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The International Comparative Legal Guide to:

# Business Crime 2019

**9th Edition**

A practical cross-border insight into business crime

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

**GLG Cover Design**
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**GLG Cover Image Source**
iStockphoto

**Printed by**
Ashford Colour Press Ltd
September 2018



**ISBN** 978-1-912509-33-1
**ISSN** 2043-9199

**Strategic Partners**

## General Chapters:



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# *UK vs US*: an Analysis of Key DPA Terms and their Impact on Corporate Parties

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## I Introduction

In the US, a Deferred Prosecution Agreement ("DPA") provides a compromise position for both the government and a company looking to settle an enforcement action, whereby the government formally initiates prosecution but agrees to dismiss all charges after a specified period of time if the defendant abides by certain negotiated conditions.[1] If the defendant fails to satisfy the conditions, the government may, in its sole discretion, pursue the charges based on facts admitted in the DPA.

DPAs became available to prosecutors in the UK in 2014 and share some similarities with the US model. Both US and UK DPAs benefit prosecutors by guaranteeing a certain outcome with fewer resources expended, and allow them to obtain cooperation from companies on a going-forward basis, especially with regard to related individual prosecutions. From the corporate perspective, both US and UK DPAs provide companies with greater certainty, at least some ability to negotiate terms, and the chance to avoid collateral consequences such as debarment. A significant difference between DPAs in the US and UK lies in the extent to which the court is involved in their approval. Under the UK model, the terms of the DPA and the threshold question of whether a DPA in the particular case is in the interests of justice must be scrutinised and approved by the court in two separate hearings (one private and one public). In the US, however, the role of the court is far more limited. Once the terms have been negotiated and agreed between the prosecutors and the company, the court's role is limited to "examining whether the DPA serve[s] the purpose of allowing [the company] to demonstrate its good conduct".[2]

In this chapter, we will look at select terms from recently agreed DPAs in the UK and US covering bribery and corruption cases with a focus on the ongoing obligations on the company and how those obligations are policed. As we will demonstrate, there are many similarities but also some significant differences between the two regimes, which companies should be aware of when negotiating and entering into DPAs in the two jurisdictions.

## II DPA Terms: Key Obligations Imposed by DPAs

Given the numerous examples of DPAs entered into by the US authorities, there are clearly discernible trends and practices that emerge as to the commonly included obligations on a company. Most DPA terms in the US are fairly standardised. By contrast, the UK's Serious Fraud Office ("SFO") has so far entered into just four DPAs, three of which cover bribery and corruption offences. Of those DPAs, only the DPAs with Standard Bank and Rolls-Royce are publicly available. This section of the chapter will necessarily focus on the types of obligations that have been included in those two UK DPAs, but it should be remembered that the legislative framework governing DPAs, in particular the DPA Code of Practice, sets out a non-exhaustive list of potential terms that the SFO can seek to have included in a DPA that have not featured in the publicly available DPAs (such as monitorships, financial representations, and cooperation with sector-wide investigations).[3] Neither the legislation introducing DPAs nor the Code prescribe the terms of any DPA, which "must be proportionate to the offence and tailored to the specific facts of the case".[4] Because of the small sample currently available and the fact that there is no prescriptive list of terms to be included in a DPA, the insights that can be gleaned from the UK experience so far must inevitably be treated with some caution.

### A. Requirement to Cooperate with the Authorities

A central requirement of any DPA, whether in the UK or US, is for the company to provide ongoing cooperation with the authorities. The form that cooperation must take is generally consistent between the UK and US: cooperating with investigations into officers, directors, employees, agents and consultants; providing documents; and making witnesses available for interview. However, the scope of the cooperation can differ and companies entering into DPAs must be aware that the scope of expected cooperation can be very wide reaching.

US DPAs contain a general obligation to "cooperate fully" in any matter related to the conduct described in the DPA both with the US Department of Justice ("DOJ") and with "other domestic or foreign law enforcement and regulatory authorities and agencies".[5] US DPAs also include an obligation to cooperate regarding "other conduct related to possible corrupt payments".[6] This requirement is very broad and is not limited to allegations meeting a specific evidentiary standard or in any way tied to the specific conduct addressed in the DPA. US DPAs also include a non-exhaustive list providing guidance as to what "cooperation" requires. This includes the requirement that a company "truthfully disclose all [non-privileged] factual information" relating to any conduct under investigation "about which the [prosecutors] may inquire" and that a company use "best efforts" to make relevant individuals available for sworn testimony.[7] Therefore, once under a DPA, the DOJ could effectively compel a company to produce any non-privileged documents in its control, regardless of the subject matter.

In the UK, the SFO's approach to the extent of cooperation required under a DPA has differed. In the Standard Bank DPA, signed in November 2015, the company's cooperation obligations extended

only to "any and all matters relating to the conduct arising out of the circumstances the subject of the [indictment] and described in the Statement of Facts".[8] Rolls-Royce's UK DPA requires the company to cooperate in any SFO investigation into any matter under investigation or pre-investigation at any time during the term of the DPA.[9] Clearly this expands the scope of required cooperation compared to Standard Bank, but still falls short of the US standard.

Additionally, the Rolls-Royce UK DPA includes an express requirement relating to the retention of documents "gathered as part of [the company's] internal investigation", a term not found in Standard Bank.[10] This difference between the Rolls-Royce and Standard Bank DPAs can probably be explained by the size and scope of the respective investigations and possibly also the likelihood of subsequent individual prosecutions. US DPAs also do not contain an express provision requiring retention of records, though the disclosure requirement described above requires a company to produce truthfully and fully those documents it does have.

There is a particular aspect of cooperation required under US DPAs that has not been addressed in the UK DPAs to date. Under US DPAs, a company is obliged to report promptly to the DOJ "any evidence or allegations of conduct that may constitute a violation of the FCPA anti-bribery provisions had the conduct occurred within the jurisdiction of the United States".[11] This imposes a very broad reporting obligation on a company as there is no materiality or credibility threshold to the allegations that must be reported. Of course, in a situation where a company has cooperated equally with the SFO and DOJ in securing DPAs in both jurisdictions, it may consider providing to the SFO any reports made under this US provision. Given the significant latitude the SFO enjoys as to the terms to include in any DPA, it is not inconceivable that future DPAs may, depending on the particular facts and circumstances of the case, include an equivalent notification requirement.[12]

### B. Reoffending/New Offences

It is a standard term of US DPAs that, should the company in question commit any federal felony during the term of the DPA, it will be in breach. By the DPA's terms, this is not limited to a company being convicted of a federal felony and, as with all items set forth in the "Breach of Agreement" paragraph, determination of whether the company has committed a federal felony during the DPA term is left to the DOJ's "sole discretion".

No such provision exists under the existing UK DPAs. The breach provisions of the UK DPAs state that a breach must be a breach of a term of the DPA itself, it cannot be linked to wider conduct not covered by the DPA.[13] Therefore, if a company under a UK DPA were to commit a new offence, the SFO would be required to launch new criminal proceedings in respect of the new conduct, but the prosecution of the conduct under the DPA would remain deferred. Having said that, pursuant to the DPA Code, it is open to prosecutors to prohibit a company from engaging in certain activities under the DPA.[14]

### C. Annual Reporting

US DPAs typically require companies to make reports at least annually during the term of the DPA.[15] Attachment D – "Corporate Compliance Reporting" sets out the ongoing reporting obligations, which include a description of "remediation efforts to date" and the requirement to conduct and report on additional reviews of the company's compliance programme. Attachment D generally requires a company to report any "credible evidence … concerning any corrupt payments, false books, records, and accounts, or any matter relating to a failure to implement or circumvention of internal accounting controls".[16] While this requirement may serve to inform the DOJ of potential gaps and inadequacies regarding a company's compliance programme, it also presents the possibility of significantly broadening the DOJ's scope of inquiry. Additionally, the phrase "credible evidence" is not defined and leaves some question as to whether DOJ could, exercising the extensive discretion provided for by the DPA, determine that certain evidence was credible, should have been reported on, and declare a breach even if a company had concluded otherwise. As will be discussed further in the next section, though DOJ enjoys considerable discretion under the express terms of the DPA, it has not, historically, declared breach more than a few times.

Judging by the two publicly available UK DPAs, the SFO's approach to reporting has differed from that in the US. The SFO has favoured tailored provisions for each company governing their ongoing compliance processes and obligations. Those compliance provisions envisage the involvement of third-party consultants and advisers whose reports will be shared with the SFO. It would, however, be permissible for the SFO under the DPA Code to require annual reports from the company more akin to the US regime.

## III Monitoring and Regulation of DPAs

As discussed above, a significant area of difference between US and UK DPAs is the extent of the court's role in approving a DPA. Unlike in the US, the UK's model is one where a judge must review and ultimately approve the DPA and be satisfied that it is "in the interests of justice" and that the terms are "fair, reasonable and proportionate".[17] From the outset, the UK position has been to adopt a different regime from the US in its DPAs. During the period of government consultation prior to DPAs coming into force in the UK in 2014, there was recognition that the process in the UK would be consciously different from the practice in the US and that the role of the judge would be enhanced. In its responses to the consultation period, the UK government stated: "Although the US model has been in use for over 20 years, in its current form it would not be suitable for the constitutional arrangements and legal traditions in England and Wales ... [O]ur proposals will ensure a greater level of judicial involvement and transparency throughout the DPA process in order to command public confidence."[18]

While the difference in the two approaches in negotiating and approving DPAs has received a great deal of focus, the role of the court (or lack of it) in policing compliance with their terms has received less attention. In summary, in the UK, any question of whether a party has breached an English DPA will be heard and settled by the court. Conversely, in the US, questions relating to compliance with terms of the DPA are generally left to the sole discretion of the DOJ. We will investigate in more detail below recent examples of the DOJ's use of this discretion and its impact on potential breach scenarios.

### A. Policing of UK DPAs

Paragraph 9 of Schedule 17 to the Crime and Courts Act 2013, together with the DPA Code, sets out the framework under which a question of breach would be resolved. If the prosecutor believes a company has breached the DPA, it must apply to the court for a determination whether the company has breached, applying the civil standard of a balance of probabilities.[19] If the court finds that there has been a breach, it can either invite the prosecutor and company to agree proposals to remedy the breach, or it can order the termination of the DPA.[20] Further, in circumstances where the SFO concludes

that the company has breached the DPA but decides not to pursue that breach, the SFO must publish details relating to that decision, including reasons for the decision not to apply to the court for a determination regarding the breach.[21] According to the DPA Code, even if the prosecutor and the company are able to agree proposals to remedy the breach (as envisaged by the Act), such proposals are to be approved by the court.[22]

Not surprisingly, there has not yet been a case in the UK requiring a DPA breach determination. However, in a recent decision, the High Court made important *obiter* observations regarding the UK DPA breach framework and how it was likely to be applied by the courts.[23] In *R (on the application of AL) vs. SFO*, an individual defendant in forthcoming criminal proceedings, which had been resolved as against his former employer through a DPA, brought an application for judicial review challenging the SFO's alleged failure to enforce the company's DPA cooperation obligations through the non-provision and non-disclosure of internal investigation interview memoranda. The court held that it lacked jurisdiction (given that the relevant statutory regime was for the Crown Court, not the High Court, to administer) and thus stopped short of making an actual breach determination. It did not, however, hold back in expressing its serious criticisms over what it clearly viewed as the SFO's unjustified lack of pursuit of the company's putative breach of the DPA by virtue of its refusal to provide the memoranda – which the court clearly viewed as non-privileged – when requested by the SFO. The judgment described how the SFO, as a matter of English criminal procedure, had the available tools for, as well as the onus of, seeking production of the interview memoranda from the company for the purposes of the criminal proceedings involving the individual defendant. The court added that in the present case where a DPA was in existence, the cooperation obligations on the company made it "much easier for the SFO to obtain this material than in a case where no DPA exists".[24] Further, the court gave some weight to the argument advanced by the defendant that the SFO should at least "have adopted a decision articulating its reason for not bringing [breach] proceedings against" the company for failure to produce the requested material.[25] The general picture that emerges is thus one of clear and close judicial involvement in policing DPA compliance and making breach determinations, but also of exacting standards that the court will apply to the SFO's own policing obligations.[26]

## B. Policing of US DPAs

In some respects, US DPAs are akin to contracts between private parties. They are negotiated, set forth the rights and obligations of each party, and specify remedies in the event of a breach. However, DPAs involve the exercise of discretionary government police power at each stage.[27] For instance, the bargaining power enjoyed by the prosecutor in negotiating a DPA is rooted in the authority to employ police power either to pursue or defer a conviction.[28] Similarly, the determination of whether a term of the agreement has been breached is left to the sole discretion of the prosecutor.[29]

An additional important distinction between DPAs and private contracts is the remedy available upon breach. Rather than traditional contract remedies such as damages or specific performance, prosecutors invoke their police power upon determining that a breach has occurred, bringing charges to which the company has pre-agreed constitute a criminal offence for which it is guilty. Based on two recent circuit court decisions, judicial oversight of this entire process is significantly limited.

Given how broad the DOJ's discretion is to determine breach, it is perhaps surprising that there have been only a few instances of breached DPAs since 2000. In the section below we set out the prescribed role of the US courts in "approving" DPAs and review two historic instances of DPA breaches.

### 1. Court's Limited Role in Approving DPAs

DPAs are filed in federal court alongside formal charging documents, such as criminal information and indictments. However, despite being docketed agreements, courts have concluded that judges have neither the authority to reject a DPA on its merits nor to monitor its ongoing implementation to ensure that conditions are satisfied. Based on the Constitution's allocation of criminal charging decisions to the Executive Branch, the D.C. Circuit held in *United States vs. Fokker Services* that the prosecutors wield that authority "without the involvement of – and without oversight power in – the Judiciary".[30] It similarly held that the "prosecution alone... monitors a defendant's compliance with the [DPA's] conditions and determines whether the defendant's conduct warrants dismissal of the pending charges".[31]

Because a DPA involves formal initiation of criminal charges, it triggers the Speedy Trial Act's 70-day countdown to trial.[32] The Act provides for tolling of that 70-day clock on the basis of a written agreement between the prosecution and defendant in order for "the defendant to demonstrate his good conduct".[33] Such agreements must be "approv[ed]" by the court.[34]

*Fokker Services*[35] and *HSBC*[36] – a 2017 Second Circuit case – shed light on the Act's "approval of the court" language. Holding that the Speedy Trial Act authorises courts only to determine whether a DPA is genuinely intended to allow the defendant to demonstrate his good conduct or whether it is a "disguised effort to circumvent the speedy trial clock",[37] the decisions make it clear that DPAs will not be subject to judicial oversight absent overreaching. Where the court determines that a DPA is genuine and not pre-textual, the court "plays no role in monitoring the defendant's compliance with the DPA's conditions".[38]

(a) *Fokker Services*

In 2010, Fokker Services, a Dutch aerospace services provider, voluntarily disclosed to the Commerce and Treasury Departments its potential violations of federal sanctions and export controls laws and, as part of a global settlement, entered into an 18-month DPA. When reviewing the DPA, the district court raised concerns about the lack of prosecution of individual company officers and denied the motion for exclusion of time, stating that to permit this DPA would "promote disrespect for the law".[39]

On appeal, the DC Circuit held that the district court exceeded its authority under the Speedy Trial Act by rejecting the DPA based primarily upon concerns about the government's charging decisions.[40] The court rejected an attempt to analogise the court's role in approving a DPA with its oversight role before a proposed plea agreement, noting that unlike a plea agreement, DPAs do not involve "formal judicial action imposing or adopting" the DPA's terms.[41]

(b) *HSBC*

Similarly, the Second Circuit's July 2017 decision in *HSBC Bank USA* held that federal trial courts do not have the authority to supervise DPA implementation absent a showing of impropriety.

In December 2012, HSBC Holdings plc and its indirect subsidiary HSBC Bank USA, N.A. (collectively "HSBC") entered into a five-year DPA to settle charges that HSBC violated the Bank Secrecy Act and Trading with the Enemy Act. The district court approved the DPA, but made its approval "subject to [the court's] continued monitoring" of the DPA's execution and implementation and directed that quarterly reports be filed to update the court on significant developments.[42]

The Second Circuit held that the lower court "erred in *sua sponte* invoking its supervisory power to monitor the implementation of the DPA in the absence of a showing of impropriety."[43] According to the court, which agreed with the reasoning in *Fokker*, "in the absence of any clear indication that Congress intended courts to evaluate the substantive merits of a DPA or to supervise a DPA's out-of-court implementation, the relative function and competence of the executive and judicial branches" should govern the understanding of the Speedy Trial Act's "court approval" language.[44] The Second Circuit then held that the Speedy Trial Act authorises courts to determine that a DPA is genuinely intended to allow defendants to demonstrate good conduct and not a disguised effort to circumvent the Speedy Trial Act.[45]

(c) *Criticism*

Other federal judges approving DPAs have questioned the appropriateness of their use. For instance, Judge Chuang of the U.S. District Court for the District of Maryland approved a 2018 DPA with Transport Logistics International Inc. ("TLI") – a Maryland-based provider of logistical support services for uranium transportation.[46] TLI did not disclose the wrongdoing which implicated its two co-presidents, but it received full cooperation and remediation credit (for, among other things, terminating all employees involved in the misconduct).[47]

Judge Chuang stated that, because a DPA "confers a substantial benefit on a company for which there is probable cause to charge it with a crime", it "should be reserved for companies that have engaged in extraordinary cooperation and have entirely rid themselves of all remnants of the prior criminal activity".[48] Despite his reproach, however, the court noted its "very limited" "authority to take action other than approval of the DPA", cited *Fokker*, and approved the DPA.[49]

**2. Biomet**

The Biomet DPA, breach, and subsequent resolution, demonstrate a "best case" scenario for a company in the event the DOJ actually finds an agreement has been breached. Rather than DOJ pursuing prosecution of the charges, which in general seems likely given the company's prior agreement in the DPA that "[a]ll statements …including the [] Statement of Facts…shall be admissible in evidence",[50] Biomet continued to cooperate with DOJ and, after an initial one-year extension of the original DPA, Biomet entered into a second, three-year DPA with DOJ regarding different misconduct.

(a) *2012 DPA: Terms*

On March 26, 2012, Biomet, Inc. entered into a three-year DPA based on improper payments made from 2000 to 2008 to publicly employed health care providers in Argentina, Brazil, and China to secure business with hospitals.[51]

The DPA included imposition of an independent compliance monitor for at least the first 18 months of the DPA term. It also contained the typical provisions regarding breach of the agreement. These provide that if the DOJ determines "in its sole discretion" that Biomet committed a felony subsequent to signing the DPA, provided "deliberately false, incomplete, or misleading information", or "otherwise breached" the Agreement during the three-year term, Biomet is subject to prosecution "for any criminal violation of which the Department has knowledge, including the charges in the Information".[52] The "otherwise breached" provision is broad, and could be read to include all other terms of the DPA including requirements related to the compliance programme, ongoing cooperation, and any relevant public statements by the company.

In the event of finding a breach, the DPA required the DOJ "to provide Biomet with written notice…prior to instituting any prosecuting resulting from such breach" and provide Biomet 30 days in which to respond.[53]

(b) *2012 DPA: Breach*

On March 13, 2015, the government informed Biomet that the DPA and independent compliance monitor's appointment, which were set to expire two weeks later, would be extended for one additional year.[54] Five days later, the DOJ filed a "Status Report" with the court explaining that the extension was based on two factors: 1) the independent compliance monitor's inability to certify that Biomet's compliance and ethics programme met the standards contemplated by the DPA; and 2) Biomet's ongoing investigation into alleged misconduct in Brazil and Mexico.[55] The Status Report stated that DOJ and Biomet agreed that "the government shall have until April 15, 2016 to determine whether Biomet has breached the DPA".[56]

In a court-ordered status update on June 6, 2016, DOJ stated that it had, on April 15, 2016, notified Biomet that the government determined Biomet had breached its DPA based on the conduct in Mexico and Brazil and based on its failure to implement and maintain a satisfactory compliance programme.[57] The update further stated that Biomet "is committed to continuing to cooperate" and that the parties "have been in discussions to resolve this matter which would obviate the need for a trial".[58] There is no further public information regarding DOJ's analysis.

(c) *2017 DPA*

On January 12, 2017, DOJ announced that it entered into a new DPA with Biomet with an additional three-year term and oversight by a compliance monitor.[59] The DOJ's press release stated that "even after the 2012 DPA between the department and Biomet, the company knowingly and wilfully continued to use a third-party distributor in Brazil known to have paid bribes to government officials on Biomet's behalf".[60]

**3. Aibel Group (2008)**

Unlike the Biomet DPA breach, Aibel Group's 2007–2008 breach resulted in a guilty plea[61] and termination of the DPA that had been executed less than two years earlier.[62] The nature of the breach was never made public and the relevant pleadings do not refer to a separate scheme than that set forth in the DPA, though some additional facts are provided, which may indicate that Aibel Group was more culpable than the DOJ initially believed.

(a) *2007 DPA*

In February 2007, Aibel Group – a UK company and then-subsidiary of Vetco International Ltd. – entered into a three-year DPA to resolve charges that it violated the FCPA in connection with corrupt payments to Nigerian customs officials between 2002 and 2005.[63] Regarding the same conduct, three other Vetco International Ltd. subsidiaries[64] pleaded guilty to conspiracy and substantive violations of the FCPA's anti-bribery provisions, agreeing to pay a combined $26 million – the then-largest criminal fine imposed by the DOJ in an FCPA case.[65]

In its DPA, Aibel Group agreed to cooperate fully (including the typical "obligation of truthful disclosure" language) and represented that it had implemented a compliance and ethics programme designed to detect and prevent FCPA violations. The parties also agreed for Aibel Group to appoint an Executive Chairperson of Aibel Group's Board (unaffiliated with lead shareholders), establish a board Compliance Committee, and to engage outside Compliance Counsel to monitor execution of the DPA's terms and obligations for the duration of the DPA's three-year term.[66] Aibel Group also represented, among a handful of other obligations, that it would appropriately discipline any employee or officer of the businesses acquired in July 2004[67] who continued to be employed by Aibel Group and who were found to have authorised or made unlawful payments to foreign officials, to disclose any additional unlawful payments made before that time related to the earlier acquisition, and to complete a compliance review of "Second Tier Countries"

in which it conducts business, "Secondary Acquisitions", and "all existing or proposed joint venture partners".[68]

(b) *2008 Breach and Guilty Plea*

In November 2008, the DOJ announced that Aibel Group had "admitted that it was not in compliance" with its 2007 DPA "regarding the same underlying conduct". Aibel agreed to pay a $4.2 million fine and pleaded guilty to a two-count superseding information charging conspiracy and substantive FCPA violations.[69]

Because no additional public statements were made, it is impossible to know precisely what DOJ determined to be the cause of Aibel Group's breach. However, there are some important differences between Aibel Group's plea agreement and the initial Statement of Facts attached to Aibel Group's 2007 DPA. These include the addition of a few sentences relating to corrupt payments made on Aibel Group's behalf[70] and to employees of Aibel Group and certain co-conspirators having had knowledge of the corrupt payments.[71]

We also do not know whether Aibel Group's breach was based on a failure to comply with one of the DPA mandates. Given the above-noted differences coupled with the DOJ's statement that Aibel Group's plea concerned the same conduct underlying its 2007 DPA, it is possible that DOJ subsequently discovered that Aibel Group shared the scienter of its 2007 co-defendants, pushing it to join them in pleading guilty. Whether that information was simply previously unknown to or withheld from the DOJ, we likely will never know.

Given that there are only a few examples of the DOJ declaring breach of a DPA, it seems that, at least in practice, the DOJ uses this discretion sparingly. However, additional court involvement both in approving the DPA terms and in monitoring compliance with the DPA terms and assessing any alleged breach, would provide an important check on unfettered prosecutorial discretion. It would also serve to create clearer guidance for other companies going forward regarding compliance with DPA terms and what appropriately constitutes a breach.

## IV Conclusion

While it is understandable that companies concentrate on negotiating the key terms relating to conduct and penalties when entering into a DPA, it is important that they do not lose sight of the obligations they will face while under the DPA. There are numerous terms within US and UK DPAs that place onerous requirements on companies, especially with respect to cooperation with the authorities and reporting of future issues. The challenge of complying with these requirements can be increased in circumstances where a cross-border resolution has been achieved. The scope of cooperation and reporting required in the US and UK (not to mention other jurisdictions in which resolutions may be reached) is often different. A company entering a DPA must be prepared to comply with different obligations in different jurisdictions.

Further, a company entering a DPA must be aware of the difference in approach to monitoring DPAs in the US and UK. The DPA regime in the US has developed to allow the DOJ broad discretion in determining matters relating to the company's compliance with a DPA's terms. In the UK, the exercise of prosecutorial discretion in this context is subject to court review, and only the courts are in a position to determine whether a DPA has been breached. This results in a position where a company under DPAs in both the US and UK may face very different consequences arising from the same conduct, where it is able successfully to challenge an allegation of breach in the UK but has little opportunity to do so in the US.

## Acknowledgment

The authors would like to acknowledge the contributions of Jil Simon (associate) and Thomas Jenkins (associate) of Debevoise & Plimpton in drafting this chapter.

## Endnotes

1. *United States vs. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016).
2. *Id.* at 747.
3. Serious Fraud Office & Crown Prosecution Serv., Deferred Prosecution Agreements Code of Practice ¶ 7.10 (2014) ["DPA Code"].
4. *Id.* ¶ 7.5.
5. *See*, *e.g.*, Deferred Prosecution Agreement ¶ 5, *United States vs. Rolls-Royce PLC*, No. 16-CR-247 (S.D. Ohio Dec. 20, 2016), https://www.justice.gov/criminal-fraud/file/929126/download ["Rolls-Royce US DPA"].
6. *Id.*
7. *See*, *e.g.*, *id.* ¶ 5(a), (c).
8. Deferred Prosecution Agreement ¶ 9, *Serious Fraud Office vs. ICBC Standard Bank PLC*, No. U20150854 (Nov. 30, 2015) ["Standard Bank DPA"]. Although the XYZ DPA is not publicly available, the High Court judgment in *R (AL) vs. SFO* sets out the cooperation provisions, which indicate that they have the same scope as the provisions in Standard Bank. *See R (on the application of AL) vs. Serious Fraud Office* [2018] EWHC 856 (Admin), at 53.
9. Deferred Prosecution Agreement ¶ 10, *Serious Fraud Office vs. Rolls-Royce PLC*, No. U20170036 (Jan. 17, 2017) ["Rolls-Royce UK DPA"]. Interestingly, in both the Standard Bank and Rolls-Royce DPAs, the companies' obligations to cooperate with authorities other than the SFO (whether domestic or foreign) are limited to matters covered in the indictment and described in the statement of facts.
10. *Id.* ¶ 9.
11. *See*, *e.g.*, Rolls-Royce US DPA ¶ 6.
12. Although not included in the current DPAs, it should also be noted that the DPA Code does envisage as a normal term of a DPA that a company would notify the SFO and provide related information that it becomes aware of whilst the DPA is in force that the company knows or suspects would have been relevant to the offences particularised in the draft indictment.
13. *See*, *e.g.*, Rolls-Royce UK DPA ¶¶ 35–36; Standard Bank DPA ¶¶ 33–34.
14. DPA Code ¶ 7.10(i).
15. *See*, *e.g.*, Rolls-Royce US DPA at D-1, D-2 (providing that the company must submit its first written report "no later than one (1) year from the date [the DPA] is executed", that the "first follow-up review and report shall be completed by no later than one (1) year after the initial report", and that "[t]he second follow-up report shall be completed and delivered...no later than thirty (30) days before the end of the [DPA] Term").
16. *See*, *e.g.*, *id.* at D-1.
17. Crime and Courts Act 2013, Schedule 17, Part 1 ¶ 7(1).
18. Ministry of Justice, Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations 8 (Oct. 2012).
19. Crime and Courts Act 2013, Schedule 17, Part 1 ¶ 9(2).
20. *Id.* ¶ 9.
21. *Id.* ¶ 9(8).

22. DPA Code ¶ 12.4. Similarly, any variation to the DPA must be approved the court. *Id.* ¶ 13.
23. *See R (on the application of AL) vs. Serious Fraud Office* [2018] EWHC 856 (Admin).
24. *Id.* ¶ 90 (emphasis added).
25. *Id.* ¶ 80.
26. *See*, *e.g.*, *id.* ¶¶ 90, 125.
27. *See* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. OF LEGAL ANALYSIS 191, 212 (2016).
28. *See*, *e.g.*, Deferred Prosecution Agreement ¶¶ 12–13, *United States vs. Keppel Offshore & Marine Ltd.*, No. 17-CR-697 (E.D.N.Y. Dec. 22, 2017), https://www.justice.gov/opa/press-release/file/1020706/download ["Keppel DPA"] (noting the government's agreement "that if the Company fully complies with all of its obligations under [the DPA], the [government] will not continue the criminal prosecution against the Company described in Paragraph 1 [of the DPA] and, at the conclusion of the Term, [the DPA] shall expire").
29. *See*, *e.g.*, *id.* ¶ 14 ("Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company shall be in the Fraud Section and the [U.S. Attorney's Office's] sole discretion").
30. *Fokker Servs.*, 818 F.3d at 737, 741.
31. *Id.* at 744; *see also United States vs. HSBC Bank USA, N.A.*, 863 F.3d 125, 137 (2d Cir. 2017) (noting also that "a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct").
32. 18 U.S.C. § 3161(c)(1).
33. *Id.* § 3161(h)(2) (emphasis added); *see HSBC Bank*, 863 F.3d at 130 (noting that "[a]bsent such an exemption, the logic of any DPA would unravel, as the filed charges would be subject to mandatory dismissal once the 70-day period had run").
34. *Id.* § 3161(h)(2).
35. *Fokker Servs.*, 818 F.3d 733.
36. *HSBC Bank*, 863 F.3d at 138.
37. *Id.*
38. *Fokker Servs.*, 818 F.3d at 744.
39. *Id.* at 740.
40. *Id.* at 738.
41. *Id.* at 746. Rather, the court said, the "entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence" through a showing of compliance.
42. *HSBC Bank*, 863 F.3d at 131–32.
43. *Id.* at 35. The court did not define "impropriety", but it noted that "if *misconduct* in the implementation of a DPA came to a district court's attention (for example, through a whistleblower filing a letter with the court), the district court might very well be justified in invoking its supervisory power *sua sponte* to monitor the implementation of the DPA or to take other appropriate action". *Id.* at 137 (emphasis added). The court clarified in a footnote that "misconduct" does not refer to revelations of the HSBC variety concerning the pace of "remediation efforts and deficiencies in HSBC's corporate culture that HSBC leadership was working to address", but rather to "misconduct that smacks of impropriety". *Id.* at 137 n.4.
44. *Id.* at 138 (noting that because "Congress did not speak clearly in § 3161(h)(2)", the court declined "to interpret that provision's vague 'approval' requirement as imbuing courts with an ongoing oversight power over the government's entry into or implementation of a DPA").
45. *Id.* at 138.
46. Deferred Prosecution Agreement, *United States vs. Transport Logistics International, Inc.*, No. 18-CR-00011-TDC (D. Md. Mar. 12, 2018), ECF. No. 6, https://www.justice.gov/criminal-fraud/file/1044656/download ["TLI DPA"].
47. *Id.* at 5. The DOJ considered TLI's representations and conducted an independent inability-to-pay analysis *en route* to reaching the $2 million fine amount – despite the fact that the parties agreed that $21.3 million was the appropriate fine under the U.S. Sentencing Guidelines. *Id.* at 9.
48. Order at 2, *United States vs. Transport Logistics Int'l, Inc.*, No. 18-cr-00011-TDC (D. Md. Apr. 2, 2018), ECF No. 10 ["TLI Order"]; *see also* Transcript of Proceedings – Motions Hearing at 16-17, *United States vs. Transport Logistics Int'l, Inc.*, No. 18-cr-00011-TDC (D. Md. Mar. 22, 2018), ECF No. 9 ["TLI Transcript"] ("[T]he thing that always bothers me about [DPAs] is that it seems as if the discussion is always about what do we do to save the company when it's the company and its personnel who were engaged in crimes...It seems like the [DOJ] spends a lot of time trying to figure out how to save these companies when, perhaps, they should not have engaged in crimes in the first place.") The government responded that "we're not in the business of trying to put companies out of business. There is also the cooperation and the remediation and the compliance enhancements that we do want to incent[ivize] going forward....And if this was simply an effort to try to seek a death penalty for the company, then that may not incent[ivize] future companies to do those things". *Id.* at 18–19.
49. TLI Order at 2–3.
50. Deferred Prosecution Agreement ¶ 16(a), *United States vs. Biomet, Inc.*, No. 12-cr-00080-RBW (D.D.C. Mar. 26, 2012), ECF. No. 1-1, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/30/2012-03-26-biomet-dpa.pdf.
51. *Id.*
52. *Id.* ¶ 14.
53. *Id.* ¶ 15.
54. Status Report ¶ 4, *United States vs. Biomet, Inc.*, No. 12-cr-00080-RBW (D.D.C. Mar. 18, 2016), ECF No. 5.
55. *Id.*
56. *Id.* ¶ 5.
57. Status Report ¶ 3, *United States vs. Biomet, Inc.*, No. 12-cr-00080-RBW (D.D.C. June 6, 2016), ECF No. 7.
58. *Id.*
59. *See* U.S. Dep't of Justice Press Release, *Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges* (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act.
60. *Id.*
61. Plea Agreement, *United States vs. Aibel Group Ltd.*, No. 07-CR-005 (S.D. Tex. Nov. 21, 2008), ECF No. 34, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-21-08aibelgrp-plea.pdf ["Aibel Group Plea"].
62. Order of Dismissal, *United States vs. Aibel Group Ltd.*, No. 07-CR-005 (S.D. Tex. Nov. 21, 2008), ECF No. 38, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-21-08aibelgrp-dismiss.pdf.
63. Deferred Prosecution Agreement, *United States vs. Aibel Group Ltd.*, No. 07-CR-005 (S.D. Tex. Feb. 6, 2007), ECF No. 14, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-06-07aibelgrp-agree.pdf ["Aibel Group DPA"]; U.S. Dep't of Justice Press Release, *Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines:*

*Separate Subsidiary Enters into a Deferred Prosecution Agreement Following Cooperation with Justice Department* (Feb. 6, 2007), https://www.justice.gov/archive/opa/pr/2007/February/07_crm_075.html ["Aibel Group 2007 Press Release"].

64. Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray UK Ltd.

65. *See* Aibel Group 2007 Press Release.

66. Aibel Group DPA at 3–9.

67. *See* Dep't of Justice Press Release, *ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges* (July 6, 2004), https://www.justice.gov/archive/opa/pr/2004/July/04_crm_465.htm.

68. Aibel Group DPA at 10–14.

69. U.S. Dep't of Justice Press Release, *Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines* (Nov. 21, 2008), https://www.justice.gov/archive/opa/pr/2008/November/08-crm-1041.html.

70. New sentences set forth that "[o]n at least 61 occasions, corrupt payments of approximately $2.1 million were made to NCS officials in Nigeria on behalf of Aibel Group Limited and certain other co-conspirators. The total estimated value of the benefit received by Aibel Group Limited and certain other co-conspirators as a result of the illegal conduct was $10,500,000". Aibel Group Plea at Exhibit 2 ¶ 22.

71. Additionally, the Aibel Group Plea Agreement states that Aibel Group knew that the international freight forwarding and customs clearing agent "provided services in Nigeria that were neither listed on its published tariff rate sheet for Nigeria nor openly advertised", that they knew that, in connection with the clearing agent's unlisted services, the clearing agent made corrupt payment to Nigerian customs officials "to induce these officials to disregard their official duties and responsibilities and to provide preferential treatment regarding the customs clearance process", and that the conduct of Aibel Group and its co-conspirators was "knowing". Aibel Group Plea ¶¶ 23–24.

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