

US CORPORATE PRETRIAL DIVERSION: NON/DEFERRED PROSECUTION AGREEMENTS AS A MODEL FOR CONTINENTAL LAW SYSTEMS?⁽¹⁾



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Introduction

Under American criminal procedure and jurisprudence, prosecutors are afforded reasonable prosecutorial discretion; they are given the sole discretion to decide whether or not they will prosecute a defendant in the first instance.⁽²⁾ Due in part to the creativity and flexibility of the US judicial system, federal prosecutors may choose between several means of action when confronted with corporate wrongdoing: declining prosecution; entering into a non-prosecution or deferred prosecution agreement (N/DPA); entering into a plea agreement⁽³⁾; or trying the case in full before a criminal court. This contribution focuses on the pretrial diversion process in the form of N/DPA⁽⁴⁾ since it may represent a source of inspiration for continental legal scholars and policy-makers and an opportunity to augment the continental law tradition with a novel legal mechanism – given

the arguable lack of effective prosecution of corporate wrongdoing across the European continent.

Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) are pretrial arrangements between a prosecutor and a corporate entity, which afford the latter the opportunity to avoid criminal prosecution, potentially formal conviction⁽⁵⁾ and a mark on their criminal record.⁽⁶⁾ These pretrial arrangements are comparable in certain ways to other forms of criminal transactions that already exist within continental law systems,⁽⁷⁾ though the scope of requirements contained in these American pretrial arrangements is broader – i.e. tailor-made for corporate offenders.

This discussion first retraces the historical developments of N/DPAs in the US (I). It then focuses on the structure of such agreements – with a particular emphasis on the terms that may be included by prosecutors in the accord (II) and provides a succinct critical evaluation of the N/DPA regime in the US after a quarter century of existence (III). Last, succinct developments are devoted to the introduction of DPAs in the UK in 2013 (IV) and of a DPA-alike regime in France in late 2016 (V).

I. Historical Developments

NPAs and DPAs have their roots in the US federal “pretrial diversion program” for individual defendants, an alternative to prosecution which purpose is to divert certain offenders – generally juveniles or first time street criminal offenders – from traditional criminal justice proceedings into a program of supervision. When participants successfully complete the program, they are either not charged or existing charges against them are dismissed. If they fail the program, prosecution is (re-)initiated.⁽⁸⁾

1. This contribution is the first of a two-part article devoted to corporate pretrial diversion agreements in the US. The author would like to thank A. E. Zambrano for his assistance in research and editing throughout the writing of this contribution. The second article, which will be published in a forthcoming issue of this Journal, will discuss the particular case of the United States Department of Justice’s “Swiss Bank Program”. See A. E. ZAMBRANO, M. FERNANDEZ-BERTIER, “US corporate pretrial diversion: the case of the Swiss Bank Program”, *International Journal for Financial Services* (forthcoming).
2. The United States Attorney Manual (USAM) provides for general principles of prosecution that must be followed by federal attorneys. USAM 9-27.110.
3. About 97% of federal criminal cases are resolved with a plea agreement. Administrative Office of the US Courts. *Statistics Division, Statistical Tables for the Federal Judiciary*, June 2013, 2014 and 2015, Table D-4, www.uscourts.gov; J. RAKOFF, “Why innocent people plead guilty”, *The New York Review of Books*, 20 November 2014, www.nybooks.com.
4. Solely from a federal law perspective.

5. Although the entity admits to corporate wrongdoing. B. L. GARRETT, “Structural Reform Prosecution”, *Virginia Law Review*, Vol. 93, 2007, p. 853; J. ARLEN, “Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements”, *Journal of Legal Analysis*, Vol. 8, No. 1, Spring 2016, p. 192.
6. United States Sentencing Commission (USSC) 2012 Guidelines Manual, §4A1.2(f).
7. As opposed to common law systems, for the UK has formally adopted a DPA mechanism through the Crime and Courts Act of 2013 (*infra*, IV).
8. USAM 9-22.000. For historical developments on N/DPAs, see L. GIUDICE, “Regulating Corruption”, *Boston University Law Review*, Vol. 91, 2011, pp. 362-365; D. M. UHLMANN, “Deferred prosecution and non-prosecution agreements and the erosion of corporate

Corporate deferrals, that is, deferrals for corporate legal entities, appeared in the early 1990s and were applicable to major companies from the onset. However, these deferrals were sparingly used at first; it has been estimated that only about 10 corporate N/DPAs were concluded within the first decade of their existence.⁽⁹⁾ Non-prosecution and deferred-prosecution agreements became more mainstream at the beginning of the new millennium following the fallout of the Arthur Andersen LLP indictment in 2002, which occurred as a result of the Enron scandal; though the US Department of Justice (DOJ) had initially considered entering a DPA with Arthur Andersen, a settlement never materialized.⁽¹⁰⁾ The subsequent indictment and conviction of one of the five largest accounting companies worldwide eventually forced Arthur Andersen to go out of business, which had a direct effect on jobs, the firm's shareholders, and the accounting industry at large. Furthermore, the US Supreme Court ultimately overturned the conviction verdict pronounced against the legal entity⁽¹¹⁾ – however this decision was moot as the damage had already been done as a result of the failure of the firm. Hence, “[t]he Andersen story taught the DOJ to be extremely cautious of the harmful consequences to innocent third parties if it indicts a corporation”.⁽¹²⁾

The DOJ's⁽¹³⁾ tendency to turn to NPAs and DPAs in corporate criminal matters progressively increased following the Enron debacle⁽¹⁴⁾ and throughout the 2000s.⁽¹⁵⁾ The DOJ's use of pretrial diversion agreements accelerated further since 2010, presumably as a result of the global financial crisis⁽¹⁶⁾ and the birth of a war on white-collar crime. From 2000 to 2016, estimates indicate that the DOJ entered into approxi-

mately 450 N/DPAs compared with only a dozen of such settlements by the Securities Exchange Commission (SEC).⁽¹⁷⁾ Around 80 of those settlements were reached in 2015 and early 2016 alone, as a result of the DOJ Tax Division's "Swiss Bank Program"⁽¹⁸⁾ (which is discussed in a forthcoming issue of the *International Journal for Financial Services*⁽¹⁹⁾). Overall, it is important to note that most corporate offenders still face actual criminal prosecution; that N/DPAs only concern a limited fraction of corporate criminal matters.⁽²⁰⁾

II. Structure of N/DPAs

Non/deferred prosecution agreements are a “middle ground option” between an indictment and the declination of criminal proceedings against a business entity.⁽²¹⁾ Although the use of N/DPAs is not limited to an enumerated list of offenses, the misconduct in question must relate to corporate crime.⁽²²⁾ Most agreements involve alleged Foreign

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- criminal liability”, *Maryland Law Review*, Vol. 72, 2012-2013, pp. 1303-3115.
9. L. ORLAND, “The transformation of corporate criminal law”, *Brooklyn Journal of Corporate, Financial and Commercial Law*, Vol. 45, 2006, p. 210.
 10. Presumably because the demands of the prosecution office were “too onerous” to the company. *Id.*, p. 216.
 11. *Arthur Andersen LLP v United States* (04-368) 544 US 696 (2005) 374 F.3d 281, reversed and remanded.
 12. L. GUIDICE, *op. cit.*, p. 363. See also D. M. UHLMANN, *op. cit.*, pp. 1310-1311.
 13. And – in a very limited way – of the Securities Exchange Commission (SEC).
 14. I.e. the creation of the Corporate Fraud Task Force in 2002; the dissolution of Arthur Andersen; and the issuance of the Thompson Memo in 2003. V. P. NANDA, “Corporate Criminal Liability in the United States: Is a New Approach Warranted?”, in M. PIETH, R. IVORY (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk*, Dordrecht, Springer, 2011, p. 81.
 15. L. GUIDICE, *op. cit.*, p. 361; P. SPIVACK, S. RAMAN, “Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements”, *American Criminal Law Review*, Vol. 45, 2008, p. 160.
 16. E. W. MARTIN, “Deferred Prosecution Agreements: Too Big to Jail and the Potential of Judicial Oversight Combined with Congressional Legislation”, *North Carolina Banking Institute*, Vol. 18, No. 2, 2014 pp. 472-477.

17. F. J. WARIN *et al.*, 2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), p. 2 (2016 Mid-Year Update); 2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), p. 1 (2016 Year-End Update), www.gibsondunn.com.
18. The Swiss Bank Program, which was announced on 29 August 2013, was the result of negotiations between the DOJ and the Swiss Federal Department of Finance. The Program has allowed Swiss banks (and not individuals) the opportunity to resolve potential US tax liabilities for tax-related offenses without the need to go to trial and risk criminal sanctions; in exchange for such out-of-court resolution of tax liabilities, the banks would agree to pay certain fines and disclose certain information related to undeclared “US Related Accounts” located at the bank in question under the period under which the Program applied. US DOJ, “Swiss Bank Program”, www.justice.gov; Joint statement between the US Department of Justice and the Swiss Federal Department of Finance, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, 29 August 2013, www.justice.gov.
19. A. E. ZAMBRANO, M. FERNANDEZ-BERTIER, *op. cit.* (forthcoming).
20. E.g. only about 8% of corporate criminal cases were resolved on the basis of a DPA or NPA in the 2004-2009 period by US Attorneys’ Offices and the Criminal Division of the DOJ – a figure that might be yet increasing. US Government Accountability Office, *Corporate Crime. Preliminary Observations on DOJ’s Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 2009, p. 13 (GAO June 2009).
21. USAM 9.28-200.
22. *Id.* Yet in limited instances, DPAs have been concluded with an individual (i.e. natural person). See, e.g., R. L. CASSIN, “PTC Part Two: SEC announces first deferred prosecution agreement with individual to resolve FCPA case”, 17 February 2016, www.fcplablog.com.

Corrupt Practices Act (FCPA), fraud, tax, trade, compliance, and/or conspiracy offenses.⁽²³⁾ By entering into and complying with the terms of an N/DPA, the presumed offender circumvents traditional lengthy and costly judicial proceedings, but also, more importantly, avoids the consequences of a formal conviction.⁽²⁴⁾ This is a major difference between N/DPAs and plea agreements – which also seek avoidance of a criminal trial in full but do lead to the finding of guilt of the defendant. Therefore, NPAs and DPAs are more favorable and preferred by corporations over pleas given the negative impact that a conviction may have on the viability and financial stability⁽²⁵⁾ of the legal entity in question. N/DPAs allow prosecutors to exercise their discretion to avoid the dramatic consequences that a criminal conviction may have on a corporation,⁽²⁶⁾ and also limit collateral damage to innocent third parties.⁽²⁷⁾ Additional practical considerations that go into the prosecutor's calculus as to whether to enter into non/deferred prosecution agreements include the strength of the case, the feasibility and cost of judicial proceedings and relevant internal policies (e.g., NPAs within the Swiss Bank Program).

The main difference between NPAs and DPAs is a procedural one.⁽²⁸⁾ A *deferred prosecution agreement* implies that the prosecutor files formal charges against the defendant but agrees to defer the proceedings for a defined probationary period in order to allow the defendant to comply with the conditions set forth in the agreement, in which event the prosecutor stays or dismisses the charges in question. The DPA is therefore filed with a court of law – along with a document that identifies the charges that the prosecution has brought against the corporation.⁽²⁹⁾ Furthermore, the agreement is subject to approval by the appropriate court; practically speaking, however, the actual judicial review is limited in practice.⁽³⁰⁾ By contrast, a *non-prosecution agreement* can be more accurately described as a contractual arrangement between the prosecutor and the defendant. No criminal action is ever filed with a court, provided that the beneficiary of the NPA does not breach the agreement. Consequently, NPAs are neither approved nor submitted by/to a court: the agreement is maintained by the parties.⁽³¹⁾

com. On the other hand, the USAM also provides general rules for NPAs that apply to individuals in return for their cooperation – hence being unrelated to corporate offending. USAM 9-27.600. This paper nonetheless focuses on N/DPAs applied to corporate wrongdoing.

23. J. R. COPLAND, R. A. MANGUAL, *Justice out of the shadows. Federal differed prosecution agreements and the political order*, Manhattan Institute, New York, June 2016, p. 9.
24. USSC 2012 Guidelines Manual §4A1.2(f).
25. I.e., “criminal prosecution distract senior management, pummel stock prices, and can inhibit companies’ capacity to obtain credit. For those who choose to resist, government prosecutors bring heavy pressure to bear”. J. R. COPLAND, R. A. MANGUAL, *op. cit.*, p. 4.
26. Yet, one could argue that this affirmation is an overstatement when looking to the limited impact of BNP Paribas’ tremendously onerous conviction in 2015: the financial institution entered into a guilty plea in connection to the violation of sanctions against Sudan, Iran and Cuba and was sentenced to a “record penalty” of USD 8.9 billion (the almost entirety of which consisted in confiscation/forfeiture). US DOJ, “BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act”, 1 May 2015, www.justice.gov.
27. “Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement 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 the agreement”. USAM 9-28.1000, B. Comments.

28. “Although DPAs may generally be more complex and involve higher fines and penalties, the principal distinction between the two types of agreements is nomenclature and procedure, rather than substance”. J. R. COPLAND, R. A. MANGUAL, *op. cit.*, p. 5.
29. GAO June 2009, *op. cit.*, p. 12.
30. Most judges do not even hold hearings for approval of the deferred prosecution agreement; do not have a role in electing the independent monitor... US Government Accountability Office, *Corporate Crime. DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, December 2009, pp. 25-26 (GAO follow-up December 2009). Scholars such as B. L. GARRETT are of the opinion that judges “should provide a meaningful review of the terms of such agreements, given their complexity and importance” (“The metamorphosis of corporate criminal prosecutions”, *Virginia Law Review*, February 2016, Vol. 102, pp. 8-9). Yet, on April 5, 2016, the US Court of Appeals for the District of Columbia Circuit overturned the decision of a District Court to reject an agreement after “looking to the DPA in its totality” (*United States v Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015)). The Court of Appeal held that “[i]t has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences” (*United States v Fokker Servs. B.V.*, No. 15-3016, 2016 WL 1319226, at 1 (D.C. Cir. Apr. 5, 2016)). Although the implications of this decision remain unknown at national level, it seems to confirm the general understanding that DPAs are subject to a quite limited judicial review – an oversight “limited to ensuring their compliance with the Speedy Trial Act” (J. R. COPLAND, R. A. MANGUAL, *op. cit.*, p. 4). “For those who have criticized DPAs as excessively collusive and unreviewable, the opinion is a significant setback”. G. DiBIANCO *et al.*, “DC Circuit Affirms Primacy of Prosecutorial Discretion Over Deferred Prosecution Agreements in *United States v Fokker Services BV*”, 12 April 2016, www.skadden.com.
31. C. S. MORFORD (Acting Deputy Attorney General), Memorandum for heads of department components

Although they are two faces of the same coin, NPAs are more favorable to the defendant – and arguably less burdensome on a prosecution perspective – for no charges are ever brought or any judge involved.

A. Factors to be considered

When determining whether to commence or decline prosecution against a corporation, the authorities must consider several factors such as “the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches”.⁽³²⁾ Yet, given the unique considerations of prosecuting a corporate entity as a defendant, ten additional factors must be weighed by prosecutors – including where they envision entering a non/deferred prosecution agreement:

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

united states attorneys. Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, 2008, p. 1, www.justice.gov.

32. USAM 9-28.300.

10. The adequacy of the prosecution of individuals responsible for the corporation’s malfeasance”.⁽³³⁾

Hence, based on the fourfold and gradual options of the government to resolve a criminal matter – i.e. *declination* < *NPA* < *DPA* < *prosecution*, non-prosecution agreements will be awarded to corporate defendants that have committed less serious offences; that have less misconduct history; that cooperate more actively with the authorities; that take more active remedial actions... whereas deferred prosecution agreements will follow more serious conducts and fewer (effective) actions from the entity.⁽³⁴⁾

It is important to note, however, that the DOJ has taken a unique route with regards to NPAs (excluding the use of DPAs therein) in the implementation of the Swiss Bank Program⁽³⁵⁾: said agreements applied to financial institutions that were not already under investigation by the DOJ at the time of the publication of the Program (i.e. 29 August 2013) and had reason to believe that they had committed tax-related offenses.⁽³⁶⁾

B. Terms of the agreement

American N/DPAs are a fascinating subject for study given the significant (excessive?⁽³⁷⁾) amount of discretion prosecutors are afforded when negotiating such accords – knowing that they are tailor-made for corporate defendants. Besides the financial sanction component, the prosecution may include a wide range of terms in the agreement which imply governance changes and that the corporation must comply with to avoid subsequent prosecution. The most frequent provisions imposed by the prosecutor on the entity, from most to least imposed, are the following⁽³⁸⁾:

Financial sanctions: monetary payments which include high penalties imposed by the DOJ, forfeiture (i.e. confiscation) of the proceeds of crime, restitution to victims, and regulatory sanctions. It is the confiscation of property that traditionally constitutes the biggest portion of the total financial penalty;

Waiver of rights: such requirement includes, amongst others, waiver of the applicable statute of limitation; of the right to challenge the admissibility of evidence in

33. *Id.*

34. GAO June 2009, *op. cit.*, p. 8.

35. A. E. ZAMBRANO, M. FERNANDEZ-BERTIER, *op. cit.* (forthcoming).

36. Joint statement between the US Department of Justice and the Swiss Federal Department of Finance, *op. cit.*

37. J. ARLEN argues that the “broad grant of discretion to individual prosecutors’ offices is inconsistent with the rule of law”, *op. cit.*, p. 191.

38. According to a study period that ranges from 1993 to 2013. V. A. KAAL, T. A. LACINE, “The effect of deferred and non-prosecution agreements on corporate governance: evidence from 1993-2013”, *The Business Lawyer*, Vol. 70, November 2014, p. 33.

court; of the rights of criminal defendants contained within the Sixth Amendment of the Constitution; of the right to appeal the agreement judicially approved;⁽³⁹⁾

Cooperation with the government: the corporation must make full disclosure of its wrongdoing, i.e. it must disclose the “relevant facts” of the alleged misconducts that are at the subject of the agreement.⁽⁴⁰⁾ The notion of “cooperation”, inherently broad, may imply various positive obligations such as identifying to producing documents; providing testimonies from directors to agents of the corporation; disclosing activities of the entity; designating knowledgeable employees as to the corporate wrongdoing; identifying witnesses; authenticating documents into evidence; and/or giving access to facilities⁽⁴¹⁾;

Improved compliance program: the existence of a compliance program serves the purpose of preventing and detecting wrongdoings within the business entity and helps ensure that corporate activities are administered in accordance with existing regulations and other legal obligations. Yet the prosecution must guarantee that the compliance program is not merely a “paper program” but that it is designed for maximum effectiveness and that it is adequately implemented.⁽⁴²⁾ Hence, the agreement proposed by the government often includes establishing or improving a compliance program within the corporate entity. Changes in the program may include improving communication and training; amending corporate policy; disclosing books and records; producing or improving a compliance code; and/or creating a chief compliance officer position⁽⁴³⁾;

Increased monitoring requirements: one of the most interesting features of N/DPAs in terms of reformatory policy (*infra*, III) is the possibility to impose monitoring obligations on the corporation – i.e. with a view to transforming it into a sound and law-abiding entity. The primary role of the third-party independent corporate monitor, which is hired at the own expenses of the corporate target, is to ensure that the legal entity meets the terms set up in the agreement to reduce the risk of recurrence of corporate misconduct. The monitor is therefore appointed for a definite time (i.e. a probationary period). The USAM Criminal Resource Manual provides nine principles for the selection and use of monitors in N/DPAs with corporations.⁽⁴⁴⁾ Succinctly, the monitor must be a highly qualified and respected natural/legal person that has no (potential) conflict of interest with the corporate target⁽⁴⁵⁾ and that is an independent third-party; their primary responsibility is to assess and monitor the compliance of the corporation with the terms of the agreement – through

the evaluation of internal controls, corporate ethics and compliances programs; the monitor may make periodic written reports both to the authorities and the corporation – including recommendations as to necessary changes that the latter should make to promote compliance with the agreement (following the principle “comply or explain”); previously undisclosed or new misconducts shall be reported by the monitor to the government and/or the legal entity; the duration of the monitorship must be tailored to the problems that affect the corporation – with the possibility to extend or reduce the mandate according to its evolution and to the entity’s compliance efforts.

Structural changes: the prosecution may also impose several modifications as relates to the overall structure of the corporation such as changes in senior management – which is required to take on additional oversight responsibilities; board changes that may include a modification of membership but also the creation of subcommittees and the appointment of independent directors; and/or business changes such as interdictions to engage in a certain business segment, to contract with certain counterparties, or the obligation to create new facilities.⁽⁴⁶⁾

Probationary period: the duration of the agreement generally oscillates around a term of 2 to 5 years.⁽⁴⁷⁾ If the terms of the accord are successfully met, criminal proceedings are definitively terminated. To the contrary, if the government finds that the agreement has been breached, it may prosecute the corporation.⁽⁴⁸⁾ The N/DPA therefore hangs as a Sword of Damocles above the business entity’s head until completion of the probationary period – what some refer as “mandates as a new form of liability”.⁽⁴⁹⁾

39. *Id.*, p. 47.

40. USAM 9-28.720.

41. V. A. KAAL, T. A. LACINE, pp. 41-44.

42. USAM 9-28.800.

43. V. A. KAAL, T. A. LACINE, *op. cit.*, pp. 44-47.

44. USAM CRM 163.

45. The monitor cannot be employed or affiliated with the corporation for a period of not less than one year following the end of the monitorship. *Id.*

46. V. A. KAAL, T. A. LACINE, *op. cit.*, pp. 34-38.

47. GAO June 2009, *op. cit.*, p. 16; F. J. WARIN *et al.*, 2010, 2011, 2012, 2013, 2014 and 2015 End-Year Updates, 2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), Gibson, Dunn & Crutcher LLP, www.gibsondunn.com. The probationary period may also be indefinite, 2016 Mid-Year Update, *op. cit.*, pp. 13-14.

48. Yet, between 2000 and mid-2016, only three declarations of breach were issued by either the US DOJ or the SEC. F. J. WARIN *et al.*, 2016 Mid-Year Update, *op. cit.* There have however been recent talks about the potential unwinding of a USD 1,9 billion DPA HSBC entered into in 2012. G. FARRELL, K. GEIGER, “U.S. considers HSBC charge that could upend 2012 settlement”, *Bloomberg*, 7 September 2016, www.bloomberg.com.

49. “PDA mandates thus in effect transform individual prosecutors into firm-specific quasi-regulators with authority to devise and impose new duties on a firm with detected wrongdoing, enforced by liability that is non-harm-contingent”. J. ARLEN, M. KAHAN, “Corporate governance regulation through non-prosecution”, NYU School of Law, Public Law Research Paper No. 16-04; NYU Law and Economics Research Paper No. 16-04, pp. 10, 12.

III. Evaluation of N/DPAs

Since the beginning of the 21st Century, the DOJ (and the SEC in very limited instances) has been deploying extensively the use of NPAs and DPAs, which have become “a mainstay in the federal playbook for corporate criminal justice matters”.⁽⁵⁰⁾ From 2000 to 2016 it is estimated that 450 settlements were concluded with corporate targets.⁽⁵¹⁾ Yet, around 80 of those agreements consist in NPAs that were reached in 2015 and early 2016 in relation to the Swiss Bank Program.⁽⁵²⁾ Further, 17 of America’s 100 largest companies have benefited from an N/DPA since 2010.⁽⁵³⁾ Those agreements which involve no formal conviction of the defendant have led to monetary penalties totaling a jaw-dropping figure of USD 55 billion⁽⁵⁴⁾ (where the Swiss Bank Program-related NPAs only totaled USD 1,36 billion⁽⁵⁵⁾).

Yet the road ahead for N/DPAs remains quite uncertain: a controversy does exist in the US over the resolution of high-profile corporate crime matters through such agreements, and even the DOJ itself has recently suggested that these settlements “have been used too extensively in the context of corporate wrongdoing”.⁽⁵⁶⁾ Many have lamented the recourse to such deals with no emphasis on individuals’ accountability. E.g., Judge Rakoff pointed out in 2013 that “the DoJ has not prosecuted any top Wall Street executive in relation to the financial crisis but has struck deals with companies using deferred prosecution agreements over sanctions violations and money laundering without charging any individuals”.⁽⁵⁷⁾ Thus, it has been argued that the Yates Memorandum⁽⁵⁸⁾ issued in September 2015,

which precisely addresses the lack of prosecution of individuals within the scope of corporate crime (which might be somewhat correlated to the use of N/DPAs), may impact corporate criminal enforcement in the future⁽⁵⁹⁾.

Statistics and prospective policy considerations put aside, the shift from traditional prosecution to pre-trial diversion agreements demonstrates a dramatic transformation⁽⁶⁰⁾ in the DOJ policy as relates to corporate criminal enforcement.⁽⁶¹⁾ I.e. the use of N/DPAs is “arguably the most profound recent development in corporate white collar criminal practice”.⁽⁶²⁾ But what is the exact rationale in offering corporate offenders such agreements instead of prosecuting them? Must they be considered as “too big to jail”?⁽⁶³⁾ Corporate offences do involve complex, lengthy and very costly proceedings. The ability to enter into pretrial diversion is thus cost-efficient. Yet the literature denounces a “N/DPA proliferation” in the form of a “shift in prosecutorial culture from an *ex-post* focus on punishment to an *ex-ante* emphasis on compliance”⁽⁶⁴⁾; “prosecutors seem to focus more on reforming corporations than on punishing them, as evidenced by the use of pre-trial diversion agreements and the imposition of compliance monitors with significant reformatory – and not punitive – power over the corporation”.⁽⁶⁵⁾ According to Judge Rakoff, “the Department of Justice has been persuaded by its own rhetoric that the main point of [NPA and DPA] agreements is to change corporate culture, so that company employees of all levels will be dissuaded in the future from committing company-

50. F. J. WARIN *et al.*, 2014 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), *op. cit.*

51. B. L. GARRETT, J. ASHLEY, Federal Organizational Prosecution Agreements, University of Virginia School of Law, lib.law.virginia.edu/Garrett/prosecution_agreements; See F. J. WARIN *et al.*, 2016 Year-End Update, *op. cit.*, p. 2. It remains to be seen what use will be made of N/DPAs under the Trump Administration.

52. US DOJ, “Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG”, 27 January 2016, www.justice.gov.

53. The top-100 list is ranked by *Fortune* magazine. J. R. COPLAND, R. A. MANGUAL, *op. cit.*, p. 4.

54. F. J. WARIN *et al.*, 2016 Year-End Update, *op. cit.*, p. 3.

55. US DOJ, “Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG”, 27 January 2016, www.justice.gov.

56. A DOJ statement reported by E. ABRAMOWITZ, J. SACK, “Deferred Prosecution Agreements In Decline? Enforcement Implications”, *New York Law Journal*, Vol. 255, No. 2, 5 January 2016.

57. K. SCANNELL, “Top judge criticises DoJ for not holding individuals accountable”, *Financial Times*, 12 November 2013, www.ft.com.

58. S. Q. YATES, *Memorandum Re: Individual Accountability for Corporate Wrongdoing*, 9 September 2015, www.justice.gov (Yates Memo).

59. “In response to criticism over the reliance on DPAs to resolve high-profile investigations, the Department of Justice is sharpening its focus on wrongdoing by individuals”. E. ABRAMOWITZ, J. SACK, *op. cit.* Although the Yates Memo does not explicitly address the alleged overuse of N/DPAs, it asserts that “criminal and civil corporate investigations should focus on individuals from the inception of the investigation” and that “corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct” before being eligible for such an agreement. Yet “it would be premature to conclude that the Justice Department is turning away from the DPA model post-Yates”. J. R. COPLAND, R. A. MANGUAL, *op. cit.*, p. 7. See also C. MODLISH, “The Yates Memo: DOJ Public Relations Move or Meaningful Reform that Will End Impunity for Corporate Criminals?”, *Boston College Law Review* (forthcoming).

60. J. ARLEN, M. KAHAN, *op. cit.*, p. 1.

61. L. ORLAND, *op. cit.*, pp. 71-75; J. ARLEN, *op. cit.*, pp. 197-199.

62. P. SPIVACK, S. RAMAN, *op. cit.*, p. 159.

63. See, e.g., B. L. GARRETT, *Too big to jail. How prosecutors compromise with corporations*, Cambridge, Harvard University Press, 2014, 365 pp.

64. V. A. KAAL, T. A. LACINE, *op. cit.*, pp. 2, 24, 59.

65. L. GIUDICE, *op. cit.*, p. 366.

related crimes”.⁽⁶⁶⁾ Others denounce the pervasive effect of such agreements for they help US federal authorities to extract fines from (alleged) corporate wrongdoers under the threat of criminal prosecution.⁽⁶⁷⁾ Further, such agreements allow prosecutors “to create and impose new legal duties whose breach can subject the firm to criminal sanction” – a power that is arguably inconsistent with the rule of law⁽⁶⁸⁾; in that, prosecutors assume the role of firm-specific regulators.⁽⁶⁹⁾ More generally, the legal literature is concerned with the use, the application and the legitimacy of NPAs and DPAs⁽⁷⁰⁾, sometimes referring to a “disturbing trend” where corporations avoid criminal charges by entering said forms of agreements.⁽⁷¹⁾ No actual evidence of their effectiveness has been provided yet⁽⁷²⁾ although the Government insists on the potential long-term benefits of N/DPAs on the corporation.⁽⁷³⁾ Overall, such agreements may be warranted to address policing agency costs⁽⁷⁴⁾ but, as argued by Garrett, they should not be out of court and they should be transparent and publically disclosed.⁽⁷⁵⁾

IV. The adoption of DPAs in the UK

On 25 April 2013 the Crime and Courts Act (CCA) received Royal Assent, laying the legislative foundations for the use of DPAs in the UK.⁽⁷⁶⁾ The Act was supplemented with a DPA Code of Practice on 11 February 2014⁽⁷⁷⁾; the mechanism formally entered into effect on 24 February 2014. The DPA is a “discretionary tool” that the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO) may propose to a business “organisation” (to the exclusion of individuals⁽⁷⁸⁾) as an alternative to prosecution⁽⁷⁹⁾. Contrary to the US system, the UK has chosen not to incorporate NPAs in its legislation; the agreement must follow a judicial process. Also contrary to the US regime, such an agreement may only be proposed for financial and economic offences that are expressly listed within the CCA.⁽⁸⁰⁾

The prosecutor can enter into a DPA provided that a two-stage test is met: that there is sufficient evidence of the commission of a crime by the business entity *and* that it would be in the public interest to enter into a DPA in lieu of prosecuting the organization.⁽⁸¹⁾ Similarly to the US system, the UK prosecutor must take various factors into consideration when determining whether to enter into DPA negotiations or to initiate a prosecution, including but not limited to: the seriousness of the offence; the risk of harm a conviction would have on innocent third parties, on financial markets and on international trade more largely; the impact of offending on other countries; the history of similar conducts involving the corporate target; the (in)existence of an effective compliance program; the cooperation efforts of the entity (including self-reporting)...⁽⁸²⁾

The structure of a DPA also largely follows the US model. According to the Crime and Courts Act 2013, the agreement may impose (but is not limited to) the following requirements: monetary sanctions in the form of a financial penalty⁽⁸³⁾, compensation of vic-

66. In his review of B. L. GARRETT's *Too Big to Jail. How prosecutors compromise with corporations* (op. cit.). J. S. RAKOFF, “Justice differed is justice denied”, *The New York Review of Books*, Vol. 62, No. 3, February 2015.
67. As a result of their will to avoid indictment at all costs, “a culture of cooperation has arisen wherein business entities are willing to compromise their rights under traditional criminal law, as well as the rights of their employees, in exchange for lenience”. R. J. RIDGE, M. A. BAIRD, “The pendulum swings back: revisiting corporate criminality and the rise of deferred prosecution agreements”, *University of Dayton Law Review*, Vol. 33, 2007-2008, pp. 187, 195.
68. J. ARLEN, op. cit., p. 192.
69. J. ARLEN, M. KAHAN, op. cit., p. 39.
70. V. A. KAAL, T. A. LACINE, op. cit., pp. 2, 24, 59.
71. D. M. UHLMANN, op. cit., p. 1301. According to GARRETT, “the most far-reaching corporate crimes have received leniency for years now, as the result of careful thinking and rethinking of the precise contours of a federal leniency program designed to avoid excess collateral consequences for corporate offenders. Rehabilitation is not taken seriously enough, with concerns that compliance may often be overly cosmetic. Corporate fraud enforcement needs more powerful teeth. In the years to come, hopefully we will see a reversal of federal priorities, with new efforts to avoid collateral consequences for individuals committing relatively small offenses, combined with far more rigorous prosecution of the largest corporate crimes”. “The metamorphosis of corporate criminal prosecutions”, op. cit., p. 13.
72. GAO follow-up December 2009, op. cit., pp. 20, 28.
73. GAO June 2009, op. cit., p. 30.
74. J. ARLEN, M. KAHAN, op. cit., p. 40.
75. B. L. GARRETT, “The metamorphosis of corporate criminal prosecutions”, op. cit., pp. 10-12.

76. CCA, Schedule 17: deferred prosecution agreements. For a commentary of the legislative provisions, see C. GRASSO, “Peaks and troughs of the U.K. deferred prosecution agreement: the lesson learned from the first-ever DPA between the SFO and ICBC SB PLC”, *Journal of Business Law*, 2016, No. 223 (forthcoming); L. TOLAINI et al., “Deferred prosecution agreement”, *Practical Law UK*, Thomson Reuters, 2016.
77. Serious Fraud Office, Deferred Prosecution Agreements Code of Practice, 1.1, www.cps.gov.uk (DPA Code of Practice).
78. Contrary to the US system. CCA, Schedule 17, Part 1, Section 4(1).
79. DPA Code of Practice, 1.1.
80. CCA, Schedule 17, Part 2: offences in relation to which a DPA may be entered into.
81. DPA Code of Practice, 1.2.
82. DPA Code of Practice, 2.1-2.10.
83. “Where a financial penalty is to be imposed, the figure agreed must approximate to what would have been imposed had P pleaded guilty”. *Id.*, 7.9.iii.

tims, donations and/or disgorgement of profits (i.e. confiscation); the implementation or improvement of a compliance program; cooperation with the prosecution; and/or the payment of the prosecutor's costs. The DPA must further specify an expiry date (i.e. a probationary period).⁽⁸⁴⁾ The DPA Code of Practice provides for supplemental requirements that may be imposed on the entity, such as the appointment of a monitor – for which extensive guidelines are specified; the prohibition of engaging into certain activities; and/or financial reporting obligations.⁽⁸⁵⁾

The DPA is subject to judicial oversight (arguably broader in scope than in the US): the Crown court must approve the agreement following a two-stage process (preliminary then final hearing) if it finds that the DPA is in the interests of justice *and* that its terms are fair, reasonable and proportionate – i.e. tailored to the specific facts of the case. The Court must give reasons for its decision to approve or reject the agreement. The approval of a DPA leads to its publication on the prosecution's website for transparency purposes⁽⁸⁶⁾ – unless the prosecutor is prevented from doing so by the court.⁽⁸⁷⁾ Allegations of breach of the DPA will have to be submitted to the Court; if the latter decides that the corporation failed to comply with the terms of the agreement, it may either invite the parties to find a suitable remedy to the breach or terminate the DPA with a view to the prosecution of the defendant.⁽⁸⁸⁾

Since the entry into force of the regime in the UK, the SFO has entered into two DPAs – which might set the tone for corporate bribery enforcement in the future.⁽⁸⁹⁾ The first one was approved on 30 November 2015 in relation to allegations of failure to prevent bribery by a financial institution.⁽⁹⁰⁾ The second agreement was approved on 8 July 2016 in relation to allegations of

conspiracy to corrupt and bribe and failure to prevent bribery by an undisclosed SME.⁽⁹¹⁾ It now remains to be seen whether and to what extent UK prosecutors will make use of said pretrial diversion agreements for non-corruption related misconducts. According to a statement of the SFO director in October 2016, “significant” DPAs should be expected over the coming months...⁽⁹²⁾

V. The introduction of a DPA-alike mechanism in France

In early December of 2016, France introduced a corporate pretrial diversion agreement mechanism modelled after the common law DPA. The agreement, which is known as *convention judiciaire d'intérêt public*, is established at article 41-1-2 of the Criminal Procedure Code following the adoption of *Loi Sapin II* (Act on transparency, fight against corruption and the modernisation of economic life) which entered into force on December 11.⁽⁹³⁾ It allows suspending prosecution against a business entity in relation to bribery and corruption-related offences and the laundering of tax fraud (and other specific tax offences) proceeds exclusively.

Under the agreement, prosecution is suspended in exchange for the payment of a monetary penalty (“*amende d'intérêt public*”), which amount must be proportional to the proceeds derived from the identified unlawful activities but may not exceed 30% of the annual revenue of the legal person (based on the last 3 years' average); the implementation of a compliance program⁽⁹⁴⁾, under the supervision of the French anti-corruption agency for a period of maximum 3 years – at the expenses of the corporate target; and restitution to victims within a 1 year period. The compliance program requirement obliges the entity to implement the following measures and procedures: a code of conduct against bribery and corruption; an internal alarm system for employees; an up-to-date risk mapping process; an assessment of clients, suppliers and agents in relation to said risk mapping; internal or external auditing procedures of the company; a training program for the most exposed employees; and a disciplinary regime for the violation of the code of conduct.

84. CCA, Schedule 17, Part 1, Section 5. “The length of a DPA will need to be sufficient to be capable of permitting compliance with other terms such as financial penalties paid in instalments, monitoring and cooperation with the investigations and trials into individuals”. DPA Code of Practice, 7.2, fn 4.

85. DPA Code of Practice, 7.1-8.5.

86. Whereas there is no express rule as to transparency in the US. B. L. GARRETT, “The metamorphosis of corporate criminal prosecutions”, *op. cit.*, pp. 11-12.

87. CCA, Schedule 17, Part 1, Sections 7-8; DPA Code of Practice, 9-11, 16.

88. CCA, Schedule 17, Part 1, Section 9; DPA Code of Practice, 12-13.

89. Corruption Watch UK, *The UK's first deferred prosecution agreement*, December 2015, p. 1; D. MYLES, “SFO says first DPA will be template”, *International Financial Law Review*, 1 December 2015, www.iflr.com; N. O'MAY, A. WALLIS, “UK's second Deferred Prosecution Agreement”, 15 July 2016, www.nortonrosefulbright.com.

90. See *SFO v Standard Bank plc*, www.judiciary.gov.uk; C. GRASSO, *op. cit.*; Corruption Watch UK, *op. cit.*; E. CLOUGH, “Anti-Bribery: Lessons from the first deferred prosecution agreement – between the SFO and a bank”, 23 March 2016, allenoverly.com.

91. SFO, “SFO secures second DPA”, 8 July 2016, www.sfo.gov.uk.

92. S. RING, “‘Significant’ Corporate Plea Deals Coming, U.K. Prosecutor Says”, *Bloomberg*, 25 October 2016, www.bloomberg.com.

93. Art. 22, loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

94. It is interesting to note that art. 18 of the Act also creates a “compliance program” penalty for corporate offenders, which is introduced at art. 131-92-2 of the Penal Code.

The agreement is subject to judicial review: the competent court must verify the merits of having recourse to such a procedure and its regularity, the legality of the monetary sanction and the proportionality of the measures imposed on the entity. If approved by the court, the agreement must be made public through press release by the prosecutor and through publication on the website of the anti-corruption agency. The *convention* entails no recognition of guilt or mark on the criminal record. If the legal person complies entirely with the conditions set forth in the agreement, prosecution is definitively discontinued; otherwise, the prosecutor must install criminal proceeding against the entity.

In short, the *convention judiciaire d'intérêt public* is a cut-down (but welcome) version of the US and UK DPA mechanism. It now remains to be seen what actual use will French prosecution authorities make of it.

Conclusion

NPAs and DPAs as known in the US are interesting concepts from which Western legal systems could draw inspiration. Using a DPA, the prosecuting authority files criminal charges in court against a corporate target along with a concurrent request to defer or suspend the prosecution until the end of a probationary period. If the beneficiary fails to fulfill the terms of the DPA he agreed to, the prosecutor proceeds with the criminal prosecution. If the terms are met, prosecution lapses without recognition of criminal liability of the offender. NPAs (which have been the instrument of choice within the scope of the Swiss Bank Program) are similar to DPAs except that charges are never filed in court – the agreement being more comparable to a contract between the parties than a criminal process. American prosecutors may include any relevant condition in the agreement besides monetary sanctions; e.g.,

improved compliance program, increased monitoring requirements, changes in senior management, board changes and business changes. This flexibility makes N/DPAs an important alternative mode of resolution of criminal disputes for corporate targets. The main interest of the mechanisms is that emphasis is put on changing corporate culture and minimizing the risks of repeat offending; i.e. such agreements further a preventive approach and foster a reformatory purpose of the (alleged) delinquent entity. The existence of a probationary period is further demonstration of such an affirmation.⁽⁹⁵⁾

Hence, US corporate pretrial diversion agreements could serve as a source of influence for corporate criminal enforcement across the Atlantic. The DPA model seems particularly suitable for it imposes a mandatory judicial oversight of such (high-profile) settlements. Interestingly enough, the UK did implement a DPA mechanism very alike to the US device in its legislation in 2013 and the SFO has entered into two agreements since its entry in effect. Further, France has just introduced a DPA-alike mechanism to address corporate bribery/corruption-related offences and the laundering of tax crime proceeds. Although it is uncertain whether other continental legal systems will follow the same path, there is little doubt as to the fact that both the recent legislative developments in Europe and the 80 NPAs concluded within the Swiss Bank Program will help generate discussions on the topic.⁽⁹⁶⁾

95. See M. J. BLOTWIJK, M. FERNANDEZ-BERTIER, "Out-of-court criminal dispute resolution in the Netherlands, Belgium and the US", *Tijdschrift voor Sanctierecht & Onderneming*, 2015, No. 2/3, p. 106; M. FERNANDEZ-BERTIER, R. ROLLAND, « La transaction pénale élargie appliquée aux personnes morales : cap sur le modèle américain des N/DPAs ? », *Droit pénal de l'entreprise*, 2016/2, p. 105.
96. See A. E. ZAMBRANO, M. FERNANDEZ-BERTIER, *op. cit.* (forthcoming).