

## **Corruption, Regulation and The Law: The Power not to Prosecute under the UK Bribery Act 2010**

### **Introduction**

Profound changes in the relationships between the state, the global market and civil society in the contemporary period have necessitated entirely new approaches to crime control. Prominent amongst recent initiatives is a strategy, referred to by Garland as 'responsibilisation' (Garland 2001) which, so it is argued, goes some way to meet these new challenges. This doctrine seeks to mobilise non-state organisations and individual citizens to 'raise consciousness' and to 'create a sense of duty' in combating crime, enabling the state to govern from a distance (Garland 2001, pp. 125, 137). It is a manifestation of Foucault's conception of governmentality (Burchell, Gordon et al. 1992) in which sovereignty is expanded in order to shape 'preventive partnerships' (Crawford and Evans 2017). Such an approach reflects the increasingly limited capacity of the modern state to respond to serious and corporate crime, particularly, where successful criminal investigation and the prosecution of corporate offenders is time-consuming, complicated, and costly. In these circumstances, the sovereign state is no longer able to act upon crime directly and independently but instead, by activating indirect action from non-state agencies and organisations, it can adopt a shared model of policing.

A number of scholars, including Gill (2002), Kooiman (1993) and Lord (2014) have argued that we are increasingly witnessing a shift in the enforcement of criminal law against corporate crime towards non-police agencies seeking alternative compliance measures such as regulatory techniques of negotiation and settlement. Hawkins (2002, p. 295) sees this as a converse process. Instead of reliance on normal police action associated with the criminal prosecution of offenders, we have moved towards regulators and non-police agencies, and therefore, prosecutions have become a last resort. Lord (2014) argued that these broader processes, practices and relations shape behaviour within corporations and markets. As a result, it is no exaggeration to assert that the criminal justice response to serious and corporate offending has been transformed.

This chapter will examine the challenges as well as opportunities for a more proactive prosecution model which places anti-bribery enforcement responsibility on corporations themselves, using the provisions of Section 7 of the UK Bribery Act 2010 as an example. It will analyse the operation of this Act in the light of responsibilisation theory and the de-centring of prosecution, by focusing on some regulatory dimensions of the Act and a new tool of the Deferred Prosecution Agreement (DPA). This has been subjected to sharp criticism as undermining the main purposes of the Act, particularly after the *Rolls Royce* case<sup>1</sup> in January 2017. First, the chapter will discuss the difficulties of conducting investigations and prosecutions against major corporate offenders, before examining the shift from old governance in crime control, leading on to the debates in the next section on applying regulatory actions in such a transformed crime management framework. This will be followed by a consideration of the Bribery Act 2010 with the focus on section 7, particularly the new offence of failure to prevent, and the way in which DPAs have been used so far. Finally, a discussion on the way in which this new regulatory tool has treated corporations will conclude the chapter.

### **The Problems of National Prosecution of Companies**

The prosecution of companies must be seen in the context of a globalised world in which many corporations can deploy considerably more resources and even political power than a nation state.

---

<sup>1</sup> *SFO v Rolls-Royce PLC and Another* [2017] Lloyd's Rep. FC 249.

According to Khanna, Apple has more cash on hand than two-thirds of the world's nations<sup>2</sup> and many corporations have simply escaped the confines and legal restrictions of specific national territories. It has even been argued that many such global oligopolies (Suarez-Villa 2014) have themselves become the essential institutions of global government, increasingly usurping the traditional role of the nation state (May 2018). Heywood has noted that:

“Profound changes in the nature and organisation of the contemporary state mean that many of our traditional concepts and categories in regard to power and authority – perhaps most notably, the separation between public and private sectors and the autonomy of state action – need to be revised.” (Heywood 2017, p.27)

The almost insurmountable difficulties faced by a mere nation state in attempting to prosecute an international corporation are well known. First, a global organisation which feels itself challenged by a national prosecution agency can simply threaten to move its operation elsewhere, with the consequent loss of employment and tax revenues to the home state. Effective corporate impunity may also be achieved where an organisation is backed by another, powerful nation. For example, a Serious Fraud Office investigation into the highly questionable *Al Yamamah* arms deal involving BAE Systems was abruptly terminated in 2006 (Williams 2008). There were suggestions at the time that continuation of the investigation might result in the Saudi Royal Family transferring an order for £6 billion worth of Eurofighters to France, leading to a potential loss of employment for 5,000 people in the UK and a suspension of security cooperation.<sup>3</sup>

Some organisations may simply be too big to prosecute (Packin 2014, Hardouin 2017) and, as the US Assistant Attorney General Lanny Breuer pointed out in December 2012 when declining to bring criminal proceedings against HSBC for money laundering:

“Had the U.S. authorities decided to press criminal charges, HSBC would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat and the entire banking system would have been destabilized.”<sup>4</sup>

Locating evidence against a global corporation can be equally daunting when digital data can be deleted or transferred abroad in a matter of seconds. Large corporate entities can also employ the very best accountancy and legal teams, frequently able to outmanoeuvre the very ungenerously funded professionals in a national prosecution agency. The Blue Arrow prosecution in the UK in 1992, for example, resulted in a year-long trial which consumed £40 million (£70 million at current values) of the Serious Fraud Office's limited budget. Not only did the trial place an intolerable burden on jurors, who were required to navigate complex financial accountancy evidence, but the eventual convictions were shortly afterwards overturned by the Court of Appeal. Lord Phillips, the former President of the Supreme Court, opined at the time that “the Blue Arrow affair has remained in the “institutional memory of the prosecutorial authorities and regulators”, suggesting to some commentators that such cases are “untrialable” and that the Serious Fraud Office (SFO) would never again dare to take on the City of London establishment.<sup>5</sup> Currently it spends an estimated average of

---

<sup>2</sup> Parag Khanna, ‘These 25 Companies and More Powerful Than Many Countries’, *Foreign Policy* (March/April 2016), available at: <http://foreignpolicy.com/2016/03/15/these25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power/>, accessed on 22 May 2019.

<sup>3</sup> *The Guardian*, March 2008, The BAE Files, at <https://www.theguardian.com/world/bae>, accessed on 22 May 2019.

<sup>4</sup> *The Guardian*, 12 December 2012, at <https://www.theguardian.com/commentisfree/2012/dec/12/hsbc-prosecution-fine-money-laundering>, accessed on 22 May 2019.

<sup>5</sup> BBC News, 14 April 2014, at <https://www.bbc.co.uk/news/uk-politics-26178868>, accessed on 22 May 2019.

three and a half years and £1.5 million (\$2.25 million) investigating each bribery case (Amaee 2012). As is well known, prosecuting either a company or corporate executives, presents serious problems of proof and the identification of individual perpetrators with appropriate mental culpability (Gobert 2008). The reluctance to prosecute any of the bankers who helped to precipitate the 2008 banking crisis (Will, Handelman et al. 2012) may not be unconnected with these extreme logistical difficulties. Moreover, it is very difficult to punish a corporation with an appropriate sentence which is not financial and will not merely be passed on to innocent consumers or result in the loss of employment for innocent employees. As former Lord Chancellor, Baron Thurlow most appositely noted:

“Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” (cited in Coffee 1981, p.386.)

Worse still, public attitudes towards the prosecution of corporate offending are scarcely supportive. According to Levi, crimes of deception are treated by the mass media as extensions of ‘infotainment’, such as individual and corporate celebrities in trouble (Levi 2006). In popular imagination and in the culture of many large financial institutions, risk taking with other people’s money is normality and even fraud need not be judged too harshly. Conrad Black, who was jailed in 2007 for fraud and obstructing justice, has been able to conduct a high profile campaign, recently described as “the Wall Street Journal’s Innocence Project” to clear his name.<sup>6</sup> In May 2019 Donald Trump signed a full pardon for Black, describing him as a “friend... entrepreneur and scholar”.<sup>7</sup> The White House statement noted Black’s “tremendous contributions to business, as well as to political and historical thought” including the publication of a 2012 book entitled “Donald J Trump: A President Like No Other”.<sup>8</sup>

All of these difficulties suggest that the traditional route of national prosecution might not always be the most appropriate course for dealing with large scale or corporate offending in the twenty-first century. This is not to suggest that the recent resurgence in effective corporate prosecutions is not welcome but that new strategies and new measures to enforce the rule of law in the international corporate sector are long overdue.

### The shift from old to new governance

These new strategies will inevitably reflect changes in the relationship between the state and civil society. As the former head of the SFO, the lead agency in England and Wales for investigating and prosecuting transnational bribery and corruption has put it, his agency cannot manage this alone, without the assistance of companies and senior executives in tackling economic crimes (Amaee 2012).. A review of the literature on the relations between government and society and their impact on laws and policies can help us to understand this transformation of governance towards a decentralised enforcement system, which is the focus of this chapter. Rose (2000) and Burchell (1993), for example, drawing on Foucault’s conception of governmentality, have argued that the central functions of the sovereign state have been replaced by a renewed focus on the development of technologies for exercising power. As Boyne (2000) puts it, the goal of governance becomes the ‘integration of society’ which also incorporates new ways of governing economic life (Hindess 1998). Hindess sees the economy as a self-regulating system which provides resources for both the state and society if properly managed (1998, p. 223). It is in this liberal context that independent and responsible citizens

---

<sup>6</sup> *The Bulwark*, 21 May 2019, at <https://thebulwark.com/the-wall-street-journals-innocence-project-the-case-of-conrad-black/>, accessed on 22 May 2019.

<sup>7</sup> BBC News, 16 May 2019 at <https://www.bbc.co.uk/news/world-us-canada-48290529>, accessed on 22 May 2019.

<sup>8</sup> *Ibid.*

interact with the public, make their own choices, and facing the consequences of those choices (Mazerolle and Ransley 2006: p. 8).

The complexity of economies makes it difficult and arguably ineffective for them to be controlled by a central state, leading to government by the market in a decentralised decision-making process (Mazerolle and Ransley 2006: pp. 9-10). This diffusion of power and control between the state and civil society breaks down barriers between governmental authorities and a range of agencies and justifies new forms of interventions that can be far more extensive (Garland 1997: p, 175). In a way, as Garland argued, the burden of crime control has been shifted from governments to 'responsibilized' agents who have to take responsibility for their own decisions on risk (1997). This can lead us to what Feeley and Simon called 'actuarial justice'(1994) which focuses on the population rather than individuals and is aimed at prevention and risk minimisation rather than detection, punishment and rehabilitation. This responsibilisation strategy, therefore, goes beyond responsible individuals to communities and groups who become responsible for their choices (O'Malley 1996) and instead of rehabilitating offenders it focuses on limiting the reach of crime. A decentred government and broad 'networks of power' (Loader 2000) are formed to include multi-agency partnerships.

Policing beyond government is a model that has increasingly transformed the government monopoly on policing, justice and corrections and has introduced a shared model in which policing belongs to everybody in a mixture of public, private and voluntary agencies (Bayley and Shearing 1996). The involvement of third parties, particularly corporations in the new model of criminal law enforcement, encourages more proactivity (Alldrige 2012: p. 1182) than was possible in a control environment dominated solely by the responsive actions of the police and criminal courts. This new enforcement responsibility regime has been already applied by some regulation authorities such as the Financial Services Authority (FSA) which obliged firms to set up effective control systems to mitigate financial crime risk (Trautman and Altenbaumer-Price 2013). This has become a highly impactful strategy in the context of criminal investigation.

## Regulatory Actions

This section will discuss whether the risk of corruption and the failure to prevent it can be reduced by regulatory interventions to hold companies accountable for their actions and to 'influenc(e) the culture of the company' (Bisgrove and Weekes 2014, p. 418) instead of just punishing the wrongdoing. Although some authors like Black (2014) and others have criticised the regulatory techniques which might be used as a strategy for the avoidance of prosecution by questionable companies it cannot be ignored that the factors discussed above present real obstacles to successful prosecution. The negotiation and settlement process may, by contrast, secure rapid and effective compliance. The chapter will return to this issue in the later discussion of the Deferred Prosecution Agreements (DPA).

Mazerolle and Ransley (2006) suggest that contemporary society is facing a new management paradigm where government and governance have been transformed from centralised state control to a system of de-centred networks of governance and crime control agents. In this new trend, a crime control partnership, therefore, in the name of 'third party policing' has been initiated as one of the key policing innovations where a multiple of 'regulatory nodes' take some responsibility for preventing or reducing crime problems by using a range of civil, criminal and regulatory rules and laws (Buerger and Mazerolle 1998: p. 301). This partnership activates the indirect use of legal provisions with a range of engagement strategies from collaborative (e.g. self-reporting) to coercive, to address crime problems with the focus on prevention. This new form of nodal governance can be also seen as a direct reflection of the inadequate operation of criminal investigations and proceedings. As Alldrige

puts it, 'following the money trail' is a clear indication of the failure of criminal investigations and the UK Proceeds of Crime Act 2002 would not have been brought forward if the criminal investigation and criminal proceedings could secure the crime reduction (Alldrige 2013: p, 244).

This new 'preventive turn' was initially characterised as 'responsibilisation strategy' by Garland (1996: p. 452) when he argued that indirect interventions can bring diverse actors and agencies together to enhance the capacity of state and non-state organisations and result in an effective crime prevention policy and practice. Lord claimed that such responsibilisation strategies can be manufactured by the state as self-regulation but as a result of that self-regulatory practices can also emerge independently from state influence (2014,p. 43). As Braithwaite (2004) puts it, states and companies would therefore be unable to dominate global markets and global governance if they fail to adapt to the networked economy and networked governance which enabled a shift in both the private and public sector to compete for growth. Therefore, in such a framework, the state alone cannot take the responsibility for crime control. Corporations become distinctively powerful agents who play an important role in the economic, social, political and routine in the modern world. They cover such a huge space that they can have a major structural influence. These powerful agents in our liberal political community can decide how to exercise their agency and so to perform their functions effectively to comply with the obligations imposed upon them (Shiner and Ho 2018: p. 714). Shiner and Ho claimed that society trusts corporations to respect the rules but if they betray that civic trust then social agencies are entitled to step in to take actions alongside steps permitted by criminal justice (ibid).

### The UK Bribery Act 2010

One important domestic example of how these strategies can have an impact on legislation, is the UK Bribery Act 2010. According to Horder, deploying a regulatory strategy in parallel with a 'criminal offence-led strategy' can have a number of distinctive features which can be applied to bribery and other kinds of corporate wrongdoing in order to minimise the risk but also to offer a flexible range of penalties (2013, p, 200). In its 2017 consultation paper, 'Reforming Bribery' the Law Commission recommended a new criminal offence of failing to prevent bribery which seemed to have some regulatory dimension to it as the burden was put on the company to prove that it had adequate procedures in place to prevent bribery (The Law Commission, 2007). This was also one of the objectives of the Impact Assessment which was expressed to be supplemental to 'Criminal Liability in Regulatory Contexts' (The Law Commission, 2010, No 195, p.231) to modernise the law enforcement and to replace outdated 'doctrines of criminal liability applicable to a business'. The regulatory approach was introduced to supplement criminal legislation on bribery in order to break the negative cycle of offending committed by global corporations with impunity which it is impossible to investigate because of inadequate time and resources. They pointed out that any penalty imposed by the courts may be small compared with the cost of bringing the prosecution. Horder claimed that the government has nonetheless failed to explain why a regulatory strategy to address bribery should not be implemented sectorally. He has argued that there is a strong case for making the guidance on adequate anti-corruption procedures mandatory in some industries, such as arms manufacturing and export, so that the UK can be taken seriously as a force in anti-corruption policy across the world (2013, p. 214). In order for the criminal offence-led strategy for bribery to work effectively it is better for it to be supplemented by a regulatory strategy in order to reduce the risk of bribery being committed (ibid., p. 215).

Before moving on to the discussion of this 'failure to prevent' model, it is worth mentioning briefly that until the late 1990s UK Bribery laws were governed by the Victorian and Edwardian legislation of

the Prevention of Corruption Acts 1889 to 1916. This legislation consisted of the Public Bodies Corrupt Practice Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and the common law offence of bribery. However, so cumbersome were these statutes that there was a very limited number of convictions each year and these were mainly for private sector bribery (The Law Commission, 2007, p. 19). As the Select Committee on the Bribery Act 2010 in its 2019 Report mentioned, the Prevention of Corruption Acts were outdated and ineffective to respond to important events particularly following the 'cash for questions' scandal and the case of John Poulson which provided an example of how small-scale bribery can build up into a multi-million pound industry and involving 23 local authorities. The actual nature of the 'public official' division and the procedural question of prosecutorial consents, amongst other issues, were problematic under the old law (Alldridge 2012, p. 1184) which called for the reform of the UK Bribery law.

The world also witnessed some highly significant changes in this period, due to liberalisation of markets and the demands for fair competition in global markets which formed the target of the law in relation to different types of corruption at both national and international levels. This global process was initiated by the influential 1977 Foreign Corrupt Practice Act (FCPA) in the U.S. which had extraterritorial jurisdiction reach. This was followed by the decision of the Organisation for Economic Co-operation and Development (OECD) countries to create the OECD Convention on Combating Bribery of Foreign Public Officials in 1997 to deal with international business transactions. By joining this Convention, the UK Bribery law came under intense scrutiny and were subjected to criticisms that the Prevention of Corruption Acts 1889-1916 did not adequately address overseas bribery, since there had never been any such prosecution by the United Kingdom (Bean and MacGuidwin 2013, p. 67).

Therefore, from the early 2000s the substantive and procedural English law of bribery looked increasingly unfit for purpose. For example, Part 12 of the Anti-Terrorism, Crime and Security Act 2001 amended the old laws by incorporating the bribery of foreign public officials as a triable offence if a UK national or company paid a bribe to a public officer abroad. This was in line with the implementation of the OECD Bribery Convention and it made a major contribution in the UK anti-corruption reform but also it created an enforcement focus for overseas bribery of foreign public officials (Monteith 2013, p. 251). This has extended the international scope of the SFO's investigatory power.

More significantly still, the UK Bribery Act was enacted in 2010 and created four categories of offences which reformed the entire UK anti-bribery regime. This legislation surpassed the FCPA and criminalised not only active bribery by offering, giving and promising a bribe but also passive bribery which is the request, acceptance or receiving of a bribe (Trautman and Altenbaumer-Price 2013: p. 503). The extra-jurisdictional reach of the Act covers a broad range of corruption from private and public sector transactions both domestically and transnationally (Boles 2014). It also made 'failure of commercial organisations to prevent bribery' a criminal offence under section 7 of the Act. The corporate entity, however, can have a defence if they can prove that they 'had in place adequate procedures designed to prevent persons associated with' it from bribing.<sup>9</sup> This has pioneered a new path for corporate accountability in the UK and as Lord's findings demonstrated this new corporate offence of failure to prevent is a reflection of self-policing which has been built in the UK Bribery Act section 7 (Lord 2014). The new legislation could therefore be seen as a prime example of the regulatory and responsabilising tendencies referred to above.

---

<sup>9</sup> UK Bribery Act 2010, s. 7(2).

## Section 7 and Deferred Prosecution Agreement (DPA)

As the select committee on the Bribery Act 2010 stated in its 2019 report on 'The Bribery Act 2010: post-legislative scrutiny', the problem of how companies can be punished for the wrongdoing of a minority of those involved in corrupt conduct should be put in a broader context. The response should not harm the great majority of those involved with the company who have played no part in the corrupt activities. This was a question which was considered at some length by the Law Commission which suggested making it an offence for a commercial organisation to fail to prevent bribery (The Bribery Act 2010: post-legislative scrutiny, 2019, para 167). A culture of self-policing and compliance, therefore, was activated in section 7 of the UK Bribery Act 2010 by introducing the proactive and preventive 'failure to prevent' model but also to strengthen the UK's role in the global fight against corruption.

This section will provide some brief analysis of this new corporate crime, its defence of 'adequate procedure' and the new Deferred Prosecution Agreement (DPA) in the context of a particular prosecution. Under Section 7 of the Bribery Act, UK companies can be held strictly liable for failing to prevent bribery by those associated with them. The SFO has the authority to decide whether or not prosecute a corporate body. This decision has been governed by the 'Full Code Test' in the Code for Crown Prosecutors<sup>10</sup> and the joint prosecution Guidance on Corporate Prosecutions.<sup>11</sup> According to the Guidance on Corporate Prosecution, when a corporate body decides to self-report wrongdoing the prosecution will consider whether this represents a genuine proactive approach taken by the corporate management team. But inevitably, if the decision is not to prosecute, how can good practice be enforced?

As discussed above, in a globalised world, a criminal investigation and prosecution of economic crime particularly in relation to corporations is slow, costly and not always straightforward. A new trend towards 'global settlements' (Garrett 2011) was articulated for example in the case of *Innospec Ltd*<sup>12</sup> where an agreement was made between the SFO<sup>13</sup> and the defendants which resulted in a range of guilty pleas, fines, confiscation and civil recovery orders. In 2012, challenges and difficulties in the prosecution of corporate economic crime were discussed in the '(c)onsultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements'.<sup>14</sup> Some of the main issues considered related to the question as to whether the conviction of commercial organisations should depend upon whether they were prepared to plead guilty to a criminal charge, given that there exist serious legal and evidential difficulties in proving corporate liability.<sup>15</sup> There can also be some serious economic and social considerations in respect of a criminal conviction of a commercial organisation, such as the adverse impact on employees, customers, pensioners, suppliers and investors.<sup>16</sup> This consultation paper concluded that:

---

<sup>10</sup> The Code for Crown Prosecutors [www.cps.gov.uk/publication/code-crown-prosecutors](http://www.cps.gov.uk/publication/code-crown-prosecutors)

<sup>11</sup> Guidance on Corporate Prosecutions [www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/](http://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/)

<sup>12</sup> *R. v. Innospec Ltd* [2010] EW Misc 7, para. 36.

<sup>13</sup> <https://www.sfo.gov.uk/cases/innospec-ltd/>

<sup>14</sup> The 2012 Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236065/8348.pdf](http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf)

<sup>15</sup> The 2012 Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements, para 32.

<sup>16</sup> The 2012 Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements, para 27.

‘the current system does not allow for swifter alternatives to prosecution which can deal with wrongdoing effectively, proportionately and with a greater degree of certainty. We need to look afresh at prosecutorial and other enforcement options for dealing with offending by commercial organisations’.<sup>17</sup>

It was therefore suggested that there was a need to consider a range of tools and alternatives such as Deferred Prosecution Agreements (DPAs) which would facilitate a fair and pragmatic approach to tackling these kinds of crime. As Shiner and Ho (Shiner and Ho 2018) put it, making money is the main aim of a company and deterrence by way of financial penalties and reputational sanction can be practically more effective. Agreements with defendants and bargaining with accused persons and corporations have increasingly been used to avoid the difficulties with securing convictions in economic crime trials (Alldrige 2012, p. 1182). Such agreements may include a range of types of plea bargain (whether or not achieved by means of self-reporting), civil recovery orders or as the outcome of involvement in international agreements. Tellingly, agreements not to press charges or impartial application of the law in bribery cases can be controversial due to the traditional roles of judge and prosecutor in the adversarial system (Alldrige 2013, p. 222). However, given that companies are by their nature very different from natural persons, applying a DPA as a novel prosecutorial tool to tackle economic crime, is a compromise for effective punishment and regulation within a reasonable timeframe (Bisgrove and Weekes 2014).

The DPA model was adopted from the United States where it was initially offered to non-corporate cases and mainly to protect vulnerable members of society. However, the Ministry of Justice gradually changed this practice and since the 2000s it has offered DPAs to corporate offenders (Amulic 2017). In 2012, the UK Government responded to a consultation on a new enforcement tool to deal with an economic crime which was based on a consultation with wide range of sources such as members of the public, prosecutors, members of the judiciary, the legal profession, businesses and academic and regulatory bodies.<sup>18</sup> In this consultation paper, the Government maintained that the use of DPAs would allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity or length of a criminal trial. This process was intended to encourage self-reporting by commercial organisation although the guidelines<sup>19</sup> on the prosecution of bribery offences made it clear that self-reporting is no guarantee that a prosecution will not follow.

Consequently, a DPA regime was introduced in the UK in 2014 via Section 45 of the Crime and Courts Act 2013, while Schedule 17 to this Act sets out the procedure for entering into a DPA. It is a discretionary agreement and based on voluntary cooperation between the offending company and the prosecutor, which allows prosecution of an offence to be suspended for a limited time. A DPA does not cover any individual but only a ‘body corporate’. The rationale was that the company voluntarily will comply with a range of conditions deemed appropriate to penalise the offending behaviour in order to avoid the reputational damage of criminal prosecution (Bisgrove and Weekes 2014). The conditions may include a combination of financial sanctions, implementing enhanced

---

<sup>17</sup> The 2012 Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements, p. 12.

<sup>18</sup> (2012). Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations. M. o. Justice.

<https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf>

<sup>19</sup> "Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions", General approach to bribery prosecutions. <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>



compliance procedures, and providing ongoing cooperation with the SFO.<sup>20</sup> Although criminal charges will be filed by the prosecutor, the actual investigation would be suspended. The suspension may be lifted if the defendant breaches the terms of the agreement and the prosecution will drop the charges when the defendant completes the requirements successfully.<sup>21</sup> During the negotiation for a DPA, the Criminal Procedure and Investigations Act 1996 (CPIA) will not be applied<sup>22</sup> however, the application for approval of the DPA will be considered before the court for final approval so that the court can make a declaration under paragraph 7(1) of Schedule 17 to the Act that the parties have settled the terms of the DPA.<sup>23</sup>

Since the introduction of DPAs in 2014, the SFO has secured four deferred prosecution agreements; *Standard Bank PLC* in 2015, *XYZ* in 2016, *Rolls-Royce* in 2017 and *Tesco* in 2017.<sup>24</sup> *Standard Bank* was charged by SFO with one offence of failing to prevent bribery under Section 7 of the Bribery Act 2010. The proceedings were suspended when the DPA was approved by the President of the Queen's Bench Division, the Rt. Hon. Sir Brian Leveson at Southwark Crown Court. In November 2018, *Standard Bank* met the requirements of the terms of its DPA with SFO within three years.<sup>25</sup>

The second DPA was approved in 2016 for *XYZ*, a small to medium sized enterprise (SME). *XYZ* during 2004 -2012 was involved in systematic payment of bribes through its controlling minds to secure contracts in foreign jurisdictions. After admission of lack of adequate compliance provisions in place, *XYZ* made two self-reports to SFO. Given the scope of this case, the SFO decided to bring charges for offences in relation to the pre-2010 Act conduct, conspiracy to corrupt, in relation to post-2010 Act conduct, conspiracy to bribe contrary to s. 1 of the Criminal Law Act 1977 and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010.<sup>26</sup> The judge considered the seriousness of the offences but also took into account the impact of prosecution on employees and others innocent of any misconduct; the risk of insolvency; and the fact that the company self-reported corporate wrongdoing; fully disclosed internal investigation and co-operated with SFO.<sup>27</sup> These issues resulted in the approval of a DPA for *XYZ* and Judge Leveson, as in the *Standard Bank* case, declared that the DPA is in the interests of justice and that its terms were *fair, reasonable and proportionate*.<sup>28</sup>

The third DPA was reached between *Rolls-Royce* and the SFO<sup>29</sup> in January 2017 for a period of five years. This has been the most highly controversial usage which was approved by the Court, since it raised some important questions, due to the gravity and extent of the offending involved. *Rolls-Royce* is considered to be a company of central importance to the United Kingdom and the second largest provider of defence aero engine products and services in the world with the capacity to employ 50,000

---

<sup>20</sup> Deferred Prosecution Agreements <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

<sup>21</sup> Schedule 17 to the Crime and Courts Act 2013, paras 1 and 2.

<sup>22</sup> Criminal Procedure and Investigations Act 1996 c. 25 Arrangement of Act

<sup>23</sup> Deferred Prosecution Agreements Code of Practice, paras 9 and 10. This DPA Code was issued by the Director of Public Prosecutions and Director of the Serious Fraud Office pursuant to paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013.

<sup>24</sup> Serious Fraud Office (SFO), Deferred Prosecution Agreements available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

<sup>25</sup> SFO v *Standard Bank*

<sup>26</sup> SFO v *XYZ* case, paras 8-12.

<sup>27</sup> SFO v *XYZ* case, para 15.

<sup>28</sup> SFO v *XYZ* case, para 26.

<sup>29</sup> SFO v *Rolls-Royce plc* [2017] Lloyd's Rep. F.C. 249

people in more than 50 countries.<sup>30</sup> It was established that during the last three decades, this enormous corporation made corrupt payments to local agents to secure contracts across several countries such as Indonesia, Thailand, Brazil, Nigeria, India, and the United States.<sup>31</sup> Sir Brian Leveson, who also approved this DPA, described the conduct of Rolls-Royce as ‘the most serious breaches of the criminal law in the areas of bribery and corruption’.<sup>32</sup> Rolls-Royce was charged with 12 offences; six offences of conspiracy to corrupt (contrary to s.1 of the Criminal Law Act 1977); five offences of failure to prevent bribery (contrary to s.7 of the Bribery Act 2010 and one offence of false accounting contrary to s.17(1)(a) of the Theft Act 1968).<sup>33</sup> As Cheung put it, this case was the largest foreign bribery in UK history and the SFO investigation was carried out by over 70 members of staff at any one time (Cheung 2018). Despite the gravity of offending and the fact that Rolls-Royce did not self-report, Sir Brian Leveson ‘was satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime’.<sup>34</sup>

The fourth DPA was agreed in the *Tesco* case<sup>35</sup> which was a false accounting prosecution. However, this chapter will not discuss this as this case did not involve offences under the Bribery Act.

### Reasonable Doubts about DPAs

As this chapter established earlier, effective enforcement of the self-regulatory mechanisms may result in negotiations between state and individual corporations which can result in flexible standards (Ayres and Braithwaite 1992). The application of DPAs based on failure to prevent bribery under the UK Bribery Act 2010 has raised some significant criticisms. Since the introduction of the new prosecutorial regime in 2014, DPAs have had a major influence on some of the largest cases of corporate corruption, allowing them to be settled without criminal convictions (The Bribery Act 2010: post-legislative scrutiny: 2019). Before the adoption of this new tool in the UK, the House of Lords considered the relevant provisions to the Crime and Courts Bill in 2012. One of the examples which provoked discussion was the announcement mentioned above, that HSBC had concluded a 5-year DPA with the US federal prosecutors relating to its failure to prevent the money laundering of ‘at least \$881 million in drug trafficking proceeds’<sup>36</sup>. Its terms suggested that at trial the Department of Justice would prove the alleged charges beyond a reasonable doubt, by admissible evidence, however, without that agreement, the conviction of HSBC might have resulted in its having to cease banking operations in the United States.<sup>37</sup>

Although a DPA enables the parties to resolve the issue efficiently without going through a traditional prosecution and trial, however, using them remains controversial as ‘the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years’ (Reilly 2017, p. 843). Senator Elizabeth Warren was concerned about such special treatment for corporations:

---

<sup>30</sup> SFO v Rolls-Royce plc para. 3.

<sup>31</sup> SFO v Rolls-Royce plc para. 5.

<sup>32</sup> SFO v Rolls-Royce plc para. 4.

<sup>33</sup> <https://www.judiciary.uk/judgments/serious-fraud-office-v-rolls-royce/>

<sup>34</sup> SFO v Rolls-Royce plc para. 139.

<sup>35</sup> SFO v Tesco

<sup>36</sup> Statement of Facts by the United States Department of Justice, 11 December 2012, para 9: [www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf](http://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf) [accessed 26 May 2019]

<sup>37</sup> ‘Too Big to Jail Congressional Report’, The New York Times (15 July 2016), para 15: [www.nytimes.com/interactive/2016/07/15/business/document-Too-Big-to-Jail-Congressional-Report.html](http://www.nytimes.com/interactive/2016/07/15/business/document-Too-Big-to-Jail-Congressional-Report.html) [accessed 26 May 2019]

'If you're caught with an ounce of cocaine, the chances are good you're gonna go to jail. If it happens repeatedly, you may go to jail for the rest of your life .... But evidently if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your bed at night.' (Gongloff 2013).

'Too big to jail' is one of the major criticism against DPAs but this has been justified by the prosecutors in a way that conviction may lead to widespread economic trouble with substantial harm to the employees and shareholders (Amulic 2017: p. 137). Nevertheless, to many it appears that rich corporations can 'buy their way out of prosecution'<sup>38</sup>.

The English DPAs have been developed beyond the US-style ones as they must be approved by the court and they are underpinned by statute. Nevertheless, they have been offered differently from each other as we discussed earlier. *Rolls-Royce* is clearly the most significant DPA agreed so far and it has been criticised for undermining the incentives of self-reporting, as in this case *Rolls-Royce* did not self-report and the investigation had been initiated by examining public internet postings. Even more importantly the application of 'public interest' test by Sir Brian Leveson in his consideration of the *Rolls-Royce* DPA, signified a significant departure from the approach adopted in both *Standard Bank* and *XYZ* (Cheung 2018).

Para 2 (5) of the DPA Code of Practice (at 2.5) requires a prosecution 'unless there are public interest factors which clearly outweigh those tending in favour of prosecution'. Sir Brian Leveson in para 61 of his judgement in *Rolls-Royce* referred to his first reaction 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'.<sup>39</sup>

He did, however, make an exception and was convinced that a DPA was in 'the interests of justice' and its terms were 'fair, reasonable and proportionate' under the Crime and Courts Act 2013, Schedule 17, para. 8(1). The co-operation by *Rolls Royce* including a waiver of privilege which was recognised as 'extraordinary' and the company was awarded a generous discounted financial penalty of a one-half discount instead of a one-third discount (Cheung 2018).

Robert Barrington, Executive Director of Transparency International UK has maintained that the lesson learned from the *Rolls-Royce* DPA seems to be that a powerful company 'will never be prosecuted due to the collateral damage; and that the possible impact on potential victims holds greater sway with the court than the actual impact on real victims'.<sup>40</sup> The use of DPAs in this context remains a highly controversial matter notwithstanding the recent scrutiny by the Select Committee on the Bribery Act 2010 in its 2019 Report.<sup>41</sup>

In an oral evidence given to Bribery Act 2010 Committee, the Policy Director at Corruption Watch, Susan Hawley pointed out that:

"There are genuine public confidence issues around DPAs and one of them is that, yes, the big companies can negotiate them. The small companies are much easier to prosecute, including

---

<sup>38</sup> Transparency International UK "Rolls-Royce Case: Justice for Sale or Fair Settlement?", from <https://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/>.

<sup>39</sup> SFO v *Rolls-Royce*, para 61.

<sup>40</sup> Transparency International UK "Rolls-Royce Case: Justice for Sale or Fair Settlement?", from <https://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/>.

<sup>41</sup> The 2019 Select Committee Report on the Bribery Act 2010

for the substantive offences, which makes the offending more serious. Therefore, the public interest in offering them a DPA is lower, because the offending appears more serious.”<sup>42</sup>

## Conclusion

It has been argued here that changes in the global political economy, and particularly the growth in the power, extent and influence of the international corporate sector, have made traditional prosecutorial measures obsolete, at least in respect of large scale and corporate offending. National prosecutions are no longer fit for purpose and reliance on them alone would encourage further a culture of impunity for powerful corporations. If large international entities are to be successfully held to account for wrongdoing and deterred from further criminality, new prosecutorial strategies must be urgently adopted. One such approach has been championed by those who have developed the concept of responsabilisation, envisaging a co-operative approach between state and civil society. Preventative networks of surveillance and self-regulation are seen in this perspective as a vastly more successful strategy than reactive prosecution.

By looking at one important example of the practical implementation of this approach under the UK Bribery Act 2010 and subsequent litigation, it has been possible to assess the viability of these responsabilisation strategies in action. Indeed, an analysis of the first significant case arising under this part of the Act throws into sharp relief the advantages and disadvantages of dealing with corporate offenders in this way. On the one hand the *Rolls Royce* case appears to represent a wildly successful avoidance of all the barriers to prosecution set out in the first section above and a holding of the company to account in a way which promises to change its institutional culture for the foreseeable future. On the other it looks like a cynical manoeuvre designed to enable a powerful company to buy its way out of criminal culpability. In this light, the case appears not so much as a radical new approach to the regulation and responsabilisation of the international corporate sector as merely a convenient cloak for lawlessness and the politics of power. More worrying still is the possibility that the outcome of the *Rolls Royce* case signals a significant diminution of the rule of law, and that trial and judgement in open court are to be replaced by back room deals in which the extraordinary power of the corporate world can be articulated through agreements crafted specifically to satisfy their commercial interests. Such concerns suggest that DPAs and other responsabilisation strategies need to be deployed with the greatest possible care, in appropriate circumstances and subject to vigorous policing and regulation by state agencies. Only then is it likely that they can hope to deliver the benefits that their proponents claim.

---

<sup>42</sup> Bribery Act 2010 Committee- Corrected oral evidence: Bribery Act 2010 took place on Tuesday 17 July 2018 available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/oral/87109.html>

## Bibliography

- Alldrige, P. (2012). "The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA"." Ohio State Law Journal **73**(5): 1181-1215.
- Alldrige, P. (2013). Bribery and the changing pattern of criminal prosecution. Modern Bribery Law: Comparative Perspectives. P. Alldrige and J. Horder. Cambridge, Cambridge University Press: 219-250.
- Amaee, R. (2012). "UK Bribery Act - Year One." FCPA Professor <http://www.fcpaprofessor.com/uk-bribery-act-year-one>
- Amulic, A. (2017). "Humanizing the Corporation while Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States." Michigan Law Review **116**(1): 123-153.
- Ayres, I. and J. Braithwaite (1992). Responsive Regulation: Transcending the Deregulation Debate. Oxford, Oxford University Press.
- Bayley, D. H. and C. D. Shearing (1996). "The Future of Policing." Law & Society Review **30**(3): 585-606.
- Bean, B. and E. H. MacGuidwin (2013). "Unscrewing the Inscrutable: The UK Bribery Act 2010." Indiana International and Comparative Law Review **23**(1): 63-109.
- Bisgrove, M. and M. Weekes (2014). "Deferred Prosecution Agreements: A Practical Consideration." The Criminal Law Review(6): 416.
- Black, J. (2014). Learning from Regulatory Disasters.
- Boles, J. (2014). "The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes." Michigan Journal of International Law **35**(4): 673-713.
- Boyne, R. (2000). "Post-Panopticism." Economy and Society **29**(2): 285-307.
- Braithwaite, J. (2004). "Methods of power for development: weapons of the weak, weapons of the strong.(Globalization, Law & Development Conference)." Michigan Journal of International Law **26**(1): 297-330.
- Buerger, M. E. and L. G. Mazerolle (1998). "Third-party policing: A theoretical analysis of an emerging trend." Justice Quarterly **15**(2): 301-327.
- Burchell, G. (1993). "Liberal government and techniques of the self." Economy and Society **22**(3): 267-282.
- Burchell, G., C. Gordon, P. Miller and M. Finnane (1992). The Foucault effect: studies in governmentality Chicago, University of Chicago Press.
- Cheung, R. (2018). "Deferred Prosecution Agreements: Cooperation and Confession." The Cambridge Law Journal **77**(1): 12-15.

- Coffee, J. C. (1981). "'No Soul to Damn: No Body To Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment." Michigan Law Review **79**(3): 386-459.
- Crawford, A. and K. Evans (2017). Crime Prevention and Community Safety. The Oxford handbook of criminology. A. Liebling, S. Maruna and L. McAra, Oxford, United Kingdom : Oxford University Press.
- Feeley, M. and J. Simon (1994). Actuarial Justice: The Emerging New Criminal Law. The futures of criminology. D. Nelken. London, Sage: 173-201.
- Garland, D. (1996). "The limits of the sovereign state: Strategies of crime control in contemporary society." The British Journal of Criminology **36**(4): 445-471.
- Garland, D. (1997). "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology." Theoretical Criminology **1**(2): 173-214.
- Garland, D. (2001). The Culture Of Control : Crime And Social Order In Contemporary Society. Oxford, Oxford : Oxford University Press.
- Garrett, B. L. (2011). "Globalized Corporate Prosecutions." Virginia Law Review **97**(8): 1775-1875.
- Gill, P. (2002). "Policing and Regulation: What is the Difference?" Social & Legal Studies **11**(4): 523-546.
- Gobert, J. (2008). "The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making But Was it Worth the Wait?" The Modern Law Review **71**(3): 413-433.
- Gongloff, M. (2013). Elizabeth Warren: Banks Get Wrist Slaps While Drug Dealers Get Jail. Huffington Post.
- Hardouin, P. (2017). "Too Big To Fail, Too Big to Jail: Restoring Liability. A Lesson from HSBC Case." Journal of Financial Crime **24**(4): 513-519.
- Hawkins, K. (2002). Law as last resort : prosecution decision-making in a regulatory agency. Oxford, Oxford : Oxford University Press.
- Heywood, P. M. (2017). "Rethinking Corruption: Hocus-pocus, Locus and Focus." Slavonic & East European Review **95**(1): 21-48.
- Hindess, B. (1998). Neoliberalism and the National Economy'. Governing Australia M. D. a. B. Hindess. Cambridge, Cambridge University Press.
- Horder, J. (2013). Deterring Bribery: Law, Regulation and the Export Trade. Modern Bribery Law: Comparative Perspectives. P. Alldridge and J. Horder. Cambridge, Cambridge University Press: 196-215.
- Kooiman, J. (1993). Modern governance : new government-society interactions. London, London : Sage.
- Levi, M. (2006). "The Media Construction of Financial White-Collar Crimes." British Journal of Criminology **46**(6): 1037-1057.
- Loader, I. (2000). "Plural Policing and Democratic Governance." Social & Legal Studies **9**(3): 323-345.

Lord, N. (2014). *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany*. Farnham, Ashgate.

Lord, N. (2014). "Responding to transnational corporate bribery using international frameworks for enforcement: anti-bribery and corruption in the UK and Germany." *Criminology and criminal justice* **14**(1): 100-120.

May, C. (2018). "The Corporation as an Institution of Global Governance." *Handbook of the International Political Economy of the Corporation*: 349-364.

Mazerolle, L. and J. Ransley (2006). *Governance, risk and crime control. Third Party Policing*. Cambridge, Cambridge University Press.

Monteith, C. (2013). *Bribery and Corruption: the UK Framework for Enforcement. Modern Bribery Law: Comparative Perspectives*. P. Alldridge and J. Horder. Cambridge, Cambridge University Press: 251-266.

O'Malley, P. (1996). *Risk and Responsibility. Foucault and Political Reason*. A. Osborne, T. Barry and N. Rose. London: UCL Press/Chicago, University of Chicago Press: 189-208.

Packin, N. (2014). "Breaking Bad: Too-Big-to-Fail Banks Not Guilty as Not Charged." *Washington University Law Quarterly* **91**(4): 1089-1097.

Reilly, P. R. (2017). "Corporate Deferred Prosecution as Discretionary Injustice." *Utah Law Review* **2017**(5): 839-883.

Rose, N. (2000). "Government and Control." *British Journal of Criminology* **40**(2): 321-339.

Shiner, R. and H. Ho (2018). "Deferred Prosecution Agreements and the Presumption of Innocence." *Criminal Law, Philosophy* **12**(4): 707-723.

Suarez-Villa, L. (2014). *Corporate Power, Oligopolies, and the Crisis of the State*. New York, Suny Press.

Trautman, L. J. and K. Altenbaumer-Price (2013). "Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act." *The International Lawyer* **47**(3): 781-517.

Will, S., S. Handelman and D. Brotherton (2012). *How They Got Away With it: White Collar Criminals and the Financial Meltdown*. New York, Columbia University Press.

Williams, S. (2008). "The BAE/Saudi Al-Yamamah Contracts: Implications in Law and Public Procurement: Public International Law." *International & Comparative Law Quarterly* **57**(1): 200-209.

Transparency International UK "Rolls-Royce Case: Justice for Sale or Fair Settlement?", from <https://www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/>.

'Reforming Bribery', Law Com. Consultation Paper No. 185, 2007.