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Deferred prosecution agreements in Singapore: What is the appropriate standard for judicial approval

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Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?

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Abstract:
Originating from the US, deferred prosecution agreements ("DPAs") have made their way to the UK through the Crime and Courts Act 2013 and Singapore through the Criminal Justice Reform Act 2018. The Singapore model for approval of DPAs draws heavily from the UK and both require proof to a court that DPAs are in the "interests of justice" and that their terms are "fair, reasonable and proportionate" before DPAs can be approved. This paper considers the theoretical basis for the court's approval of DPAs, critically examines the application of the tests for approval of DPAs in the UK and considers Singapore's likely approach. Where appropriate, it also draws on the experience of the US and identifies lessons that can be learnt for Singapore.

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In the UK and Singapore, a deferred prosecution agreement ("DPA") is an agreement by the prosecutor to hold off prosecuting a corporate offender so long as the offender agrees to certain terms and conditions. Under the legislation in both these jurisdictions, a DPA must be approved by a court as being in the "interests of justice" and with terms that are "fair, reasonable and proportionate" before it can be proceeded with.[1] This paper first outlines the DPA regime in Singapore and contrasts it with the UK position. It then considers the theoretical basis for the court's approval of DPAs, before going on to critically examine the application of the tests for approval of DPAs in the UK and consider Singapore's likely approach to these same tests. Before concluding, and where appropriate, it draws on the experience of the US and identifies lessons that can be learnt for Singapore. It is hoped that this piece can contribute to a better understanding of judicial supervision of prosecutorial discretion in the context of DPAs and highlight potential issues with proving the requisite thresholds for the approval of DPAs to the satisfaction of courts in the UK and Singapore.

The DPA Regime in Singapore

The origins of DPAs can be traced to the US where DPAs were initially conceived as a mechanism to address non-serious charges committed by juvenile offenders.[2] The objectives of DPAs then were to reform individuals through community supervision, thus reducing the resources spent on minor cases.[3] Under a DPA, the accused would agree to have his or her prosecution deferred and ultimately have one's charges dropped, provided that he or she completes a rehabilitation programme and commits no other offences during this period.[4]

DPAs later became the "mainstay of white collar criminal law enforcement" in the US,[5] and have, in recent times, become commonly invoked for offences including corruption, money laundering, and fraud.[6] DPAs have since made their way to the UK through the Crime and Courts Act 2013 and Singapore through the Criminal Justice Criminal Justice Reform Act 2018.

Unlike in the US, DPAs in the UK and Singapore were conceived as tools only to be used against corporate bodies, partnerships or unincorporated associations for specific economic crimes. The justification for introducing DPAs has largely been to provide prosecutors with a more sensitive instrument that can be used to deal with the misconduct of a few individuals without having to take down an entire corporation.[7] As described by the US Department of Justice, DPAs are "an important middle ground between declining prosecution and obtaining the conviction of a corporation".[8] DPAs may help in bringing about a change in corporate behaviour

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while facilitating the investigation and prosecution of the individual wrongdoers, which will not be precluded by the DPAs.

Singapore lies somewhere between the US and the UK in its DPA framework. In terms of the approval of DPAs, Singapore is aligned with the UK in placing the judiciary at the heart of the DPA approval process and expressing in legislation the standard for the courts to assess DPAs.[9] Both the UK and Singapore legislation also stipulate a broad range of terms that the DPA may include, such as a financial penalty, victim compensation, payment of reasonable costs of the prosecution, and co-operation with investigations.[10]

However, in various respects, Singapore does not go as far as the UK does on judicial supervision. For example, in Singapore, court approval of the DPA is required only after the prosecution and the company in question have agreed on the terms of the DPA. In the UK, there is a two-stage approval process where the court first gives preliminary approval after the commencement of DPA negotiations to permit the negotiations to continue, before later giving final approval when the prosecutor and the company in question have agreed on the terms of the DPA.[11] In relation to a breach of the DPA, the Singapore High Court's role once it has found that a company has, on a balance of probabilities, failed to comply with the terms of the DPA, is only to terminate the DPA.[12] In contrast, the court in the UK when faced with a breach of the terms in the DPA, may either terminate the DPA, or to invite the prosecutor and the company to agree to proposals to remedy the company's failure to comply.[13] Thus, where *de minimis* breaches of the DPA are concerned, the termination of the DPA may only be avoided in Singapore if the prosecution refrains from applying to the court concerning the breach.

One key difference between the UK and Singapore is that the UK legislation requires the publication of a binding Code of Practice that contains the test for whether it is possible to enter into a DPA and the factors that the prosecution may consider in deciding whether or not to enter into a DPA. The legislation in Singapore does not provide for an equivalent and it was stated during the Second Reading of the Criminal Justice Reform Bill that there would be no code of practice in Singapore, consistent with Singapore's general position that prosecutorial guidelines should not be published to prevent them from becoming "a tool for criminals to refer to in manipulating the criminal justice system to escape punishment".[14]

Another key difference is in the publication of information concerning the approval of DPAs. In Singapore, all DPA hearings take place in private[15] and there is no obligation for the courts to publish any reasons for their decisions in relation to the approval of DPAs. In the UK, legislation allows the DPA hearings to be in public or in private. Although the practice may be that the hearing is usually private due to the uncertainty as to whether the court will grant the declaration to approve the DPA,[16] if the court approves the DPA, that decision and the reasons for it must be given in open court.[17] The absence of an obligation to publish reasons has been justified by Singapore's then Senior Minister of State for Law as being consistent with the current position that places no compulsion on the Singapore High Court to publish grounds of decision unless there is an appeal.[18] Nevertheless, based on the practice of the Singapore High Court, one can be optimistic that reasons will generally be given due to the recognition in Singapore of the common law judicial duty to give reasoned decisions in both civil and criminal cases.[19]

With this understanding of the DPA frameworks in Singapore and the UK, we turn to consider the theoretical basis for a judicial role in the DPA approval process.

Theoretical Underpinnings of the Court's Role in Approving DPAs

Is there a need for the court to have a role in approving DPAs? Professor Jennifer Arlen posits that modern legal systems employ two mechanisms to constrain discretion such that it is exercised consistently with the rule of law: (i) imposition of limitations on the scope of authority; and (ii) implementing external and internal oversight over the exercise of discretionary powers.[20] Underlying the notion of limitations on the scope of authority is the principle of the separation of powers, where very broadly speaking, the authority to create duties lies with the legislature, the authority to determine the validity and scope of those duties lies with the judiciary, and the authority to enforce those duties lies with the executive.[21]

These broad notions have become somewhat muddied in the modern regulatory state, but still remain a useful touchstone. Even where the executive is granted expanded powers to create duties, limitations can be placed on the scope of authority granted, for example, through a precise statement of the social goals to be achieved and the methods employed.[22] In the US, Professor Rachel Barkow paints a stark picture of the power of prosecutors, who she argues have taken on adjudicative powers due to several dynamics, including: (i) criminal laws being written in broad terms; (ii) the limiting of judicial sentencing authority via mandatory minimum sentences and sentencing guidelines; (iii) prosecutorial control of sentencing discounts for cooperating with the government and accepting responsibility; (iv) the reluctance of the judiciary to scrutinise threats by Prosecutors to proceed with more severe charges if the defence goes to trial; and (v) legislative efforts that promote

rather than constrain plea bargaining.[23] Similarly, Professor Gregory Gilchrist has also argued that the expansive power exercised by prosecutors in corporate settlements follows the same trend in more traditional cases and stems from the predictable consequence of plea bargaining, discretion, and regulatory failure.[24]

Although this does not represent the situation in the UK and Singapore, due to different trends in criminal law and practice including that plea bargaining does not involve the court or any agreement on sentence,[25] the need to implement some form of oversight over the exercise of prosecutorial discretion to ensure that the limitations to the scope of authority are complied with remain necessary. Such oversight can only be effective if there is a "standard to employ when determining whether a particular government action represents legitimate exercise of power".[26] This will limit the potential for prosecutorial power and abuse and provide a check to ensure that the terms of the DPA are not too lenient or harsh by requiring the court to make certain express findings before a DPA can be implemented.[27]

It may be argued that the entry of DPAs, as with plea bargaining, should be a matter left to the discretion of the prosecution and subject to an extremely circumscribed scope of review. Plea bargaining in the UK and Singapore essentially involve agreements between the prosecution and the defence that relate to the prosecution taking certain steps, be it withdrawing charges,[28] proceeding on a lesser charge or recommend a lower sentence to the court,[29] or omitting certain facts (usually aggravating) from the agreed statement of facts to be presented to the judge for the purposes of sentencing.[30] In exchange, the defence offers up something, whether it is evidence, cooperation with the prosecution in other proceedings, a plea of guilt, or otherwise. Similarly, DPAs involve agreements between the prosecution and the defence that relate to holding off on proceeding with the charges against the accused, in exchange for the accused offering up something, including cooperation with law enforcement, compensation to victims, and a commitment to certain steps to change its behaviour.[31] A closer analogy may be drawn with the diversion of individuals to an agreed program of behaviour in lieu of incarceration by juvenile courts, drug courts, and impositions of probation generally.[32] In these situations, beyond the agreement between the prosecution and defence, the threat of revocation of the agreement and resurrection of the original charges in case of failure to comply is similar.[33]

In plea bargaining and the taking of diversionary measures, the prosecutorial discretion to institute, conduct or discontinue any proceedings for an offence, which in Singapore is enshrined in Article 35(8) of the Singapore Constitution, is near absolute.[34] The only limit to the prosecutorial discretion is that it "may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose".[35] Further, to ensure that like cases are treated alike, the prosecution must also "give unbiased consideration to every offender" and "avoid taking into account any irrelevant consideration".[36]

The Singapore Court of Appeal has described prosecutorial power in this way:[37]

> The Attorney-General is the custodian of the prosecutorial power. He uses it to enforce the criminal law not for its own sake, but for the greater good of society, ie, to maintain law and order as well as to uphold the rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore, not all offences are provable in a court of law. It is not necessarily in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney-General to prosecute any and all persons who may be guilty of a crime, he cannot decide at his own whim and fancy who should or should not be prosecuted, and what offence or offences a particular offender should be prosecuted for. The Attorney-General's final decision will be constrained by what the public interest requires.

Accordingly, the only recourse an accused may have to challenge an exercise of prosecutorial discretion, is to seek judicial review on the limited grounds described above. This is notoriously difficult because there is no general obligation for the Public Prosecutor to disclose his reasons for making a particular prosecutorial decision.[38] In Singapore, where prosecutorial guidelines are not published, the challenge is even more severe. In fact, the Singapore Court of Appeal has affirmed that the accused bears the burden of establishing a *prima facie* case, and that it should be presumed that the Public Prosecutor has acted in good faith.[39]

It seems clear that we cannot take this very limited judicial review approach towards the court's approval of DPAs. Otherwise, there is very little point in having a legislated role for judicial oversight of the DPA process and stipulating standards by which the judiciary should assess the DPA, namely, whether it is "in the interests of justice" and whether its terms are "fair, reasonable and proportionate". But why should this be so (apart from the fact that the legislature has deemed it so)?

There are two main differences between plea negotiations and diversions from the criminal justice system on the one hand and entering into DPAs on the other. First, the accused is not a human person but a corporation. The well-being of a corporation affects many more people and could even affect general economic welfare and the security of a country. Indeed, it has been said that the development and exploitation of the corporate form

has allowed society to attain a quality and standard of life that would not be possible without it.[40] Concomitantly, corporations also have the capacity to cause serious harm through failures of product quality control, failures to protect the environment, failures to protect the health and safety of employees, and so on.[41] Whereas individual prosecutions are typically declined on the basis of public interest or resource constraints,[42] DPAs may be motivated by other considerations like the collateral damage of convictions (for instance, the impact on employees and shareholders), incentivising corporate entities to confront criminal conduct and cooperate with authorities, and other social, economic or political reasons.[43]

Second, the DPA goes beyond any form of existing criminal punishments in its ability to impose any amount of monetary penalty and long-term structural reform on the corporation in addition to other constraints on behaviour. The power to prescribe punishments has historically been treated as part of the legislative power.[44] However, with the move away from statutory prescription of maximum and minimum sentences as well as graded maxima towards the abandonment of minimum sentences and replacement of a plethora of narrowly defined offences, each with its separate maximum sentence, with a smaller number of broad band offences with fairly high statutory maxima, wide judicial discretion has become a characteristic of English sentencing for the last hundred years or so.[45] Although the Prosecution is able to influence sentencing to some extent, for example by preferring a more or less serious charge, or making sentencing recommendations to the Judge, the prescription of punishment has never been viewed as one for the executive branch of government. Accordingly, more substantial judicial oversight is required over the prosecutorial negotiation of DPAs than other prosecutorial functions.

Another way to justify substantial judicial oversight over DPAs is to recognise that, related to the two features of DPAs described above, DPAs are an extreme form of executive policy-making,[46] going much further than the incidental power to regulate that comes with enforcement discretion.[47] With DPAs, prosecutors may have to weigh in on questions of how the government should seek to deter corporate misconduct and the role of the criminal law in that endeavour.[48] One should bear in mind that prosecutors exist alongside regulatory agencies. Civil authorities, with their access to firm-specific information and expertise, as well as their ability to conduct ongoing empirical assessments of the effectiveness of their own measures and industry-wide assessments of how best to induce compliance, are arguably better placed to determine whether to impose any structural reform on a corporation and, if so, what reforms should be imposed.[49] Judicial supervision according to standards prescribed by the legislature is required to serve as a meaningful check on the prosecutor, to keep it within its constitutional role.

A question then arises as to institutional competence – does the judiciary have the ability to supervise the prosecutor in relation to the entry of DPAs? Suffice to say that as the judiciary's role is to interpret and pronounce on the law passed by the legislature, substantive expertise is unnecessary to serve its purpose and the court can call on the parties to produce expert evidence or even appoint its own court expert should it require that information in the application of the standards under the legislation.

The following sections examine how the UK had applied the statutory test for DPAs over three released judgments, namely:

i. *Serious Fraud Office v Standard Bank Plc* ("*Standard Bank*") involving a UK subsidiary of a foreign bank which failed to prevent persons associated with Standard Bank Plc from engaging in bribery with officials within the Government of Tanzania;[50]

ii. *Serious Fraud Office v XYZ Limited* ("*XYZ*") involving a "modestly resourced" small and medium enterprise involved in a conspiracy to corrupt and bribe as well as a failure to prevent bribery by its employees or agents;[51] and

iii. *Serious Fraud Office v Rolls-Royce plc* ("*Rolls-Royce*") involving an engineering giant described to be of "central importance to the UK". Rolls-Royce was found to have been engaged in multiple offences, including agreements to make corrupt payments, the concealment of the use of intermediaries, and the failure to prevent bribery by employees or intermediaries in conducting its business overseas.[52]

The discussion is organised based on the factors applied in the UK and comments on specific considerations for the Singapore courts in relation to each of these factors, starting with the "interests of justice" test before addressing the "fair, reasonable and proportionate" test.

The "Interests of Justice" Test

The first statutory test requires the court to examine if it is in the "interests of justice" to address the conduct of an accused company with a DPA, as opposed to prosecuting the company. While the UK DPA Code of Practice

sets out extensively the public interest factors in favour of and against DPAs,[53] Sir Brian Leveson, the President of the Queen's Bench Division who has dealt with all the above UK DPA cases, has emphasised the following factors[54]:

i. the seriousness of the offence(s);[55]

ii. the company's history of similar conduct;[56]

iii. the company's cooperation in exposing and self-reporting the offence(s);[57]

iv. the company's corporate compliance programmes prior to, at the time of, and subsequent to the offending;[58]

v. the extent to which the company has changed both in its culture and in relation to relevant personnel;[59] and

vi. the impact prosecution may have on the company, employees and others innocent of any misconduct.[60]

Although Singapore has no equivalent of the UK DPA Code of Practice, it is suggested that the Singapore courts could similarly apply a multi-factorial approach in determining the issue of whether a DPA is in the "interests of justice". Such an approach would be principled yet leave the courts sufficient discretion to respond to the particular circumstances of each case. Indeed, the UK DPA Code of Practice states that the application of public interest factors is an "exercise of discretion", and the relevance and weight of each factor are matters for the individual prosecutor (and eventually, the approving court).[61] It does, however, provide general guidance that a prosecution will "usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution".[62]

As to the precise factors that the Singapore courts may consider, we suggest that absent a Code of Practice, the Singapore courts could consider the factors referenced in the UK cases. The Singapore courts often draw upon the best practices of leading common law jurisdictions. In the context of DPAs, which may often involve crimes across multiple jurisdictions and coordinated international efforts to investigate and prosecute, international practice would be all the more relevant. Additionally, since the Singapore DPA legislation was largely modelled after the UK, the structured approach adopted in the UK would be an appropriate framework for the Singapore court to adopt in its first DPA hearing. Nevertheless, the weight given to each of the factors and the approach of the court may vary to consider the Singapore legal framework and other local cultures and practices.

Seriousness of the offence(s)

As a starting point, the UK approach considers the seriousness of the company's alleged conduct. The more serious the alleged offence is, the more likely that public interest demands for the company to be prosecuted as opposed to being offered a DPA.[63] The aggravating factors in favour of the prosecution of the company include: the systematic perpetuation of the alleged offences over an extended period of time;[64] the offences implicated multiple jurisdictions;[65] senior employees were involved in the alleged offences;[66] and the company attempted to cover up its conduct.[67] A company's failure to prevent bribery, due to the inadequacies of compliance procedures, is regarded as less serious an offence as compared to the actual act of bribery and corruption.[68]

Even if there are aggravating circumstances which favour prosecution because of the seriousness of the offences involved, the court should then turn to consider if there are strong countervailing public interest factors in favour of the use of DPAs.[69] It is this balancing of considerations that often poses difficulties because they involve comparing apples and oranges. *Rolls-Royce* is a good example of striking this difficult balance.

Described as involving the "most serious breaches of the criminal law in the areas of bribery and corruption" spanning three decades and seven jurisdictions,[70] it would seem that if ever it may not have been in the public interest to approve a DPA on the basis of the seriousness of the offences involve, this would have been such a case. Sir Leveson himself recognised this.[71] Nevertheless, the other public interest factors that tipped the scale in favour of the DPAs seemed to be Rolls-Royce's co-operation (the court was "entirely satisfied that from [the moment the Serious Fraud Office ("SFO") began to ask questions of Rolls-Royce], the company could not have done more to expose its own misconduct, limited neither by time, jurisdiction or area of business"),[72] the steps Rolls-Royce had taken to enhance its ethics and compliance procedures, including appointing an independent expert to conduct a review of its procedures and act on an ongoing basis as a "quasi-monitor" of its compliance programme and conducting disciplinary proceedings against errant employees,[73] and the change of culture and personnel ("Rolls-Royce is no longer the company that once it was").[74] Nevertheless, there were negative reactions to this decision, including that it gave the impression that Rolls-Royce was "too big to prosecute".[75]

Despite the difficulties inherent in balancing different public interest factors, there is no escaping this task for the Singapore court. The seriousness of the offences involved makes a logical starting point and the courts

will have to boldly develop a line of jurisprudence to establish how exceptional one or more of the other public interest factors have to be before they can tip the balance to permit a DPA to be approved in the "interests of justice". In line with the importance of a substantial role for judicial supervision, this exercise would necessitate close scrutiny of the offered justifications for a DPA rather than be undertaken with any presumption of validity of the prosecution's proposal.

History of similar conduct

Another aggravating factor the court will examine is the extent of any history of similar conduct involving "prior criminal, civil and regulatory enforcement actions" against the company.[76] Similar to how an accused's antecedents are taken into consideration during sentencing, a company's recidivist behaviour would weigh against granting a company a DPA.

For the company's antecedents to be deemed aggravating, the past conduct that was subject to investigation or enforcement actions should relate to the same type of offences that the company is presently charged for. As such, even though Standard Bank was previously subject to enforcement action for failing in its anti-money laundering procedures, this was found not sufficiently similar to the bank's present charge for its failings in its anti-bribery and corruption policies.[77] Additionally, Sir Leveson noted that a DPA is not against the interests of justice simply because the company has been investigated by foreign prosecutors over similar conduct, though this may be relevant when considering the multi-jurisdictional extent of the company's criminality.[78]

Given that a DPA seeks to provide an offending company an opportunity to reform its corporate culture to prevent the reoccurrence of similar misconduct, a question arises as to whether a company who had previously been granted a DPA could be eligible for another in respect of a later offence. Should a stricter approach be taken where the company was previously granted a DPA for similar misconduct? While the UK has not had the opportunity to consider this, US prosecutors have been observed to repeatedly offer DPAs to companies despite their recalcitrance. Pharmaceutical giant Pfizer Inc., together with its subsidiaries, have faced charges for illegal marketing activities on five occasions between 2002 to 2012; yet at each occasion, the parent company was offered a DPA requiring the group to once again enhance its compliance procedures.[79] Multiple DPAs have also been offered to major financial institutions, including HSBC, JPMorgan, AIG, Barclays, and UBS.[80]

The US experience exemplifies the difficulties of dealing with the issue of recidivist companies. The US sentencing guidelines provide for more severe sentences for corporations, which have committed a criminal or civil offence less than 10 years prior to the present offence if the present offence was based on "similar misconduct".[81] This gives rise to the first difficulty, which lies in what constitutes a "similar misconduct". The interpretation of this amorphous term is central to many DPAs, which often lead to consequences for firms found to engage in similar offences during the duration of the DPA.

A second difficulty arises because the US sentencing guidelines apply not only to the corporation in question, but also to a "separately managed line of business" – that is, the past conduct of the corporation's subsidiaries can be considered as well.[82] This question is whether a large corporation can be deemed a recidivist if the subsequent offence was committed by its subsidiaries or by different employees. In the 2010 deferred prosecution hearing of *US v ABB Ltd*,[83] US District Court Judge Lynn N Hughes refused to hold that the corporation's subsidiary (which was negotiating a guilty plea), ABB Inc, was a recidivist deserving of an enhanced sentence. This was despite the fact that the ABB Group, consisting of more than 500 companies under the control of ABB Ltd, had previously pleaded guilty to and been offered DPAs for violations to the Foreign Corrupt Practices Act.[84] Judge Hughes reasoned that given the vast number of employees and countries in which ABB Inc operated in, it would be "harsh" to label the company as a recidivist just because the company, its employees, or its separately managed line of business had committed an offence in any given place or period.[85] This approach to finding recidivist behaviour may unduly favour large corporation groups that could avoid harsher punishment despite multiple violations committed by the corporation through its subsidiaries, so long as the offences were committed in different states or by different employees. On the other hand, an unduly strict approach of limiting DPAs to only one per company or group of companies, also seems out of step with reality and limits the court's discretion in dealing with the particularities of each case.

The UK Code of Practice states that it may not be in the public interest to avoid prosecution where there have been "repeated or serious breaches of the law", as to do so may not provide adequate deterrent effects.[86] This approach treads the middle ground by making clear the general position that repeated breaches would be a factor that would augur against a DPA being in the interests of justice, but also allows the court to consider other factors, such as the reasons why a corporate group is structured in a particular way, the relationship between the subsidiaries and between the parent and its subsidiaries, and how it came to be that the corporation fell into wrongdoing again.

It is suggested that Singapore courts adopt a discretionary approach more similar to the UK than a more rule-based approach that requires enhancement of punishment because of the wrongdoing of subsidiaries. This

would allow the courts to respond better to the nuances of a particular case and not penalise large corporate bodies simply for being large.

Cooperation in exposing and self-reporting offence(s)

Turning then to the countervailing factors, of particular significance is the extent of co-operation demonstrated by the company in exposing the corporate wrongdoing to the relevant authorities. This cooperation includes the identification of relevant witnesses and the disclosure of the company's accounts and documents.[87] Lisa Osofsky, Director of the SFO, has described cooperation, at its simplest, to be "Tell me something I don't know".[88] Sir Leveson highlighted the important role DPAs play in incentivising companies to self-report their wrongdoing, and this openness must be rewarded and seen as a worthwhile exercise.[89]

To determine if a company is deserving of a DPA, the court examines the totality and comprehensiveness of the information provided to the prosecutor. A self-report which brings to light an offence that might otherwise have remained unknown to the prosecutor would weigh in favour of a DPA being awarded to the company.[90] Conversely, a self-report which attempts to withhold information that may jeopardise an effective investigation or the prosecution of individuals involved in the wrong doing would weigh against the award of a DPA.[91] The promptness of the self-report from the company's discovery of the wrongdoing, and the extent that the company involves the prosecutor in the early stages of an investigation are also relevant factors.[92]

Requiring companies to demonstrate cooperation has potential implications on legal privilege. Even though Rolls-Royce did not self-report its wrongdoing, the court still found the company to be a worthy candidate for a DPA, as the cooperation proffered by Rolls-Royce during the investigations were "extraordinary".[93] Rolls-Royce had voluntarily waived its legal professional privilege on a limited basis for all interview memoranda undertaken during the company's internal investigation;[94] and granted the authorities complete access to its digital repositories without filtering its contents for potential privilege, deciding instead to permit an independent counsel to resolve any issues of privilege.[95] Following this decision, commentaries have noted that the company's voluntary waiver of legal professional privilege would likely be a key indicator in demonstrating the company's genuine co-operation in an investigation.[96]

Legal professional privilege takes two forms: (1) legal advice privilege, which seeks to preserve the confidential relationship between solicitor and client; and (2) litigation privilege, which ensures that parties to litigation can prepare their cases without adversarial interference.[97] Legal advice privilege, which has been recognised to extend to commercial considerations beyond mere questions of law,[98] may be undermined as a company turns over extensive amounts of email communications without filtering the content for potential privilege.[99] The litigation privilege of individuals potentially facing prosecution may be compromised as well, as a cooperating company would likely to provide records of all interviews it has conducted with its personnel to the investigating authorities.[100]

Yet, the importance of legal professional privilege cannot be overemphasised, and the UK and Singapore courts have both expressed the crucial role of privilege in serving the "secure and effective administration of justice according to the law".[101] At one point, the US Department of Justice required waivers of legal professional privilege as part of DPAs, but it no longer does so.[102] Among others, Professor Richard Epstein had criticised the imposition of such a condition as "an effective limitation on the right to assistance of counsel" and raising the question of consistency with the "fundamental principles of procedural due process".[103]

The 2018 UK Court of Appeal decision of *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* demonstrates how there is important scope for legal professional privilege in the context of investigations by the SFO. There, the Court of Appeal upheld litigation privilege over interview notes and material associated with a review by forensic accountants after the company had received a whistle-blower email alleging corruption and financial wrongdoing. Notably, the Court observed that:[104]

> It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority.

Given the unequivocal importance of legal professional privilege, particularly in the DPA context to promote desirable corporate behaviour, the Singapore courts should be cautious not to treat a company as uncooperative simply because it has not waived its legal privilege in respect of certain materials. The importance of judicial supervision in this context is important to counterbalance the Prosecution's interest in seeking discovery of material that could aid in its investigations. In relation to how much importance the Singapore courts should

place on self-reporting, this was not something specifically discussed during the Parliamentary debates. Nevertheless, given the various references to incentivising corporations to cooperate with the authorities as well as to share information, it is suggested that self-reporting should be rewarded and should usually be present before a DPA is awarded.

Company's compliance programmes

The presence of compliance programmes within the company prior to, at the time of and subsequent to the offending is an additional relevant factor. A court would be more inclined to grant a DPA if the company has existing programmes which may be enhanced with the help of a DPA.[105] The presence of a compliance programme may even have led to the discovery of the offence and eventually the company's self-report.[106] This would favour the approval of a DPA.

In particular, the UK cases have given weight to significant improvements to the company's compliance policies and processes since the uncovering of the corporate wrongdoing. For instance, Rolls-Royce had appointed an expert to conduct independent reviews of its compliance procedures and recruited experienced compliance personnel in key positions that are independent of business divisions.[107] They had also implemented measures targeted at their offence of engaging in corrupt practices with intermediaries, by reviewing and suspending relationships with several intermediaries and conducting disciplinary proceedings for employees found to be engaged in these corrupt practices.[108] While such corrective measures cannot absolve a company of their offences, the court looked favourably upon the fact that Rolls-Royce "could not have done more to address" the wrongdoing that had been exposed.[109]

The converse is not necessarily true, in that the absence of a compliance programme prior to and at the time of the offending could more appropriately be a neutral factor than an aggravating one, depending on the reasons for the absence.

Separately, this factor could be particularly important when considering a company that is a second-time offender. In such a situation, where the enhancements to previous compliance programme had no effect on deterring wrong-doing, this could be a strong aggravating factor for refusing to approve a DPA as being in the interests of justice save in exceptional circumstances.

In coming to a judgment on this factor, it is also important to recognise that neither the Prosecution nor the courts are experts on compliance matters and company governance. In this respect, Professor Barkow advocates a model of consultation where prosecutors work closely with regulatory agencies and seek out their advice but still remain able to differ where expert views may be tainted.[110] This appears to be a sensible approach and even more suitable in the UK and Singapore context where the court can scrutinise the evidence relating to the effectiveness of compliance programmes and require the appointment of an advisor to the court if necessary.

Extent to which the company has changed since the offending

Another mitigating factor is the extent to which the corporate entity has changed in both its culture and in relation to relevant personnel within the company. It appears that if the employees involved in the wrongdoing are no longer with the company, or where the company's majority shareholding and board composition is substantially different from when the offence had occurred, the court may find no further need to impose harsh sanctions on a company which is "culturally different" to that which committed the said offences,[111] and it may thus be in the interest of justice to grant the present entity a DPA.

This factor is perhaps also relevant to repeated wrongdoings in that if it could be said that a change in management and culture had led to the repeated wrongdoing, there may be reason to offer another DPA to the recalcitrant company.

Impact of prosecution

Finally, the court considers the impact of prosecuting the offending company. A DPA should be favoured if a prosecution is likely to have "disproportionate non-penal legal consequences" on the company or is likely to have "collateral effects on the public or the organisation's employees".[112] Potential debarments and exclusions from public contract procedures as a result of a criminal conviction are significant factors to account for, as the UK cases have recognised that these non-penal legal consequences would have severe long-term effects on the company's financial position, significantly impacting its share price and possibly the viability of the company.[113] These effects may have a national impact as well. For instance, Sir Leveson in *Rolls-Royce* acknowledged that

Rolls-Royce had a critical role in the nation's defence industry as they supplied the military's engines and nuclear propulsion technology.[114]

However, Sir Leveson emphasised that the potential impacts following a company's prosecution cannot be a determinative factor in granting a DPA, even for companies which are of particular significance to the state.[115] To allow otherwise would effectively grant these giant corporations immunity from prosecution to avoid the fallout a prosecution may have on its many employees, shareholders, and suppliers. The starting position for a company that commits serious crimes continues to be that of prosecution, and a DPA would only be awarded in light of sufficient countervailing factors demonstrating that it was in the public interest to do so.[116]

This must be correct, and similarly applicable to the Singapore context, otherwise fairness and equality of treatment under the law would be comprised by a corporation becoming "too big to jail".[117]

The "fair, reasonable and proportionate" test

Upon finding that it would be in the interests of justice to grant a DPA, the court must then be satisfied that the terms of the DPA are fair, reasonable and proportionate. The Singapore legislation elaborates on both the mandatory and permissible terms of the DPA, which largely mirrors the equivalent provision in the UK Crime and Courts Act 2013.[118] Mandatory terms include a draft charge of the company's alleged offence, and the expiry date of the DPA.[119]

The range of permissible terms that may be prescribed in a DPA may be divided into two categories: those that relate to the conduct of the company, and those that relate to financial payments.[120] The former includes a requirement to co-operate in all investigations relating to the alleged offences, to implement or improve the company's compliance programmes, and to appoint persons to monitor and advise the company of its compliance programmes. The latter includes terms to pay the Public Prosecutor a financial penalty; to compensate victims of the alleged offence; to disgorge any profits the company have made from the alleged offence; and to pay the reasonable costs of the Public Prosecutor.

While these terms may be examined independently, the UK cases have also considered them holistically to determine if the sum of the conditions imposed on the subject company are fair, reasonable and proportionate. This is particularly so for the terms seeking monetary payments from the company.

From the Singapore perspective, then Senior Minister of State for Law had stated during the second reading of the bill introducing DPAs that the Ministry's intention was that "in assessing the proportionality of the conditions proposed, the High Court will balance the extent of the wrongdoing, including the revenue or profits attributable to the wrongdoing, with the ability of the corporation to comply".[121] This is a broad mandate for the Singapore courts that similarly suggests that the terms of a DPA should be given individual consideration but also assessed as a whole. Accordingly, the Singapore courts are likely to look to the UK for guidance in applying the "fair, reasonable and proportionate" test.

Terms relating to the conduct of the company

In all of the concluded UK cases with released judgments, the court found that it was fair, reasonable and proportionate to require the company to cooperate with all investigations on its alleged offences and the individuals involved in these alleged offences. This includes the disclosure of all information and material in the company's possession, custody or control which concerns the conduct in question and that are not protected by legal professional privilege or otherwise.[122] Indeed, *XYZ* has stated that such co-operation terms may be considered "standard" for all DPAs.[123]

It is also generally fair, reasonable and proportionate to require the company to implement or enhance its compliance programmes relating to the company's policies or to the training of its employees.[124] This is crucial to the "transformative effect" DPAs are often lauded to have on the corporate culture of the subject company and of other similar companies,[125] as these terms often require the compliance programmes to match the standards required by the relevant anti-corruption laws of the state.[126] Additionally, these terms would often require the company to prepare reports on its compliance policies and the progress of its implementation. This report may be done by the company's employees, or by a qualified third-party specialist engaged at the expense of the company.[127]

These terms will likely be treated as generally acceptable by the Singapore courts. It should be noted, however, that particular concern has been expressed in the Singapore parliament concerning a term requiring the appointment of an external monitor. Member of Parliament Mr Murali Pillai pointed out during the parliamentary debates that should the external monitors be appointed at the corporation's expense even though the

monitor is in reality working for the prosecuting authorities, there may be a potential "moral hazard" in that "the external monitor may have a financial interest in having an expanded scope of work". Mr Pillai elaborated that he has seen "examples of monitors tying up the corporation's business in knots, especially when the scope of monitoring has not been precisely determined and agreed in the DPAs beforehand, and submitting bills to corporations running into millions of dollars per month". He then asked whether monitors may be subject to oversight by the court, akin to the position of liquidators appointed in the winding-up of companies. In response, the then Senior Minister of State for Law responded that because the conditions that can be attached to a DPA are "deliberately left flexible", it was "open to parties to negotiate and set out details concerning the role and supervision of monitors in the DPA".[128]

Presently in the UK, the role of an external third-party specialist has been limited to preparing a report on the company to make recommendations to improve the company's policies or as to the implementation status of the company's compliance policies. The other suggestions by Mr Pillai could also be workable if a larger role for an external monitor is required. The important point to note for the Singapore courts would be to ensure that the terms of the DPA remain "fair, reasonable and proportionate" not only of themselves but also in the course of implementation. Additionally, the courts should be slow to approve a DPA with overly broad and onerous terms for monitoring because it should bear in mind that it is the role of regulatory agencies and not the prosecutors to impose structural reform.

Terms relating to monetary payments

This section discusses the common DPA terms requiring monetary payments from the company.

First, the DPA may require the payment of compensation to the victims of the company's offences. Sir Leveson has emphasised that the payment of compensation must be prioritised over the company's payment of fines,[129] highlighting the importance of restorative justice over extracting retribution onto the company. However, it is worth noting that there are instances where the authorities and the court are unable to positively identify any entities as victims to be compensated for the company's alleged offences.[130] In such a scenario, it would not be fair, reasonable and proportionate to impose an order of compensation onto the company. In any event, it is open to any victim of the company's alleged criminal conduct to pursue a claim in compensation even after the DPA hearing.[131]

Second, the DPA may require a disgorgement of the gross profits obtained by the company as a result of the alleged offence. It is generally fair, reasonable and proportionate to require the company to surrender all the benefits it made from its alleged offence, as it would be against public policy to allow an offender to profit from his wrongdoing.[132] Although an *innocent* parent company has no obligation to contribute towards the monetary payments imposed onto its subsidiary company by the latter's DPA terms, it would be fair, reasonable and proportionate for a parent company which has profited from its subsidiary's unlawful conduct to contribute towards the payment of the subsidiary's disgorgement of profits.[133] This would remove concerns that the profits arising from corporate wrongdoing are being preserved by virtue of the parent company being a separate legal entity. There may also be an issue of assessing the gross profit made as a consequence of the alleged criminal activities to be disgorged from the company. This may be the case when the alleged offence spanned a long period of time, during which new legislation may have been implemented. In *Rolls-Royce*, the gross profit for several alleged offences were earned prior to the implementation of the Bribery Act 2010. The financial accountants appointed by the company and the authorities acted jointly to agree upon how this amount of gross profit was to be disgorged, and the court found the eventual disgorgement figure agreed upon by both parties' accountants to be fair, reasonable and proportionate.[134] Another practical and less costly alternative could be for the parties to appoint a single joint expert to determine the gross profit to be disgorged.

Third, the DPA may require the company to pay reasonable costs incurred by the authorities in the investigation of the company. This is fair, reasonable and proportionate if the company has the means and ability to pay such costs.[135]

Fourth, the DPA may impose a financial penalty onto the company. The UK Crime and Courts Act 2013 requires the eventual financial penalty imposed to be "broadly comparable to the fine that a court would have imposed ... on conviction for the alleged offence following a guilty plea".[136] This is achieved by applying the approach adopted by the Definitive Guideline for Fraud, Bribery and Money Laundering offences (the "Sentencing Guidelines").[137] The Sentencing Guidelines require the court in determining the financial penalty to consider the following.

i. The category of the offence committed with reference to the company's culpability and the harm inflicted by company's alleged actions. The degree of culpability ranges from high, medium, to lesser culpability. The harm caused would depend on the type of offence committed, for instance, the harm caused by bribery

would normally be the gross profit from the contract obtained as a result of the bribe (i. e. the "Harm Figure").[138]

ii. The starting point and category range of the financial penalty to impose. The Harm Figure would be multiplied by the percentage within the category range provided in the Sentencing Guidelines. The starting point and category range is determined by the company's level of culpability in the alleged offence.[139] For instance, a company that is highly culpable would face a Harm Figure multiplier starting at 300 %, and the court may vary this multiplier within the range of 250–400 %.

iii. Whether there should be any further factors that require an adjustment in the financial penalty, such as a reduction for assistance rendered to the prosecutor or investigator. The court should consider the overall effect of its orders and whether they achieve the removal of all gain, appropriate additional punishment on the company, and the deterrence of further offending.[140]

Overall, these terms relating to monetary payments are individually uncontroversial, and the Singapore courts are similarly likely to regard them as "fair, reasonable and proportionate". Because corporations cannot be imprisoned, for they have "no soul to be damned, no body to kick",[141] retribution is usually achieved through monetary payments whether to the State or to the victims of the offence. However, taken together, the total amount to be paid out by the company may reach exorbitant sums. Should a company be facing severe financial difficulties (possibly as a result of its offending), it would be unlikely to satisfy the full sum as required by the DPA terms. As one of the intents behind the DPA regime is to minimise the collateral consequences of a company's criminal conviction onto innocent employees and shareholders,[142] it would be counter-productive for a DPA to bring the company to the brink of insolvency.

It may thus be fair, reasonable and proportionate for the court to account for the company's means and ability to satisfy the monetary payments. The UK has done so in various ways: the authorities can agree not to seek costs for their investigations;[143] the company may be allowed to satisfy the payments in instalments; and the court can discount the final financial penalty imposed provided that the objectives of the sentencing (i. e. the removal of all gain, appropriate additional punishment, and deterrence) have been achieved by the sum of all orders taken together.[144]

In relation to instalments, it is worth noting that while the failure to meet the proposed instalments constitutes a breach of the DPA, it may be reasonable for a DPA to include a term that the late payment for a stated period (for instance, 30 days) will not constitute a breach of the DPA but will be subject to interest at a stated rate. Such arrangements are permitted by statute, which allows a DPA to include a term setting out the consequences for failing to comply with a DPA term.[145]

In relation to the quantum of the financial penalty, another important point of distinction between the UK and Singapore is that Singapore has no equivalent of the UK's Sentencing Guidelines. A major benefit arising from the Sentencing Guidelines is the categorisation of offences allegedly committed by the company to determine the Harm Figure. This allows the court to craft a financial penalty which is commensurate to the harm inflicted by the company's alleged actions. In the absence of such guidelines, the Singapore Court would likely be inclined to impose sentences based on existing practice, which is influenced by the statutory maximum. The problem with this is that Singapore's anti-bribery legislation, in particular the Prevention of Corruption Act, reflect limits for fines that are very low by international standards. This may be illustrated by the circumstances surrounding the DPA agreement between Keppel Offshore & Marine ("Keppel O&M") and the US Department of Justice.

Keppel O&M a company headquartered in Singapore, specialising in offshore rig design and ship repair and construction.[146] From 2001 to 2014, Keppel O&M was alleged to have paid US$55 million in bribes to a consultant who in turn helped Keppel O&M to procure 13 contracts from two major Brazilian oil companies, resulting in gross profit of US$351.8 million for Keppel O&M. In 2018, Keppel O&M entered into a DPA with the Department of Justice, paying a fine of US$422 million.[147] If one were to apply the UK Sentencing Guidelines to determine the financial penalty to be imposed, the Harm Figure would be the gross profit obtained as a result of the bribes (i. e. US$351.8 million), before applying a multiplier depending on the culpability of Keppel O&M for their actions. In contrast, if one were to impose a financial penalty on Keppel O&M based on Singapore's Prevention of Corruption Act, the maximum fine allowed under the legislation for each charge is a mere S$100,000,[148] thus totalling a maximum penalty of S$1.3 million for the 13 impugned contracts.

In a statement, Singapore's then Senior Minister of State for Law noted that the fine imposed by the Department of Justice on Keppel O&M would greatly exceed any penalty Singapore law could have imposed.[149] She also noted that the US and UK anti-bribery laws allow for significantly higher fines to be imposed (US$2 million and an unlimited fine respectively).[150] This has led to calls for the revision of the Prevention of Corruption Act.

Although it is recognised that amending the statute is not strictly necessary because the Singapore DPA legislation,[151] unlike the UK Crime and Courts Act 2013, does not require the financial penalty to be "broadly comparable to a fine that a court would have imposed ... on conviction for the alleged offence following a

guilty plea", revising the statutory maxima for fines upwards insofar as they apply to companies would better promote transparency and certainty. It would further allow the court determining the DPA financial penalty to impose a quantum which is commensurate to the harm caused by the company's alleged offences using the statutory maxima as a guideline. Accordingly, it is recommended that the Prevention of Corruption Act and related legislation should be revised to allow for higher financial penalties to be imposed for companies. The availability of the DPA tool should not be a way to avoid amending legislation to keep up with the times.

Other Lessons to be Learnt

Apart from the application of the statutory test to determine if a DPA is in the interests of justice and the DPA terms are fair, reasonable and proportionate, it is also important for courts to consider whether steps will be taken to ensure the prosecution of individuals responsible for the alleged offence. As a corporation has no will of its own, it can only act through its agents. Thus, it is only appropriate for the individuals responsible for the corporate wrongs to face prosecution.[152]

The US experience has been that DPAs may encourage lax prosecution of individuals in favour of settling with the company in question. Critics include US District Court Judge Jed S. Rakoff, who argued that the DPA regime has weakened the deterrent effect of the law, as prosecutors are disincentivised to prosecute individuals responsible for the corporate offences due to the time-consuming and costly nature of building a case against an individual.[153] This criticism is borne out by the statistics, which reflect that only about one-third of the US DPA cases between 2001 to 2012 have had individual prosecutions.[154]

The importance of holding individuals responsible has not been lost on the Singapore legislature. During the relevant parliamentary debates, Member of Parliament Mr Vikram Nair expressed the view that it would be important even if a DPA is in place, but where there is serious wrongdoing, for the individual wrongdoers, "preferably the key mastermind behind the wrongdoing" to be "taken to task".[155] The Singapore legislation expressly states that a term of the DPA could be for the company to cooperate in any investigation relating to any possible offence committed by an officer, employee or agent of the company, that arises from the same or substantially the same facts as the alleged offence.[156] Nevertheless, the lesson to be learnt here is not to be lulled into a false sense of achieving criminal justice when only companies are granted DPAs but no individuals are prosecuted thereafter.

The UK cases have demonstrated several means by which the DPA process can facilitate the prosecution of individuals, which can be adopted in Singapore. First, the court may withhold the publication of the DPA judgment until the conclusion of the criminal trials of the individuals in question.[157] This would prevent the findings against the company being granted the DPA from prejudicing the ongoing trials against the individuals. Second, the published DPA judgment may redact the name of the company until the conclusion of the individuals' criminal proceedings.[158] Third, the court will consider under the "interest of justice" limb whether the company as cooperated sufficiently by producing a self-report which does not hinder the prosecution of any individuals responsible for the offence. Attempts to shield any individual from prosecution would jeopardise the company's chances of the court finding that a DPA would be in the interests of justice.

Conclusion

Before the first DPA proposal is tabled before the Singapore courts, it is important to carefully consider the experience of other jurisdictions, particularly the UK where the legislation draws heavily from. The first DPA case in Singapore will set the tone for subsequent cases and provide the courts an opportunity to make clear the approach to be applied. This will be particularly significant given the absence of any Code of Practice or other guidance provided by the legislature that could inform the conduct of corporations. In this regard, the Singapore courts will likely play a bigger role than the UK courts in influencing the policy towards corporate criminal conduct. The courts should not shy away from this judicial role on the basis of deference to the exercise of prosecutorial discretion because, in recognition of the dangers of an unchecked prosecution in this regard, the legislature has given the courts this substantial supervisory role. Despite the challenges that will accompany the tasks of applying the tests of whether the DPA is in the "interests of justice" and whether its terms are "fair, reasonable and proportionate", the UK cases thus far provide a very helpful reference and material for the Singapore courts to draw from. The US experience also serves to highlight areas that deserve caution, including the treatment of corporations that re-offend, as well as the importance of individual prosecution.

Notes

1 Criminal Procedure Code (Chapter 68, 2012 Rev Ed) at section 149F; Crime and Courts Act 2013 at paras. 7 and 8.
2 Henry, P. (2016). Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform. *American University Business Law Review*, 6, 153–173 at p. 157.
3 United States Department of Justice. (2018) *Justice Manual* at para. 9–22.010. Today, this process is known as a "Pretrial diversion".
4 Rakoff, J. S. (February 19, 2015) Justice Deferred is Justice Denied. *The New York Review of Books*. Retrieved from http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/.
5 Lanny A. Breuer, Assistant Attorney General for the Criminal Division of the United States Department of Justice, speech to the New York City Bar Association. (September 13, 2012) Retrieved from https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association/.
6 Sprenger, P. (2015) *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties*. London, UK: Sweet & Maxwell, at p. 8.
7 Chua, E. (2018, 30 January) Deferred Prosecution Agreements in Singapore? *Singapore Law Blog*. Retrieved from http://www.singaporelawblog.sg/blog/article/205; Sprenger, *supra* note 6, at pp. 17–19.
8 Justice Manual, *supra* note 3, at para. 9–28.200.
9 Criminal Procedure Code, *supra* note 1, at section 149F(1); Crime and Courts Act 2013, *supra* note 1, at paras. 7(1) and 8(1).
10 Criminal Procedure Code, *supra* note 1, at section 149E(3); Crime and Courts Act 2013, *supra* note 1, at para. 5(3).
11 Crime and Courts Act 2013, *supra* note 1, at paras. 7 and 8.
12 Criminal Procedure Code, *supra* note 1, at sections 149G(2) and (3).
13 Crime and Courts Act 2013, *supra* note 1, at para. 9(3).
14 *Singapore Parliamentary Debates, Official Report* (March 19, 2018) (Indranee Rajah, Senior Minister of State for Law).
15 Criminal Procedure Code, *supra* note 1, at section 149F(4).
16 Deferred Prosecution Agreements Code of Practice – Crime and Courts Act 2013 ("UK DPA Code of Practice"), at para 10.4.
17 Crime and Courts Act 2013, *supra* note 1, at para. 8(6).
18 *Singapore Parliamentary Debates, supra* note 14.
19 Chen, S. Y., Chua, E. (2018) 2018 Changes to the Evidence Act and Criminal Procedure Code – The Criminal Justice Reform Bill and Evidence (Amendment) Bill. *Singapore Academy of Law Journal* 1–3 at para. 39.
20 Arlen, J. H. (2016) Prosecuting beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements. *Journal of Legal Analysis*, 8, at pp. 206, 209.
21 Arlen, *id* at p. 207. Professor Arlen summarises the doctrine attributable to Montesquieu, *L'Esprit des Lois* (1748).
22 Arlen, *id* at p. 208.
23 Barkow, R. E. (2011). The Prosecutor as Regulatory Agency. In Barkow, A. S., Barkow, R. E. (Ed.), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct.* New York: New York University Press, at p. 178.
24 Gilchrist, G. M. (2018) Regulation by Prosecutor. *American Law Review* (forthcoming). Retrieved from https://ssrn.com/abstract=3204644/.
25 *Chua Qwee Teck v PP* [1990] 2 SLR(R) 571 (Singapore High Court), at para. 19.
26 Arlen, *supra* note 20, at p. 209; Reilly, P. R. (2017) Corporate Deferred Prosecution as Discretionary Injustice. *Utah Law Review*, 839–883, at p. 877.
27 Martin, E. (2014) Deferred Prosecution Agreements: Too Big to Jail and the Potential of Judicial Oversight Combined with Congressional Legislation. 18(2) *North Carolina Banking Institute* 457, pp. 477–478.
28 E. g. in *PP v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 (Singapore High Court), where the accused wrote a letter to his Member of Parliament, which was later sent to the Public Prosecutor, in which he explained why what he did was not an offence.
29 E.g. in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 (Singapore Court of Appeal) ("*Ramalingam*"), two offenders involved in the same enterprise were charged with different offences, one which attracted capital punishment and one that did not.
30 E.g. in *PP v Andrew Koh Weiwen* (2016) SGHC 103 (Singapore High Court), the court noted parties omitted material facts relevant to the accused's sentencing in the Statement of Facts as a result of a plea bargain, and thus the court was necessarily limited in its consideration of sentencing to only those material facts presented in the Statement of Facts and mitigation plea.
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32 Shiner, R. A., Ho, H. (2018) Deferred Prosecution Agreements and the Presumption of Innocence. *Criminal Law and Philosophy*, 12(4), 707–723, at p. 710.
33 Arlen, *supra* note 20, p. 212; Arlen, J. H. (2017) Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals Into Corporate Cops. *Public Law and Legal Theory Research Paper Series, Working Paper No. 17–12.* New York University School of Law, at p. 5. Retrieved from https://ssrn.com/abstract=2951972/.
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35 *Ramalingam*, *supra* note 29, at para. 51.
36 *Ramalingam*, *id* at para. 51.
37 *Ramalingam*, *id* at para. 53.
38 *Regina v Secretary of State for the Home Department, Ex parte Doody* (1994) 1 AC 531 (House of Lords), at p. 564E; *Ramalingam*, *id* at para. 74.
39 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 (Singapore Court of Appeal), at paras. 36–41.
40 Shiner & Ho, *supra* note 32, at p. 712.
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42 Wong, L. (2017) "Prosecution in the Public Interest" *Singapore Law Review*, 35, 31.
43 Chen & Chua, *supra* note 19.
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46 Sekhri, A. (2018, 9 January) The Politics of Prosecution: Examining the Policymaking Role of Prosecutors, at p. 2. Retrieved from https://ssrn.com/abstract=3126497/.
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48 Barkow & Barkow, *id* at pp. 4–5.

49 Arlen, J. H. (2011) Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms. In Barkow, A. S., Barkow, R. E. (Ed.), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*. New York: New York University Press.
50 *Serious Fraud Office v Standard Bank Plc* (2015) Case No. U20150854, Preliminary Judgment heard on November 4, 2015 (Southwark Crown Court) ("*Standard Bank*").
51 *Serious Fraud Office v XYZ Limited* (2016) Case No. U20150856, Preliminary Judgment heard on April 20, 2016 and June 24, 2016 (Southwark Crown Court) ("*XYZ*").
52 *Serious Fraud Office v Rolls-Royce plc & anor*. (2017) Case No. U20170036 (Southward Crown Court) ("*Rolls-Royce*").
53 The UK DPA Code of Practice is issued by the Director of Public Prosecutions and the Director of the Serious Fraud Office pursuant to the Crime and Courts Act 2013, *supra* note 1, at para. 6(1).
54 *XYZ*, *supra* note 51, at para. 20.
55 UK DPA Code of Practice, *supra* note 16, at para. 2.5.
56 *Id* at para. 2.8.2(ii).
57 *Id* at para. 2.8.2(i).
58 *Id* at para. 2.8.2(iii).
59 *Id* at para. 2.8.2(v).
60 *Id* at para. 2.8.2(vii).
61 *Id* at para. 2.6.
62 *Id* at para. 2.5.
63 *XYZ*, *supra* note 51, at para. 21.
64 *XYZ*, *id* at para. 22; *Rolls-Royce*, *supra* note 52, at para. 35.
65 *XYZ*, *ibid*; *Rolls-Royce*, *ibid*.
66 *Rolls-Royce*, *ibid*.
67 *XYZ*, *supra* note 51, at para. 23.
68 *Standard Bank*, *supra* note 50, at paras. 25–26.
69 *Rolls-Royce*, *supra* note 52, at para. 36.
70 *Rolls-Royce*, *id* at para. 4.
71 Sir Leveson expressed this view in *Rolls-Royce*, *id* at para. 61: "My reaction when first considering these papers was that if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades, involving countries around the world, making truly vast corrupt payments and, consequentially, even greater profits, then it was difficult to see when any company would be prosecuted."
72 *Rolls-Royce*, *id* at para. 38.
73 *Rolls-Royce*, *id* at paras. 43–46.
74 *Rolls-Royce*, *id* at para. 62.
75 Watt, H., Pegg, D., Evans, R. (January 17, 2017) Rolls-Royce apologises in court after settling bribery case. *The Guardian*. Retrieved from https://www.theguardian.com/business/2017/jan/17/rolls-royce-apologises-bribery-671m-uk-us-brazil; Hawley, S. (January 30, 2017). A Failure of Nerve: The SFO's Settlement with Rolls Royce. *Transparency International UK*. Retrieved from https://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/. See also Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, "The future of Deferred Prosecution Agreements after Rolls-Royce", speech at a seminar for General Counsel and Compliance Counsel from corporates and financial institutions held at Norton Rose Fulbright LLP on March 7, 2017, where Morgan alluded to and responded to the criticism that Rolls-Royce should have been prosecuted. Retrieved from https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/.
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77 *Standard Bank*, *supra* note 50, at para. 31.
78 *Rolls-Royce*, *supra* note 52, at para. 42.
79 Rakoff, *supra* note 4; Garrett, B. L. (2014) *Too Big to Jail: How Prosecutors Compromise with Corporations* (1st Ed) Massachusetts: Harvard University Press, at p. 166.
80 Garrett, *ibid*.
81 United States Sentencing Commission. (2016) *Chapter Eight – Sentencing of Organizations*, at § 8C 2.5(c).
82 Garrett, *supra* note 79, at p. 167.
83 *U.S. v ABB Ltd* (2010) Court Docket Number H-10–665 (Southern District of Texas). See also the official press release by the Department of Justice, "ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties" (September 29, 2010) *United States Department of Justice*. Retrieved from https://www.justice.gov/opa/pr/abb-ltd-and-two-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and-will-pay/.
84 Garrett, *supra* note 79, at pp. 166–167.
85 *U.S. v ABB Ltd.*, *supra* note 83, Transcript of Deferred Prosecution Hearing at p 10, 11, 13.
86 UK DPA Code of Practice, *supra* note 16, at para. 2.8.1(i).
87 *Standard Bank*, *supra* note 50, at para. 30; UK DPA Code of Practice, *supra* note 16, at para. 2.8.2(i).
88 Lisa Osofsky, Director of the UK SFO, keynote address at the 35th International Conference on the Foreign Corrupt Practices Act in Washington DC (November 28, 2018). Retrieved from https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/.
89 *XYZ*, *supra* note 51, at para. 33.
90 *Standard Bank*, *supra* note 50, at para. 28; *XYZ*, *supra* note 51, at para. 25.
91 *Standard Bank*, *id* at para. 29.
92 UK DPA Code of Practice, *supra* note 16, at para. 2.9.2; see also *Standard Bank*, *id* at para. 27.
93 *Rolls-Royce*, *supra* note 52, at para. 121.
94 *Rolls-Royce*, *id* at paras. 19–20, 121.
95 *Rolls-Royce*, *id* at para. 19.
96 Cheung, R. (2018). Deferred Prosecution Agreements: Cooperation and Confession. *Cambridge Law Journal*, 12–15; Tan, J., Tsin, J. (March 2018) Implementation of Deferred Prosecution Agreements. *WongPartnership LLP Legiswatch*. Retrieved from https://www.wongpartnership.com/index.php/files/download/2790/; see also Lloyd, E. (May 2017) Rolls-Royce – a case study on the inappropriate use of third party intermediaries. *Financier Worldwide Magazine*. Retrieved from https://www.financierworldwide.com/rolls-royce-a-case-study-on-the-inappropriate-use-of-third-party-intermediaries/#.W69fNxMzY_U/.
97 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*") at para. 23; see also *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* (2006) SCC 39 (Supreme Court of Canada) at paras. 26–27.

98 *Skandinaviska*, *id* at paras. 47–48; see also *Balabel v Air India*, (1988) 1 Ch 317 (England and Wales Court of Appeal) at p. 330; *Three Rivers District Council v Bank of England (No 6)* (2005) 1 AC 610 (House of Lords) at para. 111.
99 See *Rolls-Royce*, *supra* note 52, at para. 19.
100 Osofsky, *supra* note 88. Addressing companies on cooperation, Ms Osofsky said: "there is significant case law in England and Wales about the importance of giving "first witness accounts" to individuals who are later charged with crimes. These "first accounts" are sometimes the very interviews that you do in the course of your internal investigations. In other words, be acutely aware that your investigative steps may create issues of, on the one hand, what you believe are privileged communications and, on the other hand, what a court believes MUST be provided to a criminal defendant to ensure a fair trial. Don't simply blunder into this and then be distressed and offended if we seek those interviews because a court wants us, as a matter of fairness, to provide this material to a defendant in the dock. That is not cooperation." See also Black, C., Coppens, K., Bowden, T. (May 30, 2018). UK: Cooperation since Rolls-Royce: Learning Points for Companies and Individuals. *Global Investigations Review*. Retrieved from https://globalinvestigationsreview.com/chapter/1170058/united-kingdom-cooperation-since-rolls-royce-learning-points-for-companies-and-individuals#endnote-020/.
101 *Skandinaviska*, *supra* note 97, at para. 23.
102 Shiner & Ho, *supra* note 32.
103 Epstein, R. (2011). Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions. In Barkow, A. S., Barkow, R. E. (Ed.), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*. New York: New York University Press.
104 *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* (2018) EWCA Civ 2006 (England and Wales Court of Appeal), at para. 116.
105 *Standard Bank*, *supra* note 50, at para. 33.
106 *XYZ*, *supra* note 51, at para. 29.
107 *Rolls-Royce*, *supra* note 52, at para. 43.
108 *Rolls-Royce*, *id* at paras. 45–46.
109 *Rolls-Royce*, *id* at para. 47.
110 *Barkow*, *supra* note 23, at pp. 192–194.
111 *XYZ*, *supra* note 51, at para. 31; *Standard Bank*, *supra* note 50, at para. 34.
112 *XYZ*, *id* at para. 32.
113 *XYZ*, *ibid*; *Rolls-Royce*, *supra* note 52, at para. 55.
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116 *Rolls-Royce*, *ibid*.
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118 Criminal Procedure Code, *supra* note 1, at section 149E.
119 Criminal Procedure Code, *id* at sections 149E(1) and (2).
120 See Criminal Procedure Code, *id* at sections 149E(3).
121 *Singapore Parliamentary Debates, supra* note 14.
122 *Standard Bank*, *supra* note 50, at para. 59; *XYZ*, *supra* note 51, at para. 62.
123 *XYZ*, *ibid*.
124 *XYZ*, *id* at para. 63; *Standard Bank*, *supra* note 50, at para. 60; *Rolls-Royce*, *supra* note 52, at para. 129.
125 Breuer, *supra* note 5.
126 See Criminal Procedure Code, *supra* note 1, at section 149E(3)(e).
127 *XYZ*, *supra* note 51, at para. 64; *Standard Bank*, *supra* note 50, at para. 61; *Rolls-Royce*, *supra* note 52, at para. 131.
128 *Singapore Parliamentary Debates, supra* note 14.
129 *XYZ*, *supra* note 51, at para. 40; *Standard Bank*, *supra* note 50, at para. 39.
130 See *XYZ*, *id* at para. 41.
131 *Rolls-Royce*, *supra* note 52, at para. 84.
132 *Standard Bank*, *supra* note 50, at para. 42.
133 *XYZ*, *supra* note 51, at paras. 43–44.
134 *Rolls-Royce*, *supra* note 52, at paras. 79–80.
135 *XYZ*, *supra* note 51, at para. 65; *Rolls-Royce*, *id* at paras. 124–125.
136 Crime and Courts Act 2013, *supra* note 1 at para. 5(4).
137 *Standard Bank*, *supra* note 50, at para. 44.
138 Sentencing Council (2014) *Fraud, Bribery and Money Laundering offences: Definitive Guideline* ("Sentencing Guidelines") at p. 49.
139 Sentencing Guidelines, *id* at p. 50.
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144 See *XYZ*, *id* at paras. 55–61, where the court imposed a modest fine for a plethora of factors, including the fact that company has spent a considerable amount of money to investigate, self-report, and cooperate with the SFO, and all ill-gotten profits made by the company was to be disgorged by instalments.
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150 *Ibid*.

151 Notably, there are no limits imposed on the Singapore High Court's sentencing jurisdiction. See Criminal Procedure Code, *supra* note 1, at section 303(1).
152 Rakoff, *supra* note 4.
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154 Garrett, *supra* note 79, at pp. 82–83.
155 *Singapore Parliamentary Debates*, *supra* note 14.
156 Criminal Procedure Code, *supra* note 1, at section 149E(3)(g)(ii).
157 For e.g. the SFO had announced that there is a contempt of court order against the publication of the DPA between Tesco Stores Limited and the SFO, the statement of facts, any reports of the DPA hearing, and any reasons of the court, until the conclusion of trial for three individuals. See "SFO agrees Deferred Prosecution Agreement with Tesco" (April 10, 2017). *Serious Fraud Office*. Retrieved from https://www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/.
158 E.g. *XYZ*, *supra* note 51, at para. 5.