judicaire d'intérêt public*), under the Sapin II Law.[6] In 2018, Singapore introduced a formal legislative

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1. Wulf A. Kaal, Timothy A. Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014), The Business Lawyer 70, pg. 71.
2. Peter R. Reilly, "Corporate Deferred Prosecution as Discretionary Injustice" (2017), Utah Law Review 839, pg. 841.
3. 15 U.S.C., 78dd-1.
4. Norm Keith and Sam Goldstein, "Will DPAs Lead to Better White Collar Compliance?" (2017), Criminal Law Quarterly 64, pg. 226; "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation", Government of Canada, pg. 5, online, <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.
5. 2013 c. 22; "Deferred Prosecution Agreements", UK Serious Fraud Office, online, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.
6. *Loi Sapin II pour la transparence de la vie Aconomique* ("Sapin II"), *Legifrance* (December 9, 2016), online: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&dateTexte=&categorieLien=id>.

framework for the Public Prosecutor to enter into DPAs with corporate offenders to resolve misconduct[7] and Australia is likely to implement its own DPA regime in the near future.[8] Canada has now implemented its own version of a DPA, which will be reviewed in detail in this article, along with the American, English and French regimes.

DPAs are a specific type of criminal diversion program generally used for economic crimes committed by corporations and other non-individual legal persons. It involves a voluntary agreement, entered into by an accused and the prosecution authority, wherein criminal prosecution is suspended for a set period of time on terms that are negotiated by the parties. During that time, the accused must comply with the terms of the agreement. If the accused complies, charges are either stayed or withdrawn and no criminal conviction results.[9]

2. Canadian Remediation Agreements

(a) Overview

In September 2017, the Government of Canada launched a public consultation to seek input on a possible Canadian DPA regime.[10] The public consultation revealed high levels of support for a Canadian DPA regime from corporations and their advocates. The regime was proposed as an additional tool for prosecutors to use to address economic crimes, at their discretion, if deemed to be in the public interest and appropriate in the circumstances.[11] The Canadian Government received submissions from over 370 presenters, industry

7. Zachary S. Brez, Brigham Q. Cannon, Mark Filip, Asheesh Goel, Cori A. Lable, Kim B. Nemirow, Abdus Samad Prdesi, Richard Sharpe, William J. Stuckwisch, Marcus Thompson, Satnam Tumani and Jodi Wu, "Singapore Introduces Deferred Prosecution Agreements", Compliance & Enforcement, online: <https://wp.nyu.edu/compliance_enforcement/2018/04/04/singapore-introduces-deferred-prosecution-agreements/>.
8. "Deferred prosecution agreement scheme code of practice", Australian Government, Attorney-General's Department, online: <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreement-scheme-code-of-practice.aspx>.
9. "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation", Government of Canada, online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.
10. *Ibid.*
11. "Expanding Canada's Toolkit to Address Corporate Wrongdoing: What we heard", Government of Canada, February 22, 2018, online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf>.

associations, businesses, non-governmental organizations and others.[12] The debate in Canada centred around three primary rationales for DPAs, and whether they would be effective as (i) deterrents against illegal activity by white collar criminals; (ii) an enhanced incentive for voluntary disclosure of white collar crime; and (iii) a measure to avoid the unintended consequences and collateral damage to stakeholders such as investors, suppliers, and employees of corporations subject to criminal proceedings.[13] The dismissed enforcement record of Canadian law enforcement of white collar and corporate crime was not an official reason offered for this initiative.

The five main arguments advanced by organizations in favour of a Canadian DPA regime were: (1) the low number of prosecutions against companies yielding a guilty verdict, DPAs would promote compliance and deter white collar crime; (2) DPAs incentivize voluntary disclosure and support whistle-blowers in the corporate context; (3) DPAs reduce the risk of unintended consequences and serious collateral damage caused by white collar criminal investigations and the lengthy, expensive trials that follow; (4) criminal diversion programs already exist in Canada for organizations that commit criminal anti-competitive offences under the *Competition Act*[14] through the Competition Bureau's Immunity and Leniency Programs and defendants that have contravened federal environmental law through the Environmental Protection Alternative Measures program under the *Canadian Environmental Protection Act*,[15] there was no reason that other corporate crime should not be treated similarly; and (5) Canada's lack of a DPA regime was inconsistent with the enforcement practices of its major trading partners in a context where white collar crime is increasingly international and investigations are often multi-jurisdictional.[16]

Five arguments made in opposition to a Canadian DPA regime

12. "Remediation Agreements and Orders to Address Corporate Crime", Government of Canada, Sept. 11, 2018, online: <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>.
13. Norm Keith and Sam Goldstein, "Will DPAs Lead to Better White Collar Compliance?" (2017), Criminal Law Quarterly 64, pgs. 227-228; "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for public consultation", Government of Canada, pg. 5, online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.
14. R.S.C. 1985, c. C-34.
15. S.C. 1999, c. 33.
16. Norm Keith and Sam Goldstein, "Will DPAs Lead to Better White Collar Compliance?" (2017), Criminal Law Quarterly 64, pg. 232-235; "Expanding Canada's Toolkit to Address Corporate Wrongdoing: Discussion paper for

were: (1) DPAs will not deter serious corporate misconduct; (2) DPAs will become a "cost of doing business" that will ultimately be passed on to consumers; (3) DPAs may undermine public confidence in the criminal justice system if they are viewed as a privilege available to companies that can afford to break the law without paying real consequences; (4) corporations should be held to the same standards as individuals; and (5) companies may be able to blame individuals while avoiding corporate responsibility through the DPA process.[17]

Following the public consultation, the Canadian government introduced its own version of a DPA regime in the *Budget Implementation Act,* 2018,[18] called a Remediation Agreement Regime ("RAR"). The RAR came into force in Canada on September 19, 2018. Much like other DPA regimes, a remediation agreement is a voluntary agreement between a prosecutor and an organization accused of committing an offence[19] Agreements would set out an end date, that is a deadline by which the terms of the agreement must be met by the organization,[20] and would need to be presented to a judge for approval.[21] Before approving a remediation agreement, the judge would need to be satisfied that the agreement is in the public interest;[22] and the terms of the agreement are fair, reasonable and proportionate.[23]

When the statutory criteria are met, the judge would issue a judicial order approving the remediation agreement.[24] While an agreement is in force, any criminal prosecution for conduct that is covered by the agreement would be put on hold.[25] If the accused organization complies with the terms and conditions set out in the agreement, the prosecutor would apply to a judge for an order of successful completion[26] when the agreement expires. The charges would then be

public consultation", Government of Canada, pg. 5, online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/volet-stream-eng.pdf>.

17. Peter Mantas, "Canadian DPA? Cross-country consultations begin", *White Collar Post* (October 31, 2017), online: <http://whitecollarpost.com/canadian-dpa-cross-country-consultations/#more-354>.
18. C. 12.
19. "Remediation Agreements and Orders to Address Corporate Crime: Backgrounder", Government of Canada, Sept. 11, 2018, online: <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>.
20. *Criminal Code*, R.S.C. 1985, c. C-45, s. 715.34(1)(p).
21. *Ibid.*, s. 715.37(6).
22. *Ibid.*, s. 715.37(6)(b).
23. *Ibid.*, s. 715.37(6)(c).
24. *Ibid.*, s. 715.37(6).
25. *Ibid.*, ss. 715.37(7)-(8).
26. *Ibid.*, s. 715.4(1).

stayed[27] and no criminal conviction would result. If the accused did not comply, the charges could be revived[28] and the accused could be prosecuted and potentially convicted.[29]

(b) Eligibility

To be eligible for a remediation agreement, the accused would have to be an organization other than a public body, a trade union or a municipality.[30]

A remediation agreement can only be used for economic crimes listed in the Schedule to Part XXII.1 of the *Criminal Code*,[31] such as corruption, fraud and bribery. It cannot be used for offences that have caused death or serious bodily harm or that have injured national defence or national security.[32] Similarly, a remediation agreement cannot be used for an offence committed on the direction of, or on behalf of, a criminal organization or terrorist group.[33]

Canada's Department of Justice has not yet provided guidance on when they intend to use the RAR. However, the *Criminal Code* requires that prosecutors consider a number of factors when deciding whether they should negotiate a remediation agreement with an organization, including: the circumstances of the offence, the nature and gravity of the act or omission and its impact on any victim, the degree of involvement of senior officers of the organization, whether the organization has taken disciplinary action against those involved, made reparations or taken other measures to remedy the harm caused, and whether the organization has previous convictions, sanctions or settlements for similar offences in Canada or elsewhere.[34]

27. *Ibid.*, s. 715.4(2).
28. *Ibid.*, ss. 715.39(1)-(2).
29. *Supra* note 19.
30. *Criminal Code*, R.S.C. 1985, c. C-45, s. 715.3(1).
31. R.S.C. 1985, c. C-45, Schedule to Part XXII.1 (Section 715.3 and ss. 715.32(2) and 715.43(2) and 3)). Offences in respect of which a remediation agreement may be entered into are any offence under: s. 119 or 120 (bribery of officers); s. 121 (frauds on the government); s. 123 (municipal corruption); s. 124 (selling or purchasing office); s. 125 (influencing or negotiating appointments or dealing in offices); s. 139(3) (obstructing justice); s. 322 (theft); s. 330 (theft by person required to account); s. 332 (misappropriation of money held under direction); s. 340 (destroying documents of title); s. 341 (fraudulent concealment); s. 354 (property obtained by crime); s. 362 (false pretence or false statement); s. 363 (obtaining execution of valuable security by fraud); s. 366 (forgery);
32. *Criminal Code*, R.S.C. 1985, c. C-45, s. 715.32(2)(b).
33. *Ibid.*
34. *Ibid.*, s. 715.32(2).

Prosecutors would be notably prohibited from considering Canada's economic interests, the identity of the organization, and any potential effects on Canada's relationships with other countries when deciding whether to negotiate a remediation agreement.[35]

(c) Terms and Conditions

The terms of a remediation agreement will vary, depending on the circumstances of each case, but to ensure accountability and promote compliance, certain terms are mandatory.[36] For example, each agreement will include an agreed statement of facts.[37] The corporation will need to

- provide an admission of responsibility for its conduct;[38]
- pay a financial penalty;[39]
- relinquish any benefit gained from the wrongdoing;[40]
- make reparation to victims, including overseas victims, as appropriate;[41] and
- cooperate in any investigation, prosecution or other proceeding in Canada – or elsewhere, if appropriate.[42]

Optional conditions would include a requirement to appoint an independent monitor to verify that the organization has complied with the terms of the agreement,[43] payment of the prosecutor's costs,[44] and an obligation to put in place or enhance compliance measures.[45]

Admissions contained in the agreed statement of facts or admission of responsibility are admissible in evidence in civil or criminal proceedings related to the act or omission. However any other admissions made in connection with the remediation agreement will not be admissible in evidence, provided the agreement is approved by the court.[46]

35. *Ibid.*, s. 715.32(3).
36. *Supra* note 19.
37. *Criminal Code*, R.S.C. 1985, c. C-45, s. 715.34(1)(a).
38. *Ibid.*, s. 715.34(1)(b).
39. *Ibid.*, s. 715.34(1)(f).
40. *Ibid.*, s. 715.34(1)(e).
41. *Ibid.*, s. 715.34(1)(g).
42. *Ibid.*, s. 715.34(1)(d).
43. *Ibid.*, s. 715.34(3)(c).
44. *Ibid.*, s. 715.34(3)(b).
45. *Ibid.*, s. 715.34(3)(a).
46. *Ibid.*, s. 715.34(2).

(d) Transparency

The RAR is highly transparent. Once negotiations have commenced, there is a duty imposed on the prosecutor to inform victims that a remediation agreement is being entered into so long as doing so will not interfere with, compromise or cause excessive delay to the negotiations.[47] When a remediation agreement is approved by the court, the decision and the reasons for the decision are required to be published as soon as possible.[48] Conversely, where a remediation agreement is not approved, the reasons and decision not to make that order are required to be published as soon as possible.[49] The same publication rules apply to any variation order, termination, stay of proceedings and order declaring successful completion.[50]

The court may decide not to publish an agreement or an order if it is satisfied that non-publication in whole or in part, is necessary for the proper administration of justice.[51] When deciding whether non-publication is necessary, the following factors must be taken into account: (a) society's interest in encouraging the reporting of offences and the participation of victims in the criminal justice process; (b) whether it is necessary to protect the identity of any victims, any person not engaged in the wrongdoing and any person who brought the wrongdoing to the attention of the investigative authorities; (c) the prevention of any adverse effect to any ongoing investigation or prosecution; (d) whether effective alternatives to non-publication are available in the circumstances; (e) the beneficial and deleterious effects of non-publication; and (f) any other factor that the court considers relevant.[52]

(e) Cases

At the time of writing, there have not yet been any cases of remediation agreements having been used in Canada. However, SNC-Lavalin Group Inc. ("SNC-Lavalin") has filed for judicial review of the Public Prosecution Service of Canada's decision not to "invite" SNC-Lavalin to take part in a remediation agreement in order to resolve corruption and fraud charges against the company.[53]

47. *Ibid.*, ss. 715.36(1)-(2).
48. *Ibid.*, s. 715.42(1)(a).
49. *Ibid.*, s. 715.42(1)(b).
50. *Ibid.*, s. 715.42(1)(b).
51. *Ibid.*, s. 715.42(2).
52. *Ibid.*, s. 715.42(3).
53. Julien Arsenault, "SNC-Lavalin requests court review of federal decision to exclude it from remediation regime", *The Globe and Mail* (Oct. 30, 2018),

(f) Implications

The RAR must be understood in the context of the risk of a corporate accused's criminal conviction resulting in a debarment from public procurement and contracts. Canada has a policy-based debarment system to protect the integrity of federal procurement and real property transactions called the "Integrity Regime." The Integrity Regime consists of the *Ineligibility and Suspension Policy*[54] (the "Policy") and any directives issued further to the policy, and clauses, which are used to incorporate the policy into solicitations.[55] It applies to contracts and real property agreements awarded by all federal departments and agencies under Schedule I, I.1 and II of the *Financial Administration Act*,[56] with some exceptions.[57] Where a federal government supplier is convicted of an offence listed in the Policy, they can become ineligible to enter into contracts or real property agreements with the Government of Canada for a period of up to 10 years.[58] A supplier may apply to have their ineligibility period reduced by up to five years if they cooperate with law enforcement authorities or undertake remediation action(s).[59] Suppliers may be suspended for a period of up to 18 months if they have been charged with a listed offence or have admitted guilt.[60] Offences listed in the policy relate to white collar and corporate crime such as corruption, fraud, bribery and collusion.[61] They are generally the same offences for which a remediation agreement would now be available.

The RAR offers the prospect of avoiding criminal prosecutions to companies accused of white collar crime and is a welcome development, particularly for companies who do business with the

online: <https://www.theglobeandmail.com/business/article-snc-lavalin-requests-court-review-of-federal-decision-to-exclude-it/>.

54. Available online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>; Integrity provisions, online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/clauses-eng.html>.
55. Government of Canada, "Integrity Regime: Annual Report - April 1, 2017 to March 31, 2018" (June 29, 2018), online: <https://www.tpsgc-pwgsc.gc.ca/ci-if/rpri-irr-2017-2018-eng.html>.
56. R.S.C. 1985, c. F-11.
57. Government of Canada, *Ineligibility and Suspension Policy* (July 14, 2017), s.4(a), online: <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html?mode=print>; *Supra* note 55.
58. *Ibid.*
59. *Ibid.*
60. Government of Canada, *Ineligibility and Suspension Policy* (July 14, 2017), s.7, online: http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html?mode=print>; *Ibid.*
61. *Supra* note 55.

Government of Canada. The loss of lucrative procurement or supply contracts can be devastating for companies who do business with the Canadian government. It is the innocent stakeholders such as employees and investors, who suffer the most when corporations are convicted; due to job losses and declining share prices. And foreign companies with similar issues are able to work freely in Canada and around the world because of DPA regimes in other jurisdictions. The RAR levels the playing field for Canadian companies and its stakeholders, allowing them to stay competitive, while also encouraging them to cooperate in the prosecution of the individuals who have committed the wrongdoing.

Note that the Integrity Regime is currently being revised (the "proposed Policy") to introduce greater flexibility in debarment decisions, increase the number of triggers that can lead to debarment, explore alternatives to further mitigate the risk of doing business with organizations engaged in organized crime and to expand the scope of business ethics covered under the regime in key areas such as human trafficking, labour rights, and the environment. The revised Policy will be released November 15, 2018 and comes into effect January 2019.[62]

Under the proposed Policy, organizations that enter into a remediation agreement for white collar and corporate crimes that would have, on conviction, resulted in a period of debarment for up to 10 years, will only face the potential for debarment from federal government contracts or real property agreements for up to 18 months.[63] Furthermore, in the draft Policy, the Registrar of Ineligibility and Suspension (the "Registrar") would be able to accept any or all of a remediation agreement to be an administrative agreement pursuant to the Policy.[64] This would allow the Registrar, at his/her discretion, to stay a supplier's period of ineligibility.[65] This is a significant incentive for organizations to enter into remediation agreements with Canadian prosecutors.

62. *Ibid.*
63. Government of Canada, "Proposed draft: Ineligibility and Suspension Policy for consultation" (Oct. 11, 2018), s.10.1.4, online: < https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html#s1 >.
64. *Ibid.*
65. *Ibid.*

3. US Deferred Prosecution Agreements

(a) Overview

DPAs in the United States have no statutory authority and are not subject to any specific legislative framework. Rather, they are based on policies issued by the DOJ and guidelines set out in memos issued by the Deputy Attorney General.[66] DPAs are only used by prosecutors from the DOJ or the Securities Exchange Commission ("SEC").[67] However, the vast majority are concluded by the DOJ. Since 2000, approximately 485 agreements[68] were initiated by the DOJ and only 10 were initiated by the SEC.[69] Accordingly, the following discussion will place a greater emphasis on DOJ guidance.

In a US DPA, the prosecutorial authority files select criminal charges against a defendant, usually in the form of criminal information. The prosecution is then deferred for a set period of time. The prosecutorial authority will agree to seek a dismissal of the charges at the end of the time period if the defendant has complied with the terms.[70] As part of the terms of the agreement, a defendant will generally need to accept not to challenge an agreed narrative and

66. "Another Arrow in the Quiver?: Consideration of a Deferred Prosecution Agreement Scheme in Canada", Transparency International Canada, July 2017, online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>.

67. Justin O'Brien, "The Sword of Damocles: who controls HSBC in the aftermath of its deferred prosecution agreement with the United States Department of Justice" (2012), Northern Ireland Legal Quarterly 63:4, pg. 534; "Another Arrow in the Quiver?: Consideration of a Deferred Prosecution Agreement Scheme in Canada", Transparency International Canada, July 2017, pg. 10, online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>; Sarah Marberg, "Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act" (2012), Vanderbilt Journal of Transnational Law 45:557, pg. 567; Peter Spivack & Sujit Raman, "Regulating the New 'Regulators': Current Trends in Deferred Prosecution Agreements" (2008), American Criminal Law Review 45, pgs. 159, 163-164.

68. These figures are inclusive of deferred prosecution agreements and non-prosecution agreements.

69. 2018 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), Gibson, Dunn & Crutchew LLP, July 10, 2018, online: <https://www.gibsondunn.com/2018-mid-year-npa-dpa-update/>.

70. Robert W. Tarun and Peter P. Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 5th ed. (Chicago: American Bar Association, 2018), pg. 353.

engage in remedial action.[71] If there is no repetition of the complained of conduct and all of the terms are complied with within the agreed timeframe, the charges are voided. Conversely, a violation allows for a filing of an indictment in which the statement of facts cannot be challenged.[72] It is, therefore, an admission of guilt.

The role of American courts is fairly limited. DPAs are filed with the court if a prosecution is resumed. However, the courts do not play a significant role in approving or in overseeing a company's compliance with the terms of the agreement. Most of the DPA process occurs between the defendant and the prosecutors. Although the final agreement requires judicial approval, judges have limited discretion to modify or reject a DPA entered into by and between a defendant and U.S. federal prosecutors.[73] According to the well-known NGO, Transparency International:

> This places DPAs under the general authority and discretion of prosecutors. Therefore, their form and content may vary a great deal from case to case. Although they have to be filed with a court and a judge must approve the terms of a DPA before it enters into force, the lack of a statute defining the court's obligations and the boundaries of the prosecutor's powers and that of the accused's rights means that the level of judicial involvement will depend on the judge hearing the case.[74]

(b) Eligibility

DOJ and SEC prosecutors have the discretion to offer a DPA to a corporation or an individual in respect of any federal crime for which there is a case for prosecution. DPAs are not available for matters such as those involving national security, foreign affairs, for an individual with two or more felony convictions, or a matter where a public official has violated the public trust.[75]

The DOJ's Attorney's Manual has in its "Principles of Federal Prosecution of Business Organizations" nine, non-exhaustive, factors that prosecutors should consider when deciding whether to charge a corporation.[76] The term corporation refers to all types of

71. *Supra* note 67.
72. *Ibid.*
73. *Supra* note 70.
74. *Supra* note 67
75. U.S. Department of Justice, *Attorneys' Manual*, Title 9-22.100, *Pre-trial Diversion program: Eligibility Criteria*, online: <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program>.
76. U.S. Department of Justice, *Attorney's Manual,* Title 9-28.300 – *Factors to be Considered,* online: <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

business organizations including partnerships, sole proprietorships, government entities and unincorporated associations.[77] The factors are as follows:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's willingness to cooperate in the investigation of its agents;
5. the existence and effectiveness of the corporation's pre-existing compliance program;
6. the corporation's timely and voluntary disclosure of wrongdoing;
7. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
9. the adequacy of remedies such as civil or regulatory enforcement actions; and
10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[78]

(c) Terms and Conditions

DPAs have no standard form in the United States. However, they will generally include an agreed statement of fact and a financial penalty. While a defendant corporation can avoid a formal guilty plea with a DPA, it cannot publicly assert its innocence or deny the filed charges.[79] Further, DPAs will usually impose a combination of the following conditions on the defendant:

77. U.S. Department of Justice, *Attorney's Manual,* Title 9-28.200 – *General Considerations of Corporate Liability*, online: <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.
78. *Supra* note 76.
79. *Supra* note 70.

- payment of a penalty (a fine and/or restitution);
- an acceptance of responsibility by the corporation;
- full and truthful cooperation;
- waivers of attorney-client and work product privilege;
- implementation of an effective corporate compliance program and/or code of conduct;
- appointment of a monitor or an independent compliance consultant;
- a provision that the statute of limitations is not time-barred and is tolled; and
- a provision that in the event of a breach, the Statement of Facts, which accompanies the DPA, will be admissible in evidence in all criminal proceedings.[80]

In a study of US non-prosecution agreements and DPAs between 1993-2013 by professors Wulf A. Kaal and Timothy A. Lacine, it was found that 96% contain waiver of rights provisions, 91% contain cooperation provisions, and 75% contain provisions requiring improved compliance programs.[81] Other terms that have been included in US DPAs with less frequency are requirements to conduct an internal investigation, dismissal of employees involved in the misconduct, changes in senior management or the board, and general business changes.[82]

Monitors are appointed in about half of all US DPAs.[83] However, in the past five years, they have only been imposed in approximately one in three corporate resolutions,[84] indicating a modest decline in usage. A monitor's primary responsibility is to assess a corporation's compliance with the terms of the agreement. Their function is to address and reduce the risk of recurrence of the corporation's misconduct and not to further punitive goals. The DOJ will only require a monitor in appropriate cases considering the potential benefits that employing a monitor may have for the corporation and the public as well as the cost of a monitor and its impact on the operations of a corporation.[85]

80. *Ibid.*; *Supra* note 67; Harry First, "Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions" (2010), The North Carolina Review 89, pgs. 23 & 47.
81. Wulf A. Kaal and Timothy A. Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014), The Business Lawyer 70, pgs. 112-113.
82. *Ibid.*; *Supra* note 67.
83. Anthony Barkow and Rachel Barkow, *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York: NYU Press, 2011): pg. 4.
85. Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United

Nine principles for the selection and use of monitors were enumerated by then Acting Deputy Attorney General Craig Morford in a 2008 memorandum and a 10th principle was added by then Acting Deputy Attorney General Gary Grindler in a 2010 memorandum, both of which have been integrated into the U.S. Attorney's Manual.[86] With regard to the selection of a monitor, the Morford Memorandum states that the monitor should be a highly qualified and respected person or entity, that any potential or actual conflicts of interests be avoided and that the monitor instill public confidence.[87] It further states that there is no one method of selection that should be used in every instance.[88] However it strongly recommends that a standing or ad hoc committee of prosecutors should be created to consider a pool of at least three qualified candidates submitted by the corporation. Alternatively, in a situation that calls for a greater role for the government in the selection of the monitor, the roles would be reversed with the Government submitting a list of names for the corporation to choose from.[89] DPAs have largely adopted the practices suggested in the Morford

States Attorneys, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008), online: <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>;

86. *Ibid.*; Memorandum from Gary G. Grinder, Acting Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (May 25, 2010), online: <https://www.justice.gov/sites/default/files/dag/legacy/2010/06/01/dag-memo-guidance-monitors.pdf>; U.S. Department of Justice, *Criminal Resource Manual*, Title 163 – *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, online: <https://www.justice.gov/jm/criminal-resource-manual-163-selection-and-use-monitors>.
87. Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008), pg. 3, online: <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.
88. *Ibid.*
89. "Another Arrow in the Quiver?: Consideration of a Deferred Prosecution Agreement Scheme in Canada", Transparency International Canada, July 2017, pg. 13, online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>; Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (March 7, 2008), pgs. 3-4, online: <https://

Memorandum and it is now standard DOJ practice for the corporation to submit three potential monitors and for the Department to select its preferred one.[90]

Due to the high cost of an independent monitor on a company which will be required to pay its bill, which is often over US $30 million, the threat of imposing a monitor on a company involved in negotiations with the DOJ has been a useful negotiating tool.[91] However, the DOJ under Jeff Sessions has been more sensitive to the over-penalization of corporate wrongdoing.[92] Assistant Attorney General Brian A. Benczkowski delivered a recent speech at New York University School of Law and released new guidelines (the "Benczkowski Memorandum"), which outline the department's new approach to the use of corporate monitors which, taken together, signal a more cautious and less liberal approach to the inclusion of monitors in DPA terms, in recognition of the burden corporate monitors represent to shareholders.[93] The Benczkowski Memorandum is a supplement to, not a replacement for, the Morford Memorandum. The new policy recognizes that the imposition of a monitor will not be necessary in many corporate criminal resolutions and holds that as a foundational principle, the imposition of a corporate monitor should not be punitive. The Benczkowski Memorandum provides that a corporate monitor will only be justified when the high cost associated with monitors is outweighed by the benefits of a monitor.[94] Four factors were enumerated for evaluating the potential benefits:

www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

90. "Another Arrow in the Quiver?: Consideration of a Deferred Prosecution Agreement Scheme in Canada", Transparency International Canada, July 2017, pg. 14, online: <http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>.

91. Robert Anello, "Rethinking Corporate Monitors: DOJ Tells Companies to Mind Their Own Business", *Forbes* (Oct. 15, 2018), online: <https://www.forbes.com/sites/insider/2018/10/15/rethinking-corporate-monitors-doj-tells-companies-to-mind-their-own-business/#69d622895b41>.

92. *Ibid.*

93. Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, New York, NY (Oct. 12, 2018), speech, online: <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>; Memorandum from Brian A. Benczkowski, Assistant Attorney General, U.S. Department of Justice, to U.S. Department of Justice Criminal Division, All Criminal Division Personnel, *Selection of Monitors in Criminal Division Matters* (Oct 11, 2018), online: <https://www.justice.gov/criminal-fraud/file/1100366/download>.

(a) whether the underlying misconduct involved the manipulation of corporate books and records or where the exploitation of an inadequate compliance program or internal control systems;
(b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
(c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and
(d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct tin the future.[95]

If the misconduct took place under an inadequate compliance environment that no longer exists, for instance where high level management has been replaced, and an argument can be made that a high-cost monitor would be burdensome to an organization's business operations, it is likely that a monitor may be avoided in corporate criminal resolutions with the DOJ going forward.

The requirement of a waiver of attorney-client or work-product privilege in a DPA has been widespread[96] and not without controversy. Prosecutors were initially encouraged to seek waivers of privilege in then Deputy Attorney General Eric Holder's non-binding guidelines which set out factors for prosecutors to consider when deciding whether to prosecute or enter into plea agreements with a corporation.[97] Significant political pressure was levied against the practice of requiring waivers of privilege and the DOJ softened their position in response.[98] The McNulty Memorandum stated that "Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged

94. Memorandum from Brian A. Benczkowski, Assistant Attorney General, U.S. Department of Justice, to U.S. Department of Justice Criminal Division, All Criminal Division Personnel, *Selection of Monitors in Criminal Division Matters* (Oct 11, 2018), pg. 2, online: <https://www.justice.gov/criminal-fraud/file/1100366/download>.
95. *Ibid.*
96. Wulf A. Kaal and Timothy A. Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014), The Business Lawyer 70, pg. 75.
97. Memorandum from Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & U.S. Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), online: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.
98. Wulf A. Kaal and Timothy A. Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014), The Business Lawyer 70, pgs. 73-77.

information to fulfill their law enforcement obligations."[99] And more recently, the Filip Memorandum has expressed support for the "extremely important function" that attorney-client privilege and attorney work product protection serve in the American legal system and asserts that waiving privilege is not a prerequisite to be viewed as cooperative, nor should such waivers be sought by prosecutors.[100] The Filip Memorandum rather indicates that what prosecutors need to advance their legitimate law enforcement mission is the facts known to the corporation about the putative criminal misconduct under review, which may still involve a waiver of privilege, but on a voluntary basis.[101]

The more recent Yates and Benczkowski memorandums discuss waivers of privilege.[102] The DOJ's position on waiver of attorney client privilege as a factor to be considered in deciding whether to charge a corporation or other business organization remains unclear. In a speech on November 16, 2015, Yates explained that companies seeking cooperation credit "must provide all non-privileged information about individual wrongdoing."[103] She also stated that companies are not required to waive attorney-client privilege or work product doctrine for cooperation credit and prosecutors will not request it.[104] However, the corporation will need to produce all

99. Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), pg. 8, online: <http://federalevidence.com/pdf/Corp_Prosec/McNulty_Memo12_12_06.pdf>.

100. Memorandum from Mark Filip, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (August 28, 2008), pg. 8, online: <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

101. Memorandum from Mark Filip, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components & United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (August 28, 2008), pg. 9, online: <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

102. Memorandum from Sally Quillan Yates, Deputy Attorney General, U.S. Department of Justice, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), online: <https://www.justice.gov/archives/dag/file/769036/download>

103. Deputy Attorney General Sally Quillian Yates Delivers Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference, Washington DC (November 16, 2015), speech, online: <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>.

104. *Ibid.*

relevant facts, unless identical information has already been provided,[105] and that may include privileged or protected information.

(d) Transparency

Publication of DPAs is not mandatory in the United States, nevertheless publication is relatively frequent for DOJ agreements and systematic for SEC agreements.[106]

4. UK Deferred Prosecution Agreements

(a) Overview

Following a public consultation process, the UK DPA regime came into effect on February 24, 2014 as Schedule 17 to the *Crime and Courts Act* (the "*Act*").[107] A *Code of Practice* was published by the Director of Public Prosecutions and the Director of the Serious Fraud Office ("SFO"), pursuant to paragraph 6(1) of the *Act*, for prosecutors to have regard to when negotiating DPAs, applying to the court for approval of a DPA, and overseeing DPAs after their approval by the court.[108]

A UK DPA is an agreement reached between a designated prosecutor (either the Director of Public Prosecutions or the Director of the SFO[109]) and an organization which could be prosecuted for an offence.[110] The agreement allows a prosecution to be suspended for a defined period of time, if the DPA is approved by a judge in the Crown Court,[111] and provided the organization meets certain specified conditions[112] such as paying a financial penalty, paying compensation and cooperating with future prosecutions of individuals. It is a discretionary tool. Only the prosecutor may

105. *Ibid.*
106. *Supra* note 67.
107. 2013 c. 22; "Deferred Prosecution Agreements", UK Serious Fraud Office, online: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.
108. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.
109. *Crime and Courts Act*, 2013, c. 22, Schedule 17, s. 3(1).
110. *Ibid.*, s. 1(1).
111. *Ibid.*, s. 2.
112. *Ibid.*, s. 1(2).

invite the accused to enter into DPA negotiations. The accused has no right to be invited.[113]

Legal proceedings must be commenced. Then they are stayed and no other person may prosecute the organization for the alleged offence.[114] Before approving a DPA, a judge would need to be satisfied that the agreement is in the interests of justice and that the terms of the DPA are fair, reasonable and proportionate.[115] Judicial approval is required in two stages. There is a preliminary hearing after the commencement of negotiations between the prosecutor and the accused organization in respect of a DPA, before the terms are agreed, and a final hearing after the terms have been agreed.[116]

If the organization does not honour the terms of the DPA, the prosecutor may make an application to the Crown Court to terminate it and resume prosecution.[117] If the court finds that the organization has breached the terms of the DPA, the court may either invite the parties to agree to proposals to remedy the breach or terminate the DPA[118] which would allow the criminal prosecution to resume. Arrangements for monitoring compliance with the conditions may be set out in the DPA.

Absent a breach, the DPA remains in force until the expiry date. After the expiry date, if all of the terms of the agreement have been complied with, the prosecutor will discontinue the proceedings by giving notice to the Crown Court.[119] However, if it is discovered, even after a DPA has expired, that the accused provided inaccurate, misleading or incomplete information, or knew or ought to have known that the information was inaccurate, misleading or incomplete, the prosecutor may introduce fresh proceedings.[120]

(b) Eligibility

DPAs are available to corporations, partnerships and unincorporated associations, but not to individuals.[121] In the case of a partnership or an association, the DPA must be entered into in

113. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, ss. 1.1 & 2.1, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.
114. *Supra* note 111.
115. *Crime and Courts Act*, 2013, c. 22, Schedule 17, ss. 8(1)(a)-(b)
116. *Ibid.*, ss. 7-8.
117. *Ibid.*, s. 9(1)
118. *Ibid.*, s. 9(3).
119. *Ibid.*, s. 11(1).
120. *Ibid.*, s. 11(3).
121. *Ibid.*, s. 4(1).

the name of the partnership or the association and any money payable must be paid out of the funds of the partnership or the association.[122]

A DPA may be entered into in relation to the offences listed in Part 2 of Schedule 17 of the *Act*, such as fraud, theft, false accounting, forgery, bribery and money laundering.[123]

The *Code of Practice* sets out what is purportedly a two-stage test for prosecutors to initiate DPA negotiations in s. 1.2 which includes: (i) an evidential stage, (ii) a public interest stage,[124] and (iii) a requirement that "the full extent of the alleged offending has been identified" which is difficult to reconcile with the requirements of the

122. *Ibid.*, ss. 4(2)-(3).

123. *Crime and Courts Act*, 2013, c. 22, Schedule 17: Offences in relation to which a DPA may be entered into are: the common law offences of conspiracy to defraud and cheating the public revenue; s. 1 (theft), s. 17 (false accounting), s. 20 (suppression etc of documents) and s. 24A (dishonestly retaining a wrongful credit) under the *Theft Act*, 1968, c. 60; s. 68 (offences in relation to expropriation of prohibited or restricted goods), s. 167 (untrue declarations etc) and s. 170 (fraudulent evasion of duty etc) under the *Customs and Excise Management Act*, 1979, c. 2; s. 1 (forgery), s. 2 (copying a false instrument), s. 3 (using a false instrument), s. 4 (using a copy of a false instrument), and s. 5 (offences relating to money orders, share certificates, passports etc) under the *Forgery and Counterfeiting Act*, 1981, c. 45; s. 450 (destroying, mutilating etc company documents) under the *Companies Act*, 1985, c. 6; s. 72 (fraudulent evasion of VAT) under the *Value Added Tax Act*, 1994, c. 23; s. 23 (contravention of prohibition of carrying on regulated activity unless authorised or exempt), s. 25 (contravention of restrictions on financial promotion), s. 85 (prohibition of dealing etc in transferable securities without approved prospectus), s.346 (provision of false or misleading statements to auditor or actuary), s. 397 (misleading statements and practices) and s. 398 (misleading the FSA) under the *Financial Services and Markets Act*, 2000, c. 8; s. 327 (concealing etc criminal property), s. 328 (arrangements facilitating acquisition etc of criminal property), s. 329 (acquisition, use and possession of criminal property), s. 330 (failing to disclose knowledge or suspicion of money laundering and s. 333A (tipping off) under the *Proceeds of Crime Act*, 2002, c. 29; s. 658 (general rule against limited company acquiring its own shares), s. 680 (prohibited financial assistance) and s. 993 (fraudulent trading) under the *Companies Act*, 2006, c. 46; s. 1 (fraud), s. 6 (possession etc of articles for use in frauds), s. 7 (making or supplying articles for use in frauds) and s. 11 (obtaining services dishonestly) under the *Fraud Act*, 2006, c. 35; s. 1 (bribing another person), s. 2 (being bribed), s. 6 (bribery of foreign public officials) and s. 7 (failure of commercial organisations to prevent bribery) under the *Bribery Act*, 2010, c. 23; an offence under regulation 45 of the *Money Laundering Regulations*, 2007 (S.I. 2007/2157); and any ancillary offence relating to any of the aforementioned offences.

124. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, s. 1.2, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.

"evidential stage." The "evidential stage" requires that either the Full Code Test in the *Code for Crown Prosecutors* is satisfied or that there is at least a reasonable suspicion based upon some admissible evidence that the organization committed the offence and there are reasonable grounds to believe that continued investigation would provide it, in a reasonable period of time, so that all the evidence taken together would create a realistic prospect of conviction in accordance with the Full Code Test.[125]

With respect to the "public interest stage", the more serious the offence, the more likely prosecution is in the public interest.[126] Prosecutors are to have regard to the United Kingdom's commitment to abide by the Organization for Economic Cooperation and Development Convention on "Combating Bribery of Foreign Public Officials"[127] and the factors set out in the *Code for Crown Prosecutors*.[128] Additional public interest factors include: (i) a history of similar conduct, (ii) that the conduct alleged is part of the established business practice of the organization, (iii) that the offence was committed at a time when the organization had an ineffective compliance programme or none at all and has been unable to demonstrate significant improvement, (iv) that the organization has been subject to previous warning, sanctions or criminal charges, (v) failure to notify the wrongdoing within a reasonable time of the offending conduct coming to light, (vi) reporting the wrongdoing but failing to verify it, or knowingly reporting inaccurate, misleading or incomplete information, and (vii) a significant level of harm caused directly or indirectly to the victims or a substantial adverse impact to the markets or governments.[129]

(c) Terms and Conditions

The terms of each DPA will vary, depending on the particular circumstances, but there are certain terms that are mandatory in all cases. A DPA must contain an agreed statement of facts, which may or may not include admissions, and specify an expiry date, which is the date on which the DPA ceases to have effect, if it is not terminated for breach.[130] According to the *Code of Practice*, there is no

125. *Ibid.*
126. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, s. 2.4, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.
127. *Ibid.*, s. 2.7.
128. *Ibid.*, s. 2.8.
129. *Ibid.*, s. 2.8.1.
130. *Crime and Courts Act*, 2013, c. 22, Schedule 17, ss. 5(1)-(2).

requirement for formal admissions of guilt in respect of the offences charged by the indictment, though it will be necessary for the organization to admit to the contents and meaning of key documents referred to in the statement of facts.[131] But according to the *Act*, the statement of facts will be treated as an admission by the organization in any proceedings brought against the organization for the alleged offence, provided the DPA has received final approval from the court.[132]

The *Act* includes a non-exhaustive list of optional requirements: (a) paying the prosecutor a financial penalty; (b) compensating victims of the alleged offence; (c) donating money to a charity or other third party; (d) disgorging any profits made by the organization from the alleged offence; (e) implementing a compliance programme or making changes to an existing compliance programme relating to policies or to the training of employees or both; (f) cooperating in any investigation related to the alleged offence; and (g) paying any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.[133]

The amount of a financial penalty agreed between the prosecutor and the organization, if any, must be broadly comparable to the fine that a court would have imposed on the organization on conviction.[134] In all four DPAs concluded to date, financial penalties have been imposed.[135] It seems that it would be the exceptional case where an organization entering into a DPA could escape a financial penalty altogether. However, the penalty may not be as high as the code indicates would be necessary based on Lord Justice Leveson's judgment in *Serious Fraud Office v. XYZ Ltd*[136] where a DPA was approved that imposed a financial penalty of merely 352,000, taking into account 6,201,085 disgorgement of profit,[137] where a financial penalty between 16.25 million and 26 million should have been the starting point[138]given that the

131. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, s. 6.1, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.
132. *Crime and Courts Act*, 2013, c. 22, Schedule 17, s. 13(2); *Criminal Justice Act*, 1967, c. 80, s. 10.
133. *Crime and Courts Act*, 2013, c. 22, Schedule 17, s. 5(3).
134. *Ibid.*, s. 5(4).
135. *Supra* note 5.
136. *Serious Fraud Office v. XYZ Ltd* (Crown Court, 11th July 2016).
137. *Ibid.*, at paras. 23-24.
138. Kevin Robinson, "The UK's Second Deferred Prosecution Agreement - Implications for Parent Companies and Lessons for the Future" (May 2017), Business Law International 18:2, pg. 192.

Sentencing Council Guideline identifies the starting point for a high level of culpability as 300% of the "harm" (i.e. gross profit), with a range of 250% to 400%[139] and in this case the total gross profit from contracts obtained by bribery was said to be 6.5 million.[140] In assessing the amount of a fine, self-reporting and cooperation will be relevant as mitigating factors.[141]

Arrangements for monitoring compliance with the conditions of the DPA will be set out in the terms of the DPA, if applicable.[142] The general principle for the appointment of monitors is that the appointment will depend on the factual circumstances of each case and must always be fair, reasonable and proportionate.[143] Whether a corporation already has a genuinely proactive and effective corporate compliance program is a factor prosecutors will consider in deciding whether a monitor should be required in the terms of a DPA.[144] Unlike in the United States where it has not been uncommon for a monitor to be appointed where the corporate accused has a functioning compliance program, the UK *Code of Practice* appears to view the two as substitutable. Where a monitor is required, it will be the responsibility of the organization to pay all the costs associated with the selection, appointment and activities of the monitor.[145]

The process for the selection of a monitor is similar to the process that is recommended by the U.S. Attorney's manual. The organization is to provide the prosecutor with three potential monitors, including relevant qualifications, past associations with the organization and an estimate of the costs of the monitorship, and their preferred monitor among the three.[146] The prosecutor will ordinarily accept the organization's preferred monitor, except if there is a conflict of interest or the monitor is inappropriate.[147]

The primary responsibility of the monitor is to assess and monitor the organization's internal controls, advise of necessary compliance improvements and report specified misconduct to the prosecutor.[148]

139. *Serious Fraud Office v. XYZ Ltd* (Crown Court, 8th July 2016) at para. 52.
140. *Serious Fraud Office v. XYZ Ltd* (Crown Court, 11th July 2016) at para. 9.
141. *Serious Fraud Office v. Rolls-Royce plc & Rolls-Royce Energy Systems* (Crown Court, 17th January 2017) at 21-22; *Serious Fraud Office v. XYZ Ltd* (Crown Court, 11th July 2016).
142. *Deferred Prosecution Agreements: Code of Practice*, Serious Fraud Office and Director of Public Prosecutions, s. 7.11-7.21, online: <https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice>.
143. *Ibid.*, s. 7.11.
144. *Ibid.*
145. *Ibid.*, s. 7.13.
146. *Ibid.*, s. 7.15-7.16.
147. *Ibid.*, s. 7.17.

The accused must afford the monitor complete access to all relevant aspects of its business during the course of the DPA. However, any legal professional privilege is unaffected and remains intact.[149]

(d) Transparency

The DPA process and application criteria are publicly available in the *Act* and in legislatively-mandated guidance. The process itself is highly transparent. The prosecutor is required to ensure that a full and accurate record of negotiations is prepared and retained and cannot agree to additional matters with the organization which are not recorded in the DPA and made known to the court.[150]

While a preliminary hearing for court approval of a DPA may be held in private,[151] court approval of a DPA at a final hearing must be made in open court, with reasons.[152] Upon approval of the DPA by the court, the prosecutor is required to publish the DPA and the court's decision approving it.[153] The prosecutor must also publish the court's decision, including the reasons for its decision: where a court decides that an organization has breached the terms of a DPA and the court has invited the prosecutor to agree on a proposal to remedy the breach, and where the court has terminated a DPA.[154] The prosecutor is also required to publish its own decision not to bring the matter before the court if it believes the organization has breached the terms of the DPA.[155] Any decision on discontinuance of the DPA must be published.[156] However, the aforementioned publication requirements in s. 8-11 of the *Act* may be postponed for any amount of time by a court order under s. 12 if doing so is necessary to avoid substantial risk of prejudice to the administration of justice in any legal proceedings.[157] A s. 12 order may in practice operate approximate to a full publication ban given the lack of any time restrictions on its use.

148. *Ibid.*, s. 7.12.
149. *Ibid.*, s. 7.14.
150. *Ibid.*, s. 3.4.
151. *Crime and Courts Act*, 2013, c. 22, Schedule 17, s. 7(4).
152. *Ibid.*, s. 8(6).
153. *Ibid.*, s. 8(7).
154. *Ibid.*, ss. 9(5)-(7).
155. *Ibid.*, s. 9(8).
156. *Ibid.*, s. 11(8).
157. *Ibid.*, s. 12.

5. French Judicial Public Interest Agreements (*Convention Judicaire d'Intérêt Public*)

(a) Overview

In December 2016, France enacted the Sapin II Law, named for then Minister of Finance Michel Sapin, which authorized DPAs *à la française*, called *Convention Judicaire d'Intérêt Public* or "judicial public interest agreements" in English ("CJIP"), and set up the French Anticorruption Agency ("AFA").[158] The purpose of the Sapin II Law is to prevent corruption and increase transparency.[159] It has been viewed as a response to criticism of France's anti-corruption enforcement by the Organization for Economic Cooperation and Development[160] and a number of highly publicized cases of French companies paying fines totalling over $2 billion to the US treasury to resolve criminal matters that could have been resolved in France.[161] The Sapin II Law puts in place anti-corruption measures with a view to a more efficient pursuit and prosecution of both domestic and foreign anticorruption cases. It mandates that large companies, or groups of companies, with over 500 employees and EUR 100 million of turnover, implement detailed anti-corruption compliance plans.[162] It also expands French anti-corruption law to cover certain extraterritorial conduct and enhances protections for whistleblowers.

The AFA is empowered to obtain disclosure, to conduct interviews

158. *Loi Sapin II pour la transparence de la vie Aconomique* ("Sapin II"), *Legifrance* (December 9, 2016), online: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&dateTexte=&categorieLien=id>; FrAdAric Ruppert and Maria Lancri, "The French system of law is changing through DPAs", *White Collar Post* (January 15, 2018), online: <http://whitecollarpost.com/page/2/>; Maria Knapp, "Will the Sapin II Anti-Corruption Law Shepherd France into a New Era of Transparency?", *Forbes* (Dec 14, 2016), online: <https://www.forbes.com/sites/riskmap/2016/12/14/will-the-sapin-ii-anti-corruption-law-shepherd-france-into-a-new-era-of-transparency/#b9d7dd148f08>.

159. FrAdAric Ruppert and Maria Lancri, "Guest Post: Insights into the New French Anti-Bribery & Corruption Law", *White Collar Post* (February 21, 2017), online: <http://whitecollarpost.com/guest-post-insights-new-french-anti-bribery-corruption-law/#more-298>.

160. *Ibid.*

161. Frederick T. Davis, "A French Court Authorizes the First-Ever 'French DPA'", *Program on Corporate Compliance and Enforcement at New York University Law School*, online: <https://wp.nyu.edu/compliance_enforcement/2017/11/24/a-french-court-authorizes-the-first-ever-french-dpa/>.

162. *Supra* note 159.

and carry out onsite inspections. It does not have investigative powers and cannot impose criminal penalties. Its mandate is to: (i) provide up-to-date guidance and support to companies in relation to prevention obligations; (ii) sanction breaches of the prevention obligation including formal warnings, injunctions or fines of up to EUR 1 million against companies and EUR 200,000 against individuals; and (iii) monitor remediation plans.[163]

The CJIP is established under Article 22 of the Sapin II Law.[164] This new procedure allows the public prosecutor to propose that companies settle before criminal proceedings are initiated and to avoid criminal conviction, provided they agree to take certain actions mandated by the terms of a CJIP.[165] Note that it is only the public prosecutor that may propose a CJIP. After the parties have reached consensus, the Public Prosecutor will submit the settlement agreement to the court for validation after a public hearing. The Public Prosecutor will not initiate a prosecution if the company complies with the terms of the settlement agreement.[166]

(b) Eligibility

CJIPs are available to any legal persons.[167] However, individuals involved in corruption may still be prosecuted personally.[168] They may be used in cases involving corporate corruption, influence peddling and money laundering related to tax fraud.[169] The Sapin II Law grants extraterritorial reach to French prosecutors to enforce anti-corruption laws committed by French companies overseas where a foreign company has a sufficient nexus with France.[170]

163. *Supra* note 158.
164. *Supra* note 158.
165. Pascal Bine, Jamie L. Boucher, Armand W. Grumberg, Ryan D. Junck, Keith D. Krakaur, Elizabeth Robertson, Francois Barriere, "New French Anti-Corruption Legal Framework", *Skadden, Arps, Slate, Meagher & Flom LLP* (December 20, 2016), online: <https://www.skadden.com/insights/publications/2016/12/new-french-anticorruption-legal-framework>.
166. Wu Wei, Zhu Yuanyuan and Zhang Shuang, "Analysis of the Sapin II Law in France", *King & Wood Mallesons* (November 24, 2017), online: <https://www.kwm.com/en/knowledge/insights/analysis-on-spain-2-of-french-20171124>.
167. *Supra* note 158.
168. *Supra* note 159.
169. *Supra* note 165.
170. *Supra* note 159.

(c) Terms and Conditions

CJIPs do not require any admission of guilt, but they do include the following terms: (i) implementation of an adequate corruption prevention program under monitorship by the AFA for up to three years; (ii) a fine paid to the French treasury and capped at 40% of a company's annual turnover; and (iii) in some cases additional compensation for victims is required.

The AFA ensures the effective application of anti-corruption compliance programs by way of its power to review the existence and efficiency of compliance programs and to impose sanctions under the review of the courts.[171]

(d) Transparency

Each CJIP order, amount and settlement agreement must be published on the AFA's website.[172] However, the settlement reached between an accused and the public prosecutor will not be included in the company's criminal record, which would otherwise prevent companies from submitting bids for French government procurement contracts for five years.

6. Conclusion

As discussed throughout this article, DPAs are a mechanism whereby organizations can resolve allegations of criminal misconduct without being prosecuted and risking a criminal conviction by complying with agreed upon terms. However, many people throughout the world share the concerns that Canadians expressed in the consultations about introducing a Canadian DPA regime that DPAs are a privilege afforded to corporations that can afford to break the law without paying any real consequences and that corporations should be held to the same standards as individuals. But the reality is that a company cannot be put in jail. It will never be possible to subject a corporation to the same penalties as an individual. Furthermore, a criminal conviction can cause immense harm to innocent parties invested in a corporation and not just its

171. *Ibid.*

172. Jamie L. Boucher, Ryan D. Junck, Keith D. Krakaur, Valentin Autret, Khalil N. Maalouf, George Akhobadze, Margot Seve, and Daniel B. Weinstein, "France Announces its First Deferred Prosecution Agreement", *Skadden, Arps, Slate, Meagher & Flom LLP* (December 8, 2017), online: <https://www.skadden.com/insights/publications/2017/12/france-announces-deferred-prosecution-agreement>.

shareholders, but also its employees, customers and suppliers that depend on the corporation's continued viability.

While recognizing that the potential for harm to innocent parties should not allow corporations to act with impunity, governments have sought to strike a delicate balance between protecting innocent parties invested in large organizations and punishing organizations that violate the law. The jurisdictions surveyed in this article have, each in their own way, tried to balance these competing priorities through the implementation of DPA regimes that allows for punishment of culpable organizations through the imposition of financial penalties, organizational changes (i.e. firing individuals responsible for the misconduct, primarily), cooperation requirements and the imposition of corporate compliance programs, that are intended to cause minimal harm to innocent parties through the avoidance of pursuing criminal convictions of the organizations. DPAs represent a sensible solution because they support the prosecution of individuals responsible for the criminal misconduct within a corporation and thereby encourage accountability. This is done through the imposition of cooperation requirements within the terms of a DPA.

Cooperation with prosecutorial authorities is incentivized by reductions in the financial penalty that would otherwise be imposed on a corporation either on conviction, or absent full cooperation. The quantum of a financial penalty is by no means insignificant. It must be large enough to maintain public confidence in the criminal justice system and prevent DPAs from becoming, or being perceived as becoming, a "cost of doing business." But the penalty must not be so high as to fail to meet the objective of encouraging companies self-report and preventing excessive harm to innocent parties invested in the company's success. The question of who decides the appropriate terms of a DPA to satisfy the need for punishment and corrective measures based on the nature of the misconduct, is one which has been addressed differently in various jurisdictions. And the need to ensure compliance with the terms of a DPA has also been addressed in various ways.

Canada has implemented a regime with a degree of judicial oversight, more in line with the deferred prosecution regimes in the United Kingdom and France, as opposed to the United States. Canada, like the United Kingdom, requires a judge to approve a remediation agreement negotiated between a prosecutor and the organisation accused of committing an offence with reference to whether the agreement is in the public interest and whether the terms of the agreement are fair, reasonable and proportionate. However,

Canada only requires judicial approval once, whereas the United Kingdom requires judicial approval at two stages, once at the commencement of negotiations between the prosecutor and the accused organization, before the terms are agreed, and a final hearing after the terms have been agreed. The UK system provides the parties with the added comfort that the terms negotiated, will ultimately be approved by the courts, given that the judicial approval will be obtained during the negotiations but may also serve to increase the expense of the DPA negotiations. The UK system may also facilitate increased judicial involvement in the terms of the agreement itself, as Canadian courts, after being presented with a remediation agreement *fait accompli*.

The existence of judicial oversight of remediation agreements in Canada is a marked improvement over the system of DPAs in the United States where the terms of a DPA are almost entirely up to the prosecutorial authority to negotiate and courts are asked to approve agreements that may not necessarily reflect the seriousness of the offence, a concern identified by Judge Gleeson and Judge Leon in *United States v. HSBC Bank USA* and *United States v. Fokker Services*, respectively. The requirement of judicial oversight over remediation agreements serves to promote Canadian public confidence in the administration of justice; with the "public interest" requirement serving as a safeguard against any negotiated agreement that may not adequately account for the revenues obtained from the illegal activity or deter future criminal activity by an organization.

Like the DPA regimes of other jurisdictions, Canada's remediation agreement regime will encourage and support the prosecution of culpable individuals through the cooperation requirements of the DPA. Remediation agreements will support the swift conclusion of white collar crime investigations removing uncertainty for companies and the Crown. Remediation agreements will also benefit Canadians by securing more money for public services while at the same time protecting jobs. The authors expect that given the many benefits of the remediation agreement regime for corporations and the Canadian public, they will be an effective tool for prosecutors to use in the enforcement of white collar crime laws and one which corporations will actively seek out.