



## **Deferred Prosecution Agreements as magic enforcement tool?**

**(Why) should other countries follow the USA (1990ies),  
Brazil (2013), Great Britain (2014), France (2016) and  
Singapore (2018) and introduce DPAs as instrument to settle  
criminal charges against corporates?**

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## I. Introductory remarks

Combating economic crime is a long-term, continuous task of law enforcement agencies and legislators.<sup>1</sup> 49% of all corporations worldwide participating in a survey conducted by PWC in 2018 said they had become victims of fraud and corporate crime.<sup>2</sup> 52% of those offences were committed by internal actors.<sup>3</sup> These figures show how great the need is for effective control mechanisms and inexpensive, efficient government measures to combat corporate crime. The latter not only causes companies to lose billions every year, but the costs are immense for countries as well.<sup>4</sup>

This paper intends to illustrate why DPAs (deferred prosecution agreements) could be a potential rapid, more efficient solution than traditional litigation and why states could adopt it as an enforcement tool.<sup>5</sup> It starts with a summary of the definition of the DPA, followed by the main part on the advantages of DPA's. The following should not only blindly illustrate the advantages of DPA's, but highlight also its associated risks, outlined in the final part of the paper.

## II. What are DPAs?

A DPA is a voluntary settlement between the concerned criminal authority and the corporation that may have committed an offence.<sup>6</sup> In such an agreement, the corporation commits itself to a monetary fine, to cooperation with the authorities, to disclose all pertinent facts and to a self-monitoring program preventing future misconduct.<sup>7</sup> In return, the prosecution will be postponed until a set date. If all requirements are met, the prosecution will be dismissed. If this isn't the case, the corporation would face further penalties and investigations.<sup>8</sup>

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<sup>1</sup> KEENAN, crime, p. 4.

<sup>2</sup> LAVION, p. 5.

<sup>3</sup> LAVION, p. 9.

<sup>4</sup> Cf. KEENAN, crime, p. 4.

<sup>5</sup> KEENAN, crime, p. 7; MINISTRY OF JUSTICE, p. 3.

<sup>6</sup> KEENAN, model, p. 1.

<sup>7</sup> REILLY, p. 313; RUGGIERO, p. 4.

<sup>8</sup> KEENAN, crime, p. 3; FLESCHE/MAEDA/SARUBBI et al., p. 5.

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Parallel to DPAs, NPAs (non-prosecution agreements) and PAs (plea agreements) are used as alternative forms of settlement.<sup>9</sup> The NPA is very similar to the DPA. The main exception is that the criminal authority entirely waives criminal prosecution.<sup>10</sup> When it comes to plea agreements, the big difference is that the defendant pleads guilty.<sup>11</sup> The corporation is therefore classified as a felon, which can have far-reaching negative consequences.<sup>12</sup> The USA was the first country to introduce DPAs against corporations in the early 2000s.<sup>13</sup> Initially, the DPA had been created as an instrument to give juvenile delinquents a second chance. Instead of continuing to press charges for a criminal act, the minors were given a probationary period during which they had to comply with the law.<sup>14</sup> Since then the practice has evolved and the DPA is increasingly used in cases against corporations. Until 2016, the Department of Justice alone completed more than 400 DPA's to combat corporate crime.<sup>15</sup> Countries as the UK do not apply DPAs on individuals anymore but only grant them to corporations.<sup>16</sup> The UK introduced a DPA program in 2014 based on the American system.<sup>17</sup> The success of British DPAs until mid-2018 is reflected by penalties of over 667 million pounds. In December 2016 France decided to follow and adopted the "conventions judiciaire d'intérêt public" (CJIP's), which are similar to DPAs.<sup>18</sup> Finally, Singapore introduced DPAs by enacting the Criminal Justice Reform Bill in March 2018.<sup>19</sup> Several other countries, including Argentina, Australia, Canada,<sup>20</sup> Switzerland<sup>21</sup> and Brazil are considering or have already implemented a DPA scheme.<sup>22</sup>

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<sup>9</sup> EMMENEGGER, p. 1048; ZULAUF/STUDER, p. 303.

<sup>10</sup> EMMENEGGER, p. 1048.

<sup>11</sup> EMMENEGGER, p. 1048; RAEDLER, p. 65; As example EMMENEGGER cites the case of the bank Credit Suisse (2014).

<sup>12</sup> EMMENEGGER, p. 1048.

<sup>13</sup> KEENAN, crime, p. 4.

<sup>14</sup> RUGGIERO, p. 4.

<sup>15</sup> KEEFE.

<sup>16</sup> KOCH.

<sup>17</sup> KEENAN, crime, p. 4.

<sup>18</sup> ANG/SUMILAS/LUA, p. 5.

<sup>19</sup> ANG/SUMILAS/LUA, p. 3.

<sup>20</sup> ANG/SUMILAS/LUA, p. 5; WARIN/DAY/DIAMANT et al., p. 15 ff.

<sup>21</sup> WARIN/DAY/DIAMANT et al., p. 21.

<sup>22</sup> FLESCH/MAEDA/SARUBBI et al., p. 6.

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### III. The benefits of DPAs

#### A. Benefits for the state

Criminal prosecution of corporations is extremely complex.<sup>23</sup> Existing criminal law instruments have the following limitations: First of all, it is difficult to prove a legal entity's guilt.<sup>24</sup> For example in British criminal law, it must be proven that the "directing mind and will" of the enterprise had the indispensable fault for an offence.<sup>25</sup> In the US, evidence beyond reasonable doubt is required to achieve a criminal conviction. Due to today's diffuse corporate decision-making systems, both examples are difficult for law enforcement agencies to obtain and prove.<sup>26</sup>

Secondly, investigation and court procedures take too long.<sup>27</sup> As a result of long proceedings, resources that are needed elsewhere to combat white-collar crime remain blocked.<sup>28</sup>

Furthermore, the costs of such a long process should not be underestimated.<sup>29</sup> The Serious Fraud Office in the UK estimates the average cost of an investigation and prosecution, which results in an admission of guilt, at 1.6 million pounds.<sup>30</sup>

Moreover, it is hard for law enforcement agencies to detect corporate crime.<sup>31</sup> This is due to the increasing size of corporations, which make it arduous not only to detect but also to prosecute misconduct, as the violations often take place in different jurisdictions.<sup>32</sup> Often, crimes merely become known because of whistleblowers or due to disclosure of the corporation itself.<sup>33</sup>

So why could DPAs be an effective solution against misconduct of corporations?

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<sup>23</sup> KEENAN, crime, p. 4; MINISTRY OF JUSTICE, p. 3.

<sup>24</sup> KEENAN, crime, p. 6.

<sup>25</sup> MINISTRY OF JUSTICE, p. 8.

<sup>26</sup> KEEFE.

<sup>27</sup> MINISTRY OF JUSTICE, p. 3.

<sup>28</sup> Cf. KEENAN, model, p. 3.

<sup>29</sup> ANG/SUMILAS/LUA, p. 5.

<sup>30</sup> MINISTRY OF JUSTICE, p. 12.

<sup>31</sup> KEENAN, model, p. 1; XIAO, p. 242.

<sup>32</sup> MINISTRY OF JUSTICE, p. 8.

<sup>33</sup> KEENAN, crime, p. 4; MINISTRY OF JUSTICE, p. 3.

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Given the fact that a DPA is a settlement, the evidence of guilt<sup>34</sup> and a long procedure is avoided, which serves the interests of both parties.<sup>35</sup> Thus, the state avoids not merely the costs of a long procedure, but DPAs also result in large fines. These not only benefit the state budget but can also be used to compensate victims for the damages they have suffered.<sup>36</sup> The fine is appositely the main penalty for the corporation since you can't just imprison it. Critics could say that such a monetary fine would mainly be at the expense of the shareholders,<sup>37</sup> but the latter have often benefited from the concerned dubious practices, which justifies the shift to some extent.<sup>38</sup>

A further advantage is that measures can be very flexibly adapted to the concrete case in a settlement.<sup>39</sup> The State Departments have plenty of room for manoeuvre. In the US, for example, no explicit federal laws on DPAs have been enacted to this date.<sup>40</sup> As the DPA is still a settlement, the measures are to be negotiated. However, criminal authorities are on the stronger side and will certainly prevent a favorable settlement for the corporation. This flexibility can even lead to a situation where the punitive character becomes negligible compared to the regulatory character of the measure.<sup>41</sup> For example, a settlement can consist only of improvement of internal compliance programs, without imposing a monetary fine.<sup>42</sup> However, transparency should not suffer from flexibility either. Clear practice guidelines and the publication of each DPA should be included in any legislation on DPAs. The greater the transparency and predictability of a regime, the more likely it is that corporations will voluntarily disclose wrongdoing, as they know what to expect.<sup>43</sup>

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<sup>34</sup> See XIAO, p. 242 f.

<sup>35</sup> KEENAN, crime, p. 9; XIAO, p. 252.

<sup>36</sup> KEENAN, crime, p. 3; MINISTRY OF JUSTICE, p. 9.

<sup>37</sup> KOCH.

<sup>38</sup> Cf. KEEFE.

<sup>39</sup> KEENAN, model, p. 9; ZULAUF/STUDER, p. 310.

<sup>40</sup> However, several attorney generals issued memorandums regarding the prosecution of corporations, ZULAUF/STUDER, p. 311.

<sup>41</sup> REILLY, p. 353; ZULAUF/STUDER, p. 311.

<sup>42</sup> Cf. ZULAUF/STUDER, p. 311.

<sup>43</sup> DATTU/RITCHIE/PAVIC.

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A DPA often contains an admission of misconduct. The admission can be used by the state in a future similar case and makes it easier to obtain a conviction against a large corporation.<sup>44</sup> Therefore, the prosecutor does not only take work off the regulators but also decreases it for the judges. However, the state should pay heed to the fact that there is no excessive concentration of power. For example, this can be achieved by requiring a judge to accept the agreement, as it's the case with the UK-style DPA model.<sup>45</sup>

A state is always a representative of its citizens and responsible for their welfare. When deciding whether to introduce DPAs or not, attention should be paid not merely to the direct advantages for the state, but also to those for third parties. Consequently, the following discussion will focus on advantages for third parties and corporations themselves.

### **B. Benefits for the corporation**

First and foremost, a corporation wants to persist and flourish. It wants to reassure its investors and increase its share price. A DPA does not only remove legal uncertainty,<sup>46</sup> but it also saves a corporation from a formal conviction. A conviction leads to damage of reputation, which reduces the chances to sign future contracts with third parties and diminishes the confidence of investors.<sup>47</sup> It may also result in the corporation no longer having the right to bid on US and EU public contracts.<sup>48</sup> For example, the Clean Air Act, 42 U.S.C. § 7606(a) forbids every federal agency to enter into a contract with a convicted legal entity. In France, a corporation found guilty of economic crime is cardinally excluded from all public procurement procedures for a period of 5 years.<sup>49</sup> Thus, corporations that are heavily dependent on government contracts risk being sentenced to ruin by a formal conviction.<sup>50</sup> A DPA provides an opportunity to enhance internal compliance measures by improving inner controls and removing employees who have been involved in misconduct, including their supervisors who should have identified the misconduct.<sup>51</sup> The corporation is thereby

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<sup>44</sup> Cf. XIAO, p. 241.

<sup>45</sup> DATTU/RITCHIE/PAVIC; KEENAN, model, p. 11.

<sup>46</sup> MINISTRY OF JUSTICE, p. 11.

<sup>47</sup> KEENAN, crime, p. 9.

<sup>48</sup> MINISTRY OF JUSTICE, p. 9.

<sup>49</sup> QUERENET-HAHN/KETTENBERGER, p. 13.

<sup>50</sup> POLLACK/REISINGER, p. 125.

<sup>51</sup> KEENAN, crime, p. 9; See XIAO, p. 245.

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preparing itself for the future and preventing further possible crimes. An arguable monitor can help the corporation with this task.<sup>52</sup>

### **C. Benefits for third parties**

The third parties which can be negatively affected by corporate misconduct and positively by a DPA are employees, investors, contractual partners, as well as related corporations<sup>53</sup> and even consumers.<sup>54</sup>

As already mentioned, the avoidance of a criminal charge and a possible conviction is one of the main reasons why a DPA should be applicable.<sup>55</sup> A conventional criminal charge against the corporation could lead to its collapse, costing thousands of employees their jobs and having an impact on a country's entire economy.<sup>56</sup> The best-known example is the case of the US accounting firm Arthur Andersen going out of business in 2002. Arthur Andersen was accused of balance sheet manipulation and obstruction of justice in the context of the Enron energy group affair.<sup>57</sup> The fact that the Supreme Court overturned the indictment in 2005 did not change anything.<sup>58</sup> The severity of the punishment was therefore disproportionately greater than the misconduct itself.<sup>59</sup> If one had applied a DPA, there would have been no formal conviction and the jobs of employees would have been preserved.<sup>60</sup> Not to be forgotten are the customers who rely on a certain product. One serious, but avowedly also extreme example would be life-saving drugs manufactured by a single corporation.<sup>61</sup> Is the state allowed to risk the bankruptcy of such a corporation? I am clearly of the opinion that by no means it must be authorized to do so and that DPAs are a good way to prevent a formal conviction. Tragically, the term "too big to jail" deserves support in this context.

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<sup>52</sup> ZULAUF/STUDER, p. 320.

<sup>53</sup> KEENAN, crime, p. 10; Cf. MINISTRY OF JUSTICE, p. 9.

<sup>54</sup> REILLY, p. 323.

<sup>55</sup> See section II and III B above.

<sup>56</sup> MINISTRY OF JUSTICE, p. 9.

<sup>57</sup> BALZAROTTI/MICCOLUPI; KEEFE.

<sup>58</sup> BALZAROTTI/MICCOLUPI.

<sup>59</sup> MINISTRY OF JUSTICE, p. 9.

<sup>60</sup> MINISTRY OF JUSTICE, p. 9; REILLY, p. 316.

<sup>61</sup> REILLY, p. 323.



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#### IV. Risks of DPAs<sup>62</sup>

There is a potential danger that the law enforcement agencies of a country will increasingly assume the tasks of supervisory authorities.<sup>63</sup> This requires more detailed functional coordination between the two bodies.<sup>64</sup> Far more concerning is the detraction from the traditional punishment of an individual, towards a simple monetary fine for the company, which constitutes the main punishment of the DPA.<sup>65</sup> The latter reduces the deterrent effect of the punishment. Doesn't it create a temptation for the individual to commit crimes?<sup>66</sup> Doesn't it send a signal that with enough money you can simply buy yourself out of the punishment?<sup>67</sup> These questions are noteworthy, and one should write a whole additional paper devoted to them. In response and as counterargument one would argue that a DPA could only be the first step in enforcement action. As soon as the legal dispute with the corporation has been settled, the authorities start investigating the individuals involved.<sup>68</sup> So it is argued that quite the contrary is the case: A DPA would create an incentive for the corporation to report misconduct to the criminal authorities on its own initiative.<sup>69</sup> That may sound convincing when it comes to misconduct of employees or third parties. However, the danger of introducing DPAs is especially acute when it comes to misconduct on part of senior management.<sup>70</sup> According to Jed S. Rakoff, not a single high level-executive has been prosecuted in the aftermath of the financial crisis of 2008.<sup>71</sup> We can either conclude that high level-executives have committed absolutely no crimes, or that a DPA is not effective enough when it comes to prosecuting the latter.<sup>72</sup>

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<sup>62</sup> For a convincing view against DPAs consult REILLY.

<sup>63</sup> REILLY, p. 344; Cf. WARIN/DAY/DIAMANT et al., p. 3.

<sup>64</sup> ZULAUF/STUDER, p. 302; Cf. WARIN/DAY/DIAMANT et al., p. 3.

<sup>65</sup> See section III A above.

<sup>66</sup> REILLY, p. 346; Contrary opinion XIAO, p. 251.

<sup>67</sup> REILLY, p. 352.

<sup>68</sup> ANG/SUMILAS/LUA, p. 3.

<sup>69</sup> KEENAN, crime, p. 9; Contrary opinion KEEFE.

<sup>70</sup> REILLY, p. 317; See KEEFE.

<sup>71</sup> RAKOFF; KEEFE.

<sup>72</sup> RAKOFF.

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Finally, there is a risk that a judicial system with a double standard will be created.<sup>73</sup> For corporations that have an impact on the economy as a whole in the event of a collapse, prosecutors are more inclined to use DPAs. Small corporations, on the other hand, are more likely to be criminally prosecuted.<sup>74</sup> Reilly compares the similar cases of HSBC and G&A Check Cashing, a small office in Los Angeles. While HSBC walked away with a settlement, G&A was criminally prosecuted for money laundering and its senior management sentenced to prison.<sup>75</sup> The message sent to the public is clear and utterly dangerous: Law isn't always the same, depending on who you are.

## V. Closing remarks

It is undisputed that DPAs carry risks and they should not be promoted as a literal “magic” enforcement tool. However, in my opinion, these risks are outweighed by the benefits described. Emphasis should be placed on the good cost-benefit ratio. DPA's can be completed very quickly and are inexpensive by avoiding going through a trial.<sup>76</sup>

The arguments against DPAs are convincing and justice seems to suffer in some cases.

However, there may be a lack of effective alternatives who achieve similar successful results in due time with the same amount of resources invested.<sup>77</sup> Moreover, one should not risk the welfare of many innocent third parties in order to punish a few. Arthur Andersen's fate and its consequences must not be forgotten.

DPAs should continue to be used in the future and become adopted by more states. Yet, when introducing DPAs, value should be given to continue prosecution of individuals in the aftermath. DPA's should not serve as personal bailouts, but only as the first part of the enforcement action against a corporation in case of corporate misconduct.

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<sup>73</sup> KOCH.

<sup>74</sup> Cf. XIANG, p. 661.

<sup>75</sup> REILLY, p. 325.

<sup>76</sup> KEENAN, model, p. 3.

<sup>77</sup> Cf. XIAO.

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