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# TOWARDS A LEGAL FRAMEWORK FOR NON-PROSECUTION AND DEFERRED PROSECUTION AGREEMENTS IN NIGERIA<sup>1</sup>

*RUMO A UM MARCO LEGAL PARA ACORDOS DE NÃO PERSECUÇÃO  
E DE ACUSAÇÃO DIFERIDA NA NIGÉRIA*

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## ABSTRACT

This article examines the use of Deferred Prosecution Agreement and Non-Prosecution Agreement as alternative mechanisms to criminal prosecution of corporations in the United States of America and United Kingdom. The articles examine the justifications for the use of the mechanisms, and concerns arising from their use. The article finds that in the United States of America, a Deferred Prosecution Agreement is subject to limited judicial review while a Non-Prosecution Agreement is not subject to any form of judicial review. The wide discretionary powers exercised by prosecutors in the United States is consequently a major concern. The legal framework for Deferred Prosecution Agreement in the United Kingdom however provides for judicial standards of review and approval which empower courts to ensure that the terms of Deferred Prosecution Agreement are in the interest of justice, fair, reasonable, and proportionate. The article finds that the Nigeria Constitution provide a framework for Non-Prosecution Agreement although there is currently no framework for Deferred Prosecution Agreement. The article recommend that Nigeria should adopt the United Kingdom's legal framework.

**Keywords:** Non-Prosecution Agreement. Deferred Prosecution Agreement. Legal framework.

## 1 INTRODUCTION

In this article, the writer examines the use of Deferred Prosecution Agreement (“DPA”) and Non-Prosecution Agreement (“NPA”) in resolving criminal cases. The

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United States of America (US) Department of Justice (DOJ) frequently utilizes DPA and NPA in criminal cases involving corporations. A legal framework has also emerged for the use of DPA in the United Kingdom (UK). DPA and NPA are used in all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases.<sup>3</sup> These legal mechanisms bypass the traditional plea-bargaining process and instead involve a negotiated settlement whereby the organisation may agree without pleading guilty, to a combination of restitution, forfeiture, monetary sanctions, and other legal and structural governance reforms. DPA and NPA did not arise from any change in federal statutes but through an innovation in criminal enforcement practices and related coordination between criminal and civil enforcement authorities.<sup>4</sup>

The use of DPA and NPA offer another mechanism for the prosecution to use in handling corporate criminal liability beyond the conventional approach of prosecuting corporations and their officers and employees for criminal conduct. The article examines the meaning of NPA and DPA, the justifications and concerns arising from their use, and the legal framework in the US and UK with the objective of drawing any relevant lessons for the use of DPA and NPA in Nigeria.

## 2 MEANING OF DPA AND NPA

Federal officials in the US no longer simply fine publicly held firms that commit crimes, they instead, use their enforcement authority to impose mandates on these firms – mandates that can require a firm to alter its compliance programme, governance structure, or scope of operations. These mandates are imposed through Pretrial Diversion Agreement (PDA), specifically DPA and NPA.<sup>5</sup> In a PDA, the prosecutor agrees not to pursue a criminal conviction of a firm, but nevertheless impose financial sanctions on the firm. In return, the firm usually agree to cooperate in the investigation of criminal conduct and admit to the facts of the crime. In addition, most PDAs contain mandates that govern the firm's future behaviour. These mandates impose new prosecutor-created duties on the firm. They may require the firm to adopt a corporate compliance programme with specified features not otherwise required by law, to alter its internal reporting structure, to add specific individuals to the board of directors, to modify certain business

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3 Cindy R. Alexander & Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements" (2015) 52 *American Criminal Law Review*, 532.

4 *Ibid.*

5 Jennifer Arlen & Marcel Kahan "Corporate Governance Regulation through Non-prosecution" (2017) 84, *The University of Chicago Law Review*, 323 at p 324-325.

practices, or to hire a prosecutor-approved corporate monitor.<sup>6</sup>

A PDA usually take the form of a DPA or NPA. A DPA or NPA is an agreement entered into between the government and a target corporation whereby the government agrees to either dismiss a filed criminal charge (in the case of a DPA) or refrain from filing any charges (in the case of an NPA), in exchange for the target corporation agreeing to reform its conduct, pay restitution to its victims and submit to government oversight over a set period of time.<sup>7</sup> DPA and NPA differ from plea bargaining because they do not involve a plea agreement, guilty plea and conviction. It gives corporations and their officers the option of avoiding guilty plea and conviction although they may agree to pay fine, compensate victims, and carry out other mandates that may be incorporated in the DPA or NPA.

Where a DPA is used, the corporation and its officers are charged to court and the prosecution agrees to defer the prosecution of the charges for a period during which the defendant is expected to carry out the mandates and corrective measures outlined in the DPA. If the defendant fully performs its obligations under the DPA, the prosecution at the end of the duration of the deferment would move the court to dismiss the charges.<sup>8</sup> NPA operates in a similar manner except that no charges are filed; the prosecution agrees not to prosecute the defendant if the mandates and corrective measures outlined in the NPA are performed within the duration of the NPA.<sup>9</sup>

### 3 JUSTIFICATION FOR DPA AND NPA

Several justifications have been advanced for the emergence and use of DPA and NPA in the US. The following are some of the arguments canvassed in support of NPA and DPA.

First, it has been argued that NPA or DPA might punish a corporation more effectively and efficiently than a criminal conviction. NPA or DPA also allow prosecutors to implement a variety of reforms within the corporation. Prosecutors can impose reporting requirements, improvements to compliance programmes and policies, and a variety of remedial measures, including significant fines. The prosecution can also appoint a monitor to oversee the corporation's activities for the term of the agreement.<sup>10</sup> The kernel

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<sup>6</sup> *Ibid*, at p. 325.

<sup>7</sup> Scott A. Resnik & Keir N. Dougall The Rise of Deferred Prosecution Agreements (2006) *New York Law Journal*.

<sup>8</sup> Cindy R. Alexander & Mark A. Cohen, *supra* note 1, at p. 545.

<sup>9</sup> *Ibid*.

<sup>10</sup> Mary Miller, "More Than Just a Potted Plant: A Court's Authority to Review More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power Under Its Inherent Supervisory Power" (2016) 115 *Michigan Law Review*, 135 at p. 140.z

of the argument is that the NPA or DPA enable prosecutors to reform corporations and make them more compliant rather than just punishing them for their crimes.

Second, is the question of time, cost and resources that are required to ensure a successful prosecution of corporations. Prosecuting corporations via trial is often difficult and time consuming, and there is no guarantee that the government will secure a victory against a corporation deserving punishment. It is argued that corporate crimes are often low visibility crimes and are thus hard to detect. As such, it is usually difficult for prosecutors to gather enough evidence for a criminal conviction, which requires proof beyond reasonable doubt.<sup>11</sup>

The third and perhaps the strongest argument canvassed in support of DPA and NPA is that prosecutors are often able to avoid imposing significant adverse collateral consequences of corporate criminal conviction on innocent third parties, such as shareholders or employees.<sup>12</sup> The argument is that the effect of conviction on a corporation may signal its death and innocent employees of the company and shareholders may lose their jobs and investments. The conviction of Arthur Anderson for obstruction of justice charges in the US resulted in almost 28,000 employees losing their jobs and the ultimate death of the firm.<sup>13</sup> A DPA or NPA with the firm could have averted its demise and thus save the job of its employees.

#### **4 CONCERNS FOR USE OF DPA AND NPA**

The use of DPA and NPA has continued to attract criticisms and objections. DPA and NPA attract criticisms because of the wide discretionary powers that the prosecution has over criminal cases generally and the possibility of the abuse of such powers. The following are some of the objections that have been raised against the use of DPA and NPA.

The major concern with the use of DPA and NPA is the wide discretionary powers exercised by prosecutors. These concerns have manifested in diverse forms. Some have argued that prosecutors favour large companies over small businesses and domestic corporations over foreign companies. Others have expressed concern about the extent to which the agreement focus on corporate compliance programmes and thus involve the DOJ in management controls and structural reforms that may go beyond its core area of litigation expertise.<sup>14</sup> Punishments placed on businesses may be unrelated to the crime

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11 Michael Yangming Xiao, "Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime" (2013) 23 *Cornell Journal of Law and Public Policy*, 233 at p.242.

12 Mary Miller, *supra* note 8, at p. 140.

13 See Linda Greenhouse, *The Andersen Decision: The Overview*; *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES, June 1, 2005 available online at <https://www.nytimes.com/2005/06/01/business/justices-reject-auditor-verdict-in-enron-scandal.html> (accessed on 1<sup>st</sup> of April 2020).

14 David M. Uhlmann "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal

that precipitated the DPA. For instance, the Bristol-Meyers Squibb DPA, which resulted from an allegation of securities fraud, required the company to endow a chair in business ethics at Seton Hall, the prosecuting US Attorney's law school *alma mater*. While beneficial to Seton Hall, the windfall did not advance the criminal justice system's goals of punishment and deterrence.<sup>15</sup>

Another important concern which has been raised in relation to DPA and NPA is that the DOJ use these mechanisms when it does not have a provable case against corporations. An empirical analysis of cases resolved by the DOJ arising from the enforcement of Foreign Corrupt Practices Act (FCPA) revealed that since the use of DPA and NPA by the DOJ since 2004, prosecution of corporate officials has significantly declined in cases where DPA or NPA were used to resolve the FCPA violations.<sup>16</sup> The argument is that corporations find it more convenient to resolve alleged FCPA violations through DPA or NPA and that corporate officials are not prosecuted because DOJ does not have provable cases. Corporate officials, according to the argument are more likely to resist criminal prosecutions more vigorously than corporations because they stand to go to jail if convicted. The empirical evaluation reveals that:

... the comparison of individual FCPA enforcement actions related to enforcement actions of business organizations materially flipped when the DOJ introduced NPAs and DPAs to the FCPA context in late 2004. In short, since the FCPA's enactment in 1977 to December 2004, 83% of enforcement actions against business organization did involve related criminal prosecutions of company employees, whereas since December 2004, 77% of enforcement actions against business organizations did not involve any related criminal prosecutions of company employees.<sup>17</sup>

Using the above empirical analysis of DOJ prosecution of FCPA violations, Koehler persuasively argued that the reason the DOJ does not bring criminal action against corporate officials is because they generally do not have provable cases against them and take the easy option of concluding DPA or NPA with corporations who for a variety of reasons prefer the option of settling the cases with the DOJ. The empirical analysis undertaken by Koehler unearths the tremendous possibility of abuse that a DPA or NPA portend.

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Liability" (2013) 72 Maryland Law Review, 1295 at p.1326.

15 Rachel Delaney "Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements" (2009) 93 *Marquette Law Review*, 875 at p. 880.

16 Mike Koehler "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement" (2015) 49 *University of California, Davis*, 497.

17 *Ibid* at p. 541.

The issue of lack of adequate judicial supervision of DPA and lack of supervision of NPA has also raised concerns of rule of law and abuse of powers. It has been argued that prosecutors' offices, exercise the broadest potential form of authority when they create and impose new mandates – authority to create, impose, and potentially enforce duties that bind individual firms. Indeed, prosecutors not only use DPA or NPA to create new duties, but they also use them to impose new duties on specific firms.<sup>18</sup> Furthermore, while prosecutors can use DPA or NPA to create new duties, senior DOJ officials have not adopted *ex ante* guidelines to constrain the scope of individual prosecutors' authority over the mandates they can impose. The consequence is that there is no genuine mechanism to ensure consistency in the mandates imposed on similarly situated firms by different prosecutors' offices. Instead, each individual US Attorney's office has authority to create and impose the duties that the specific US Attorney's office concludes should be imposed, provided that the firm is willing to consent to avoid prosecution.<sup>19</sup>

The rule of law concerns with DPA and NPA also arises in relation to the reality of lack of judicial oversight of NPA and little or no oversight over DPA. NPAs are not subject to judicial scrutiny or review. Unlike plea bargains, the fines, penalties, and mandates imposed under NPAs are not subject to judicial oversight, review, or approval. This implies that prosecutors have absolute control over the fines, penalties, and mandates that they impose.

The scope of authority of judges over DPA is more limited compared with plea bargains. The prosecution file a DPA in court after charges have been filed to suspend trials pending the implementation of the DPA. The suspension puts a hold to the time stipulated for criminal trials under the Speedy Trial Act. The decision in *United States v. HSBC Bank USA, N.A.*,<sup>20</sup> involved a criminal prosecution against HSBC, a DPA and a Corporate Compliance Monitor Agreement filed by the parties. The parties filed a request to the court urging a suspension of trial for five years under the Speedy Trial Act. The court conceded that although it does not have the general powers to accept or reject a DPA like the powers it has to accept or reject a plea agreement, it approved the DPA pursuant to its supervisory powers under the Speedy Trial Act. The court further directed the parties to file quarterly report and to inform it of significant developments in the implementation of the DPA pending the five years period of suspension of trial.

Two attempts by trial courts in the US to superintend over the process of approving DPA vide the court's power to suspend trial were thwarted by appellate courts. In *Uni-*

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18 Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements" (2016) 8 (1) *Journal of Legal Analysis* 191 at p. 214.

19 *Ibid*, at p. 216.

20 No. 12–CR–763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

*ted States v. Fokker Serv. B. V.*<sup>21</sup> the trial Judge rejected the request of parties to suspend trial after the prosecutor and the defendant entered a DPA. The court rejected the request *inter alia* on the ground that the DPA was unduly lenient having regard to the alleged criminal conduct of the company. The DOJ and the defendant successfully appealed against the trial court's order. The DC Circuit Court held that the responsibility to make decisions concerning DPA with defendants belong to prosecutors and not the court. The DC Circuit Court held that the judiciary has no authority to second-guess executive determinations in criminal charging decisions and that the courts have no free-ranging authority to scrutinise prosecutions charging decisions. A similar position was taken in *SEC v. Citigroup Global Markets, Inc.*,<sup>22</sup> The picture that emerge from the above cases is that the role of the court in approving DPA is substantially more limited than its role in accepting or rejecting a plea agreement.

## 5 DPA IN THE UK

The concerns of the lack of judicial supervision of DPA in the US has not gone unnoticed in other parts of the world desirous of utilising some of the benefits of DPA while avoiding the almost total lack of meaningful judicial supervision. The UK and Singapore are two jurisdictions where a robust legal framework has provided guidance for DPA and instituted standards of judicial oversight.

The legal framework for DPA in the UK is contained in section 45 schedule 17 of the Crime and Courts Act 2013<sup>23</sup> (CC Act). A DPA is defined as an agreement between a designated prosecutor and a person ("P") whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the "alleged offence").<sup>24</sup> Under a DPA, P agrees to comply with the requirements imposed on P by the agreement, and the prosecutor agrees that upon approval of the DPA by the court, criminal proceedings will be instituted in relation to the prosecution of P for the alleged offence.<sup>25</sup>

The prosecutor is required to institute proceedings in the Crown Court by preferring a bill of indictment charging P with the alleged offence subject to the consent of a Crown Court Judge after the court approves the DPA. When the proceedings are instituted, they are automatically suspended. The suspension may only be lifted on an application to the Crown Court by the prosecutor; and no such application may be made at any time

21 79 F. Supp. 3d 160 (D.D.C. 2015), vacated and remanded, No. 15–16, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

22 752 F.3d 285, 330 (2011).

23 A similar framework to the UK approach has been adopted in Singapore Criminal Procedure Code (Chapter 68, 2012, Section 149F) See also Eunice Chua & Benedict Chan Wei, "Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?" (2019) *International Commentary on Evidence*, 1.

24 Section 1(1) of Crime and Courts Act 2013 (CC Act).

25 Section 1(2) CC Act.



when the DPA is in force. During the suspension of proceedings, no other person may prosecute P for the alleged offence.<sup>26</sup>

The CC Act specifically listed designated prosecutors who may enter a DPA. They are the Director of Public Prosecutions, the Director of the Serious Fraud Office and any prosecutor designated by an order made by the Secretary of State. A designated prosecutor must personally exercise the power to enter a DPA and, accordingly, the CC Act excludes the application of any enactment that enables a function of a designated prosecutor to be exercised by a person other than the prosecutor. The CC Act however provides that if the designated prosecutor is unavailable, the power to enter a DPA may be exercised personally by a person authorised in writing by the designated prosecutor.<sup>27</sup> This is to streamline the category of officers that may enter a DPA and ensure the personal responsibility of designated officers. It also ensures that a decision to enter a DPA is made at the upper echelons of the prosecutorial authority.

The CC Act addressed one of the concerns with the use of DPA in the US associated with decline in the number of individual officers of corporations prosecuted whenever a DPA is used instead of prosecution. The CC Act provides that a DPA may be used with a body corporate, a partnership, or an unincorporated association, but not an individual. This ensures that in the UK, officers of corporations who commit crimes while carrying out the business of the corporations are prosecuted even where a DPA is concluded with the corporation. This would strengthen the deterrent effect of the criminal law because it is only human beings behind a corporation who are responsible for committing crimes and not the corporation itself.

The CC Act sets out elaborately the contents of a DPA. A DPA is required to contain the followings:

- (a) a statement of facts relating to the alleged offence, which may include admissions made by P;
- (b) must specify an expiry date, which is the date on which the DPA ceases to have effect if it has not already been terminated for breach;
- (c) may impose on P (but not limited to) the following requirements:
  - (i) to pay to the prosecutor a financial penalty;
  - (ii) to compensate victims of the alleged offence;
  - (iii) to donate money to a charity or other third party;
  - (iv) to disgorge any profits made by P from the alleged offence;
  - (v) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;

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<sup>26</sup> Section 2, CC Act.

<sup>27</sup> Section 3, CC Act.

- (vi) to cooperate in any investigation related to the alleged offence; and
- (vii) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

The CC Act also requires that a DPA may contain the following additional provisions:

- (a) time limits within which P must comply with the requirements imposed on P;
- (b) the amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea; and
- (c) may include a term setting out the consequences of a failure by P to comply with any of its terms.<sup>28</sup>

The requirement that the amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea is significant. This provision would ensure that applicable Sentencing Guideline governing the assessment and imposition of fine would have to be considered in fixing financial penalty. This precludes arbitrary imposition of fines either in excess or below fines the corporation would have had to pay if it were convicted of the offence following a guilty plea.<sup>29</sup> In the judgment approving the DPA in *Serious Fraud Office v. Standard Bank Plc. (Now known as ICBC Standard Bank Plc.)*<sup>30</sup> the court made the following observation:

The most difficult assessment was as to the appropriate financial penalty which para. 5(4) of Schedule 17 mandates must be “broadly comparable to the fine that a court would have imposed” following conviction after a guilty plea. This has required detailed consideration of the Definitive Guideline for corporate offenders issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences. Assessment of culpability and harm led to a conclusion that the appropriate penalty should be 300% of the total fee reduced by one third to represent the earliest admission of responsibility i.e., US \$16.8 million.

The statutory framework under the CC Act is also combined with a mandatory policy framework. The CC Act require the Director of Public Prosecutions and the Director of the Serious Fraud Office to jointly issue a Code for Prosecutors giving guidance on: (a)

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<sup>28</sup> Section 5, CC Act.

<sup>29</sup> This is one of the concerns raised with the use of DPAs in the US.

<sup>30</sup> Case No: U20150854, approved Judgment of Rt. Hon. Sir Brian Leveson, 30th November 2015, Para 16 of judgment available online at [https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank\\_Final\\_1.pdf](https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf) (accessed 5 April 2020).

the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case, and (b) the disclosure of information by a prosecutor to P in the course of negotiations for a DPA and after a DPA has been agreed. The Code may also give guidance on any other relevant matter, including: (a) the use of information obtained by a prosecutor in the course of negotiations for a DPA; (b) variation of a DPA; (c) termination of a DPA and steps that may be taken by a prosecutor following termination; and (d) steps that may be taken by a prosecutor when the prosecutor suspects a breach of a DPA.<sup>31</sup> In compliance with the CC Act, a Deferred Prosecution Agreements Code of Practice (DPA Code) was issued in the UK to regulate and guide the entire DPA process particularly the vexed issue of how to properly regulate and place *ex-ante* limitations on the exercise of prosecutorial powers to enter a DPA.

The DPA Code contained detailed provisions regulating different aspects of a DPA, principles and standards governing the exercise of prosecutorial discretion to enter a DPA and the terms of a DPA, etc. The advantage of such detailed provisions in the Code is that it places specific *ex ante* limitations on the scope of authority of prosecutors and helps promote the rule of law by forcing executive branch actors to justify their actions with respect to a legitimate articulation of the public good. The constraints also enhance consistency across decision-makers in the executive branch.<sup>32</sup>

The CC Act sets up a two-stage judicial approval process. The first stage involves an application by the prosecution to the Crown Court for preliminary approval after the commencement of negotiations between a prosecutor and P in respect of a DPA but before the terms of the DPA is agreed. The application is for a declaration by the court that: (a) entering a DPA with P is likely to be in the interests of justice, and (b) the proposed terms of the DPA are fair, reasonable and proportionate. The court is required to give reasons for its decision to make the declaration. The hearing of the application must be held in private, any declaration made by the court must be made in private, and reasons for the declaration must be given in private. In *Serious Fraud Office v. Standard Bank Plc.*<sup>33</sup> the court reasoned that the rationale for the privacy provisions is that it enables the court retain control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised because of any publicity that would follow if these proceedings had not been held in private.

The second stage of the judicial approval process comes into play after the parties have reached an agreement. The prosecutor must apply for a final declaration that the

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31 Section 6, CC Act.

32 Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements" (2016) 8 (1) Journal of Legal Analysis 191 at p. 208.

33 Supra note 28.

terms of the DPA is in the interests of justice, and its terms are fair, reasonable and proportionate. A DPA only comes into force when it is approved by the Crown Court making a declaration of approval. The court must give reasons for its decision on whether to make a declaration. The Act allows a hearing at which an application for approval is determined to be held in private, but if the court decides to approve the DPA and make the approval declaration it must do so, and give its reasons, in open court.<sup>34</sup> This provision is to ensure that a declaration of approval is subject to transparency and to make it open to public scrutiny and prevent abuse of approval powers.

In the judgment approving the DPA in *Serious Fraud Office v. Standard Bank Plc.*<sup>35</sup> the court considered the following factors before approving the terms of the DPA on the grounds that it would promote the interests of justice and that they were fair, reasonable and proportionate:

(a) The court considered inter alia the following terms of the DPA related to fines, compensation and penalties as follows:

- (i) Payment of compensation of US \$6 million plus interest in US \$1,046,196.58;
- (ii) Disgorgement of profit on the transaction of US \$8.4 million;
- (iii) Payment of a financial penalty of US \$16.8 million;
- (iv) Past and future cooperation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment;
- (v) At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws; and
- (vi) Payment of the costs incurred by the Serious Fraud Office.

(b) The court also considered the following factors in determining whether the terms of the DPA served the interest of justice:

- (i) the seriousness of the conduct, although the predicate offence of bribery involved public officials and utilisation of public funds, the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal;
- (ii) the promptness of the self-report, the fully disclosed internal investigation and cooperation of Standard Bank; and
- (iii) the agreement for an independent review of anti-corruption policies and the fact that Standard Bank is now differently owned, a majority shareholding having been acquired by ICBC.

(c) In determining the appropriateness of the financial penalty, the court applied para-

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<sup>34</sup> Section 8, CC Act.

<sup>35</sup> Supra note 28.

graph 5(4) of Schedule 17 of the CC Act which required that fines must be “broadly comparable to the fine that a court would have imposed” following conviction after a guilty plea. This the court held required detailed consideration of the Definitive Guideline for corporate offenders issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences. The court noted that it applied the Guideline to assess the appropriateness of the financial penalty before approving it.

The above outlines of the statutory standards reveal that these are standards which the courts are competent to consider and apply before approving a DPA. The terms of DPA involve mainly the imposition of fines, penalties and remedial mandates that corporations are obliged to implement. The determination of whether these disposition measures are in the interest of justice or whether they are fair, reasonable and proportionate are matters unquestionably within the competence of the court. In plea bargain agreements, the courts have the final say as to whether the terms of the agreement are in the interest of justice and whether they are fair, reasonable and proportionate. While a DPA does not involve a guilty plea, the effect of a DPA without judicial supervision and approval is to allow the prosecution, a member of the executive branch of government, to determine breach of laws and impose punishment without the intervention of the courts constitutionally saddled with the powers to consider and impose punishment. The approach to the application of DPA in the UK provides a due process safeguard to prevent the abuse of prosecutorial powers inherent in the US approach.

The prosecution reserves the right not to prosecute or enter NPA with a suspect, but the moment the judicial process is activated by the filing of an indictment, judicial powers over the administration of criminal justice is activated and the approach of providing a legal framework for judicial oversight of DPA accords in the writer’s view with due process and the rule of law.

## **6 EVOLVING A FRAMEWORK FOR NPA AND DPA IN NIGERIA**

Prosecutorial powers in Nigeria are derived from the provision of the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) which confers prosecutorial discretionary powers. Nigeria operates a federal system of government with a national federal government exercising governmental powers over the entire country and components units known as States. The Constitution confers prosecutorial powers on the Attorney General of the Federation (AGF) with respect to offences under Federal Acts and on the Attorney General of a State (AGS) over offences under State laws.

Section 174 of the Constitution confers the following powers on the AGF:

(1) The Attorney-General of the Federation shall have power -

- (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;
  - (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
  - (c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
- (2) The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department.
- (3) In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

Section 211 of the Constitution confers similar powers on the AGS with respect to offences under State Laws. The constitutional provisions confer prosecutorial discretionary powers on the AGF and the AGS.<sup>36</sup> The discretionary powers include the power to institute, take over and discontinue criminal prosecution. In *State v Ilori*<sup>37</sup> the Supreme Court of Nigeria held that the AGF or AGS has an unquestionable discretion in the exercise of prosecutorial powers to institute or discontinue criminal proceedings. Within the scope of prosecutorial discretionary powers, the authority of prosecutors to decide whether to prosecute is without dispute. Within the scope of that power, prosecutors can decide to enter NPA with any person whether an individual or corporation suspected of committing a crime. The exercise of the powers to agree NPA is not subject to judicial review and it is not subject to statutory strictures because the power has its roots in the Constitution. A statute cannot restrict constitutional powers except to the extent allowed by the Constitution. There is no need for a new framework for NPA in Nigeria; the constitutional sources of prosecutorial powers in the writer's view cover the use of NPA by the prosecution.

In addition, to the constitutional framework outlined above, the Economic and Financial Crime Commission (Establishment) Act 2004 (EFCC Act) established the Economic and Financial Crimes Commission (the Commission). Section 14(2) of the EFCC Act provides a platform for NPA as follows:

Subject to the provision of Section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the

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<sup>36</sup> Akeem Olajide Bello, "Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects" in (2006) *Current Law Series* Vol. 1, 42 at p. 47.

<sup>37</sup> [1983] 1 SCNLR 94.

Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, not exceeding the amount of the maximum fine to which that person would have been liable if he had been convicted of that offence.

Section 14(2) empowers the Commission to compound offences punishable under the EFCC Act. In *PML (Nig.) Ltd v. FRN*<sup>38</sup> the Supreme Court considered the import of section 14(2). The court defined compounding as follows:

... an act on the part of the victim, who decides to pardon the offence committed by the accused person and requests the court to exonerate him. That does not mean that the offence has not been committed; it only means that the victim is willing to pardon it or has accepted some form of compensation for what he or she has suffered. So the compounding of offences terminates the legal proceedings against the offender and he is entitled to an acquittal.<sup>39</sup>

The court held that the Commission has power to compound an offence under the EFCC Act by accepting such sum of money as it thinks fit not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence. This power is however subject to the AGF's powers to institute, continue, takeover or discontinue criminal proceedings under section 174 of the Constitution. The court held further that compounding terminates legal proceedings although it is the Court and not the Commission that acquits the accused. The court clearly held that the Commission's power to compound an offence extends to charges that are already before the court subject to the AGF's power under the Constitution. The import of this is that the Commission can compound a matter already in court and conclude an NPA with a defendant. In such a case, the prosecution can apply to the court to withdraw the charges and discontinue with prosecution. The prosecution has the power to withdraw charges subject to the consent of the court.<sup>40</sup> The prosecution may also compound an offence before criminal proceedings are instituted.

In the subsequent case of *Romrig (Nig.) Ltd. v. FRN*,<sup>41</sup> the Supreme Court added the requirement that there must be a written agreement between the defendant and the

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38 [2018] 7 NWLR (Pt. 1619) 448)

39 Ibid, at p. 484, paras. G-H.

40 Section 108 Administration of Criminal Justice Act.

41 [2018] 15 NWLR (Pt.1642) 284. See also *EFCC v. Chidolue* [2019] 2 NWLR (Pt. 1657) 442.

Commission on the issue of compounding of the crime for which the accused was charged and the amount to be accepted by the Commission must be explicitly stated in the written agreement for compounding the offence.

There have been allegations that the Commission uses section 14(2) to compound crimes under the EFCC Act. There have however been problems of openness that makes the assessment of such settlements difficult. The one clear case where there was an admission of using this provision is the case involving Halliburton. The Halliburton bribery scandal involves bribes paid to Nigerian government officials that paved the way for the TSKJ consortium to be awarded a \$6 billion contract in 1995 for the expansion of the Nigeria Liquefied Natural Gas company based in Rivers State, Nigeria. Besides the country's former rulers, some ex-ministers, former top Nigerian National Petroleum Corporation officials, and political party officials were also embroiled in the scandal. A former Justice Minister was accused of buying shares in a private airline company with proceeds from the Halliburton bribe scandal.<sup>42</sup> The case against Halliburton was eventually resolved with the Nigerian Government after Halliburton agreed to pay fines and penalties.<sup>43</sup> The secrecy and lack of openness surrounding the alleged NPA in the Halliburton cases exposes the risk of abuse and corruption that an unregulated NPA portend.

There have also been allegations that the Commission uses NPA to conclude criminal allegations of tax evasions, and money laundering offences and cases of contractors who got paid for contracts without performing their obligations. Without an articulated policy framework outlining the procedure, principles, and factors that the Commission would consider in concluding NPA with defendants, there would always be the possibility of favoritism and abuse of powers.

A defence counsel willing to negotiate a criminal matter with the Commission under the provisions of section 14(2) must ensure that whatever is agreed is captured in a written NPA as noted by the Supreme Court in *Romrig (Nig.) Ltd. v. FRN*.<sup>44</sup> The existence of such NPA will guarantee to the defendant that the Commission would not be able to pursue any criminal action with respect to the matter. Whatever NPA is concluded between the defendant and the Commission is however still subject to the powers of the AGF under section 174 of the Constitution. This implies that the AGF

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42 Punch Editorial "Dusting off Halliburton's Corruption Case File" November 24, 2016 available online at <https://punchng.com/dusting-off-halliburtons-corruption-case-file/>

43 Various sums were reported by different news agencies as the agreed fines and penalties. The sum of \$250 Million was reported by Guardian while CNN reported \$35 Million see Nigeria to drop Dick Cheney charges after plea bargain available online at <https://www.theguardian.com/world/2010/dec/15/nigeria-dick-cheney-plea-halliburton> and Halliburton settles Nigeria bribery claims for \$35 million, available online at <http://edition.cnn.com/2010/WORLD/africa/12/21/nigeria.halliburton/index.html>(accessed on 17th May 2020).

44 Supra note 37.



despite the NPA is not barred from instituting a fresh prosecution against the defendant with respect to the charge in relation to which the NPA was concluded.

It is important to draw attention to an error in the Supreme Court decision in *EFCC v. Chidolue*<sup>45</sup> which arose most probably from a typographical error in the typed judgment which was not spotted by their Lordships. The court held that for compounding an offence under section 14(2) of the EFCC Act, the following must co-exist:

- (a) The accused must not only have knowledge of the offence, there must be the actual commission of the crime;
- (b) There must be an agreement not to prosecute;
- (c) There must be a receipt of consideration, that is sums of money exceeding the maximum amount to which that person would have been liable if he had been convicted of the offence; (emphasis mine) and The offence must be punishable under the EFCC Act.

The underlined portion of the decision above is reference to the provision of section 14(2) of the EFCC Act. It provides that the money received by the Commission must be sums “not exceeding the maximum” amount of fine the person would have paid if he had been convicted. The underlined portion of the decision indicating that the Commission must receive sums of money exceeding the maximum amount to which that person would have been liable if he had been convicted of the offence is therefore wrong. The provision of section 14(2) of EFCC Act was wrongly quoted at page 460 paragraph F of the Nigerian Weekly Law Report. The error appears to have come from the certified true copy of the judgement because other law reports contained the same error.<sup>46</sup> The correct application of section 14(2) of the EFCC Act is as stated by the Supreme Court in the earlier case of *Romrig (Nig.) Ltd. v. FRN* discussed earlier.

There is no law in Nigeria permitting the prosecution, after filing a charge or instituting a criminal action to apply to the court to defer prosecution on the grounds that a DPA exist between the prosecution and the defence. A defendant’s right to trial within a reasonable time is a constitutional matter and there is no law that allows the right to be held in abeyance pending the implementation of a DPA between the prosecution and the defence.

In the writer’s view, a legislation may provide a framework for DPA and empower the court to adjourn a criminal matter to allow for the implementation of a DPA. It is instructive to note that the Supreme Court held in *Ariori v. Elemo*<sup>47</sup> that the right to speedy trial belongs to the category of fundamental rights that a citizen can waive subject

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45 Supra note 39.

46 See *EFCC v. Chidolue* as reported in Legalpedia Report available online at <https://legalpediaonline.com/economic-and-financial-crimes-comm-ission-v-chief-patrick-t-chidolue/> (accessed on 17th May 2020).

47 Supra note 35.

to a limitation. The court noted that although a litigant can waive the right to speedy trial by asking for adjournments of the case, waiver of a right to a speedy trial is not permissible where the adjournments requested is of such a nature that the court will lose the advantage it has of accurate assessment of the witnesses it had observed during trial. If this dictum is applied, a statute allowing a court at the request of parties to defer the trial of a criminal matter before the commencement of trial would fall within the waiver of rights approved by the Supreme Court in *Ariori v. Elemo*. The right to a fair trial within a reasonable time is designed primarily for the protection of the defendant. If defendants seeking to benefit from a DPA agrees with the prosecution for a waiver of the right by conceding an adjournment of trial, there is no greater public interest demanding that the adjournment should not be granted.

Another reason a legal framework for DPA is necessary in Nigeria is that unlike the NPA, which does not involve the exercise of judicial powers, a DPA involves a defendant agreeing in a formal judicial proceeding to pay fines and be subject to other penalties it may agree with the prosecution. A DPA when filed in court subjects the information/charges to the judicial process albeit a plea has not been taken and may not be taken. The terms of a DPA usually involve the imposition of fines and other criminal penalties such as forfeiture of the proceeds of crime. The imposition of fines and penalties are matters within the province of the court in criminal matters and which the courts have the competence to determine. The imposition of fines and penalties by the court is not a matter within prosecutorial discretion. Prosecutorial discretion stops at the point when the prosecution decides to file charges or to discontinue prosecution. Where fines and penalties would be the product of a criminal action, the determination of the appropriateness of penalties and punishment is matter within the domain of the courts. This argument provides the basis for a legal framework like what obtains in the UK for the court to determine whether a DPA is in the interest of justice and whether its terms are fair, reasonable and proportionate.

The justification and benefits of a DPA have been examined earlier. In view of its justification and benefits, it is fair to contend that the need to have a legal framework for DPA may emerge in the nearest future in Nigeria. The writer recommends a legal framework similar to the UK's CC Act. This would ensure that the option of a DPA would be available to the prosecution in deserving cases and made subject to judicial review. The legal framework for a DPA may be introduced by an amendment to the Administration of Criminal Justice Laws of the States and the Federal Administration of Criminal Justice Act.

## 7 CONCLUSION

The foregoing analysis has examined the meaning of NPA and DPA, the justifications and concerns for their use, and lessons that Nigerian can draw from the legal framework in US and UK. There is a grave danger of abuse of prosecutorial discretion in concluding DPAs if the US approach precluding judicial oversight of DPAs is adopted in Nigeria. The approach in the UK which provides a legal framework incorporating standards of review and judicial approval of DPAs is recommended for Nigeria. The expanding scope of the work of the Commission and other financial regulatory authorities in Nigeria, would inevitably give rise to the need to have a legal framework for DPAs in Nigeria.

## RUMO A UM MARCO LEGAL PARA ACORDOS DE NÃO PERSECUÇÃO E DE ACUSAÇÃO DIFERIDA NA NIGÉRIA

### RESUMO

Este artigo examina o uso do Acordo de Acusação Diferida e do Acordo de Não Persecução como mecanismos alternativos ao processo criminal de empresas nos Estados Unidos da América e no Reino Unido. O artigo examina as justificações para o uso dos mecanismos e as preocupações decorrentes de seu uso. O artigo conclui que, nos Estados Unidos da América, um Acordo de Acusação Diferida está sujeito a revisão judicial limitada enquanto um Acordo de Não Persecução não está sujeito a qualquer forma de revisão judicial. Os amplos poderes discricionários exercidos pelos promotores nos Estados Unidos são, conseqüentemente, uma grande preocupação. A estrutura legal do Acordo de Acusação Diferida no Reino Unido, entretanto, prevê padrões judiciais de revisão e aprovação que habilitam os tribunais a assegurar que os termos do Acordo de Acusação Diferida sejam no interesse da justiça, justos, razoáveis e proporcionais. O artigo conclui que a Constituição da Nigéria fornece uma estrutura para o Acordo de Não Acusação Diferida, embora não exista atualmente uma estrutura para o Acordo de Acusação Diferida. O artigo recomenda que a Nigéria deve adotar a estrutura legal do Reino Unido.

**Palavras-chave:** Acordo de Não Persecução. Acordo de Acusação Diferida. Estrutura legal.

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