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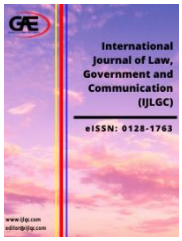

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DEFERRED PROSECUTION AGREEMENT: A NEW PATH TO COMBAT CORRUPTION IN MALAYSIA

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Abstract:

Corruption is an illegal act which not only occurs between individuals but corporations as well. Corporations are artificial entities without minds, making corruption prosecutions difficult because actus reus and mens rea cannot be established. Section 17A of the 2009 Malaysian Anti-Corruption Commission Act criminalises corporations and their affiliates for failing to prevent corruption unless they can establish they have adequate procedures to prevent it. The MACC Act allows a 20-year prison sentence or a fine of ten times the bribe or RM1 million. The United States and United Kingdom have established Deferred Prosecution Agreements (DPAs) to curb corruption. Thus, this research examined DPAs and their effects to evaluate if they may be used to combat corporate corruption in Malaysia. This study employed qualitative methodology and a legal doctrinal approach to investigate if DPA could prevent corruption in Malaysia. The legal basis for corruption and the DPA's capacity to tackle it were assessed using primary and secondary data. It is found that DPA helps both the prosecutor and the corporations avoid prosecution, and most significantly, it protects the interests of innocent third parties. This research recommends DPA as an innovative approach to corporate corruption in Malaysia.

Keywords:

Corruption, Corporation, Criminal Liability, Deferred Prosecution Agreement, Non – Criminal Alternative

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Introduction

Corruption is described as "the misappropriation of entrusted power for personal advantage" (Chandrashekhar & Barrington, 2011). It exists within and between private businesses and can manifest as bribery, fraud, and mafia methods (Kotieno, n.d.). This concept encompasses or heavily overlaps with bribery, fraud, and money laundering operations (Keremis, 2020). Corruption in business hampers private-sector progress and promotes inefficiency. It provides barriers to the business sector through regulatory barriers, intimidation, financial costs, and psychological problems associated with initiating commercial initiatives. Corruption imposes an additional tax on enterprises, reducing their competitiveness. In contrast to a tax, which is legal, structured, and integrated into the cost of a firm's operation, corruption is illegal, unexpected, and disruptive to enterprises, resulting in cost complications, reduced profitability, and inefficiency to the business community (Mauro, 1995). Corruption can result in a variety of civil and criminal procedures and penalties. Corruption is an unmistakable phenomenon that occurs in numerous forms, crosses cultural boundaries, and operates in both the private and public sectors (Arafa, 2012). Corruption is a risk that has produced an unfavourable business environment in one country, reducing trust in doing business and investing (Che Azmi, 2016). It also drives potential investors, whether domestic or foreign, to avoid investing in the country, which has a negative impact on the country's economic prospects and viability (Che Azmi, 2016). Corporations are artificial entities with no independent minds. They act through their agents, and when these agents have actual or apparent authority, the business is bound by their conduct within the area of their authority (Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480). When a crime is committed because of the corporation's special relationship with its agent or individuals who manage and control the corporation, the corporation is held accountable (Pinto & Evans, 2003).

Making the corporation responsible for bribes is a challenge in fighting corporate corruption (Mukwiri, 2015). Criminal action is usually characterised by actus reus and mens rea. To be criminally accountable, a corporation must have actus reus and mens rea. Corporations lack minds, making mens rea challenging to apply to them (Raof, Omar & Othman, 2022). Many jurisdictions have established non-criminal alternatives such as the Deferred Prosecution Agreement to avoid the high threshold of beginning a charge and ensuring corporate offenders' successful prosecution (DPA). Such jurisdiction includes the United Kingdom (UK) and the United States (US). Companies can avoid prosecution for corporate financial crimes, such as corruption by paying fines and taking corrective action under the DPA. The DPA also helps the prosecution by relieving them of the responsibility of gathering evidence and prosecuting businesses, which is tough.

Therefore, the purpose of this research is to analyse the concept of DPA and its impact and to determine whether the implementation of DPA will be a new alternative to combat corruption in corporations in Malaysia. The significance of this research is to determine the adequacy and compatibility of the DPA as an alternative in regulating corporate criminal liability law for the offence of corruption in Malaysia. This research is pertinent to propose improvements for implementing corporate criminal liability law for corruption offences in Malaysia. The implementation of this non–criminal alternative can further serve the interest of corporations and meet the objectives of corporate criminal liability law for corruption offences in Malaysia.

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Methodology

This research used doctrinal legal and qualitative methods. The technique was used to examine Malaysia's legal framework (Tengku Noor Azira Tengku Zainudin et al, 2021) for corruption and leverage DPA's basic principles, characteristics, and applicability, which other methods do not give (Hapiz et.al, 2022). This method helps find legal system flaws. To understand DPA's origins, underlying concepts, and precipitating events in other countries, the historical approach was used. Historical research "systematically recaptures the intricate nuances, individuals, meanings, events, and even ideas of the past that have influenced and produced the present" (Berg & Lure, 2012). The researcher analysed (Nurul Hidayat Ab Rahman et al, 2022) and used an exploratory method to acquire information about DPA in another nation and see if it may prevent corruption in Malaysia. In the preliminary phase, primary data, secondary data (Mohd Zamre Mohd Zahir et al, 2022) and literature reviews were used to assess Malaysia's current legislative framework for corruption and DPA's potential to prevent it. Statutes, case laws, books, and academic journals were used by the researcher. Content analysis was used (Ramalinggam Rajamanickam et al, 2019) to critically analyse the data. The data was then evaluated for Malaysia and DPA corruption-related offences. Content analysis allowed the researcher to evaluate why a country uses DPA and whether Malaysia should implement it.

Literature Review

Even though there is no universally acknowledged definition of corruption, the TI (2008) defines it as the misuse of entrusted power for personal advantage. According to Collins et al. (2009), the legal definition of corruption is an act done with the aim to benefit particular parties that is inconsistent with the doer's official obligation. According to Jain (2001), corruption is defined as acts in which the power of the public office is utilised for personal gain in a way that violates the rules of the game. Corruption usually involves two (the briber and the bribee) or more parties. In most circumstances, one or more of the partners will be from the business sector. Bribery, embezzlement, fraud, and extortion are the most common forms of corruption. People engaging in corruption are frequently public officials and politicians who have authority in government (Jain, 2001). The private sector is frequently subjected to corruption pressures or a proclivity to seek out economic possibilities. A commercial corporation, for example, may solicit bribes in exchange for some unwarranted advantage that a person in a position of authority is capable of providing (Goorha, 2000). Corruption is a bigger problem in the public sector, where the key factor is the abuse of public power. In this situation, the private sector frequently succumbs to public authority pressure since refusing to comply with the request for a bribe may jeopardise their economic chances or operations (Nguyen and van Dijk, 2012). According to Goel and Nelson (1998), corruption can be seen in terms of its demand and supply-side motivations. Beets (2005) studies the demand side of international commercial misconduct. According to Beets (2005), the demand-side of corruption involves people who demand and accept corrupt payments, and this behaviour is common among public officials. In this situation, the private sector is frequently the reluctant perpetrator or victim of such activities.

According to Martin et al. (2007), the supply side of corruption can be split into active and passive corruption. Firms (bribers) engage public officials (bribees) in active corruption by utilising the threat of payment as a means of influence and coercion. Bribery, for example, is used as a strategic influence method to obtain certain benefits, such as securing a tender or contract (Collins et al., 2009). Passive corruption, on the other hand, is employed to avoid sanctions, penalties, fines, or punishments (Wu, 2009). Firms, for example, pay bribes to

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officials in order to avoid fines for failing to follow specific rules or regulations. Many studies have examined Malaysian corruption. For instance, Beh (2011) and Siddiquee (2010) analyse the country's corruption status and government initiatives to address it. According to Joseph et al. (2016), Indonesian and Malaysian corporations' disclosure of anti-corruption practises is still in its infancy. Malaysian companies disclose less than Indonesian enterprises due to lower coercive demand for transparency and weaker regulatory capacity to prevent corruption. KPMG (2013), PricewaterhouseCoopers (2013), and Yadav and Mukherjee (2016) have also studied this problem. Yadav and Mukherjee (2016) found that private small and medium enterprises (SMEs) are more likely than state-owned SMEs to view corruption as harmful to their business. According to KPMG (2013), 16% of its respondents had experienced bribery or corruption, and 65% believed it posed a severe risk to their organisation. According to PricewaterhouseCoopers (2016), 30% of organisations reported bribery and corruption.

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd (1964) described corporations as artificial entities without minds. The corporation is bound by their agents' actions if they have actual or perceived power. According to Pinto & Evans (2003), a corporation is liable for an offence committed by its agents or managers. According to Blackstone (1765), a company cannot commit treason, felony, or other crimes in its corporate role, but its members may in their individual capacities. Therefore, holding corporations accountable for wrongdoings can be difficult. Criminal conduct requires actus reus and men's rea. A corporation must have both actus reus and mens rea to be criminally liable. Since corporations lack minds, Raof, Omar & Othman (2022) argue that corporations cannot satisfy mens rea. In the UK, section 7 of the Bribery Act 2010 holds companies liable for the illegal behaviour of any related individual resulting from criminal risks the corporation might have prevented (United Kingdom Bribery Act, 2010). Obtaining a business advantage for the corporation makes the related person liable. Failure to dissuade or prevent bribes on behalf of corporations is a strict liability offence under the section. Corporations must have sufficient procedures to defend themselves under the Act (United Kingdom Bribery Act, 2010). Similarly, under the UK Criminal Finances Act 2017, a corporation that fails to prohibit its workers or affiliated parties from helping tax evasion is guilty of a crime (Criminal Finances Act, 2017).

Despite the UK's initiative, evidence is difficult to get. Therefore, corporations are rarely prosecuted for severe crimes, especially large ones (King & Lord, 2018). R v Sweet Group PLC (2014) was the only conviction after five years of the implementation of section 7 of the UK Bribery Act 2010 for failing to prevent bribery by its workers in a foreign jurisdiction (Copp & Cronin, 2018). The DPA was established in the UK in 2014 under schedule 17 of the Crime and Courts Act 2013. Due to the difficulty of satisfying the high threshold of commencing a charge and ensuring the successful prosecution of corporate offenders, the goal is to promote corporate self-reporting of criminal activity as an alternative to criminal prosecution (Ferguson, 2018). Similarly, in the US, DPAs are becoming more popular as an alternative to corporate criminal culpability (Uhlmann, 2012). The available research on the use of non-criminal alternatives in the form of DPA in the global context reveals that non-criminal options are being used in many jurisdictions with promising results for guaranteeing corporate compliance. In the US, for example, Gipson Dunn's legal firm had discovered roughly 532 corporate non-prosecution agreements and DPAs initiated by the Department of Justice and ten initiated by the United States Securities and Exchange Commission ("SEC") (Dunn, 2020). Similar trends in non-criminal approaches may be found all across the world, with a non-prosecution agreement shining as one of the alternatives to a full criminal trial.

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Since 2015, nine corporations in the UK have struck a DPA with the Serious Fraud Office for allegations including international bribery (Lord, 2022). However, the literature reveals that using non-criminal alternatives is not without difficulties and constraints. DPAs, for example, have increased the imbalance between the rich and the poor in the American legal system (Parker & Dodge, 2022). There have also been concerns raised concerning the scale and potential collateral repercussions of monetary and non-monetary sanctions under non-criminal options, as well as the efficiency and ultimate deterrent effect of these alternative settlement vehicles (Alexander & Cohen, 2015).

According to Raof, Omar & Othman (2022), within the Malaysian context, the scarcity of literature on non-criminal alternatives such as DPA underlines the necessity for a thorough examination of the process's relevance in Malaysia. Early Malaysian literature implies that there is a gap in Malaysian law regarding DPA. With a DPA in place, huge corporations may avoid criminal prosecution, which causes enormous harm to innocent third parties and stockholders (Parker & Dodge, 2022). DPA should be considered as it may help businesses avoid many of the drawbacks of prosecution and conviction (Luth, 2021). Examples include potentially lengthy periods of ambiguity, reputational harm, exclusion from public financing and contracts, and the denial of company licences or the prohibition of specific commercial operations (Luth, 2021). For example, in recognition of the challenges in prosecuting large corporations and the lack of resources to do so, the United Kingdom has established provisions under the Crime and Courts Act 2013 for the use of DPA in cases of corporate financial crimes as means of enabling the avoidance of prosecution and conviction for those corporations deemed low risk (Lord, 2022). In the right situations, a DPA may benefit the shareholders, the corporate organisation, and the public good.

According to the then head of the Malaysian Anti–Corruption Commission, Latheefa Koya, she opined that Malaysia should adopt DPA before enforcing its failure–to–prevent bribery offences, as otherwise, it would make the prosecution process more difficult (Mlex a Lexis Nexis Company, 2019). There is not much local literature, nevertheless, on the use of the DPA as a non-criminal alternative after the statement. Hence, due to the shortcomings of the current legal system, it is essential to look at the viability of non-criminal alternatives, with a focus on the DPA, in order to regulate corporate criminal culpability for corruption offences in Malaysia.

Corruption In Malaysia

According to Transparency International, Malaysia's corruption ranking and CPI scores have been declining. In 2014, Malaysia ranked 50th out of 175 nations with a CPI score of 52, whereas in 2016, it tied for 55th with Croatia with 49. (Transparency International, 2022). In 2017, Malaysia slid to 62nd place with a CPI score of 47. (Transparency International, 2022). In 2021, Malaysia's CPI score was 48 and its rank was 62 out of 180. (Transparency International, 2022). Malaysia's situation is still at risk despite a 1% CPI increase from 2017 to 2021. Malaysia's principal bribery and corruption law is the 2009 Malaysian Anti-Corruption Commission Act (MACC Act). It created the Malaysian Anti-Corruption Commission and enhanced anti-corruption efforts. MACC superseded the 1997 Anti-Corruption Act. Section 2 of the MACC Act (2009) declares that its goal is to enhance public and private sector administration's integrity and accountability and educate public authorities, officials, and the public about corruption. The MACC Act equates bribery with corruption. However, the Act does not define those words. Bribery and corruption are also covered by the Penal Code under sections 161 to 165 for public workers and the Anti-Money Laundering, Anti-Terrorist

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Financing, and Proceeds of Unlawful Activities Act 2001, which incorporates MACC Act violations under "severe offences." Bribery and corruption offences require reading both legislations. These laws cover receiving, agreeing to receive, and giving gratification. Section 3 of the MACC Act (2009) defines gratification as money, a gift, a loan, a fee, a reward, a valuable security, property, or an interest in property.

Malaysia's corporate corruption is alarming. The Malaysia Anti-Corruption Commission (MACC) detained 782 people from 900 corruption investigation documents between 2014 and 2018. (Bernama, 2020). By April 2022, the MACC had opened 379 investigations and detained 425 people for corruption, money laundering, and Penal Code violations (Bernama, 2022). A corporate responsibility clause in Section 17A of the MACC Act (2009) went into effect on June 1, 2020, allowing law enforcement to pursue corrupt corporations. Section 17A of the MACC Act (2009) aims to reduce bribery by corporations and their associates. It was issued in the Gazette in May 2018 and is identical to the applicable UK Bribery Act 2010 and US Foreign Corrupt Practices Act 1977 provisions. Section 17A of the MACC Act (2009) shows that Malaysia is serious about controlling and preventing corruption in corporate organizations. Section 17A of the MACC Act (2009) states that "a commercial organisation commits an offence if a person associated with the commercial organisation corruptly gives, agrees to give, promises, or offers to any person any gratification, whether for the benefit of that person or another person, with the intent to obtain or retain business for the commercial organisation or to obtain or retain an advantage in the conduct of business for the commercial organisation." S17A of the MACC Act criminalises a commercial organization's corrupt acts if any employee gives or offers gratification to obtain a business benefit.

Section 17A of the MACC Act (2009) defines deeming liability two ways. First, corporate liability, where the Commercial Organization is believed to have committed the act unless it can prove "adequate measures to prevent" the behaviour. Second, if the Commercial Organisation is held guilty, the director, controller, officer, or partner of the Commercial Organisation, or any individual participating in its management, is immediately deemed liable unless he can demonstrate the statutory defence under section 17A (3) of the MACC Act (2009). Section 17A (4) of the MACC Act (2009) allows a commercial organisation to defend itself if it can show it took enough steps to prevent its employees from engaging in such conduct. In December 2018, the Prime Minister's Department released the Adequate Procedures Guidelines ("Guidelines") to help commercial companies avoid dishonest business practises (Wong & Heng, 2020). The MACC Act's Section 17A liability could be avoided by applying the Guidelines. The Guidelines are founded on five concepts: top-level commitment, risk assessment, control measures, systematic review, monitoring, and enforcement, and training and communication. Commercial Organizations can use these principles to develop anti-corruption policies, processes, and controls (Gurusamy et al, 2022).

Application of the MACC Act 2009 was formerly limited to individuals. Corporations were not responsible for bribery or corruption. Public Prosecutor v. Rosmah bt Mansor (2022) illustrates. Rosmah (the accused) was charged with three counts of corruptly soliciting and accepting gratification as an enticement and reward for helping Jepak Holdings Sdn. Bhd. win a RM 187.5 million project from the Ministry of Education in 2015. The accused was found guilty on all charges and sentenced to ten years for each offence, to run consecutively. The accused was also fined RM 970 million. The accused was found guilty of receiving a bribe to assist Jepak Holdings Sdn Bhd (the corporation). The corporation was acquitted despite clearly

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gratifying the accused. It's unfortunate the corporation hasn't been charged with corruption despite the offence.

It's also important to note that the MACC Act 2009 follows criminal law's no-retrospective-application rule. Article 7 of the Federal Constitution prohibits retroactive criminal laws (Federal Constitution, 1957). Datuk Norazlan Mohd Razali, the investigating head of the Malaysian Anti-Corruption Commission (MACC), has confirmed that Section 17A of the MACC Act of 2009 has no retrospective effect (Majid & Yeung, 2020). This means that section 17A of the MACC Act 2009 will not apply to corruption offences committed prior June 1, 2020. After nine months, MACC Section 17A had its first case. The first Malaysian company charged under the new law was offshore vessel support company Pristine Offshore Sdn Bhd (Emir Zainul, 2021). Pristine Offshore paid Petronas Carigali Sdn Bhd RM 321,350 for a subcontract, which was considered bribery. Former corporate director Chew Ben Ben was charged with bribery under Section 16(b)(A) of the 2009 MACC Act. Mazrin Ramli, Deleum Primera Sdn Bhd's COO, is accused of receiving cash for aiding Pristine Offshore obtain the Petronas Carigali subcontract. Pristine Offshore subcontracted a workboat, captain, crew, marine services, and offshore support for Petronas Carigali's maintenance, construction, and modification services. The defendants pled not guilty when Sessions Court Judge Rozilah Salleh read the charges. Pristine Offshore could face ten times the bribe and twenty years in prison if convicted. The 2016 Companies Act mandates prison term for directors and company secretaries.

Section 17A of the MACC Act holds corporations accountable for corruption without non-criminal alternatives like the DPA (Mlex a Lexis Nexis Company, 2019). Thus, the corporation has a strict liability to demonstrate that it had adequate procedures to prevent corruption. While the legal purposes of avoiding bribery are properly stated, a DPA system may better and more successfully achieve these goals (Ferguson, 2018). DPA can further serve corporations' interests and meet Malaysia's corporate criminal liability law for corruption offences (Raof, Omar & Othman, 2022).

Deferred Prosecution Agreement

Deferred prosecution agreements (DPAs) were created in the US to avoid "branding" young offenders (Gallagher, 2010). In the 1960s low-level narcotics cases and 1992 corporate criminal cases, prosecutors employed these agreements (Benjamin, 2005). Presenting a formal accusation against the corporation, negotiating and implementing a deferred prosecution agreement, and deferring further proceedings if the corporation meets all of the agreement's provisions is the typical deferral process (Gallagher, 2010). Prosecutors will drop charges if the corporation meets all requirements before the deferment period ends. DPAs were originally designed for minor offences, but numerous countries now use them to tackle corporate crime. The corporation and state can settle their issue without going to trial or the corporation pleading guilty via a DPA (Shiner, 2018). In other terms, DPA is an agreement in which the government agrees to hold charges until the criminal admits guilt and commits to rehabilitation under the agreement (Senko, 2009). The DPA is an effective instrument for punishing a corrupt organisation without destroying it or unfairly affecting innocent employees through layoffs, investors through decreased share value, and an industrial sector by forcing a critical player out of business (Senko, 2009). DPA protects innocent third parties against corporate entity indictments while fulfilling criminal justice goals of punishment and deterrence (Senko, 2009).

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Thus, each corporation can continue to do business with partners, manufacture products, and serve customers during the DPA process (Januarsyah et. al, 2020).

These traits define a DPA (Garrett, 2014). The state criminally charges the corporation based on facts. The corporation agrees to recognise the facts, pay appropriate monetary penalties, adjust corporate behaviour as decided by the state, and accept that if the agreement is not followed, the state may continue to trial and use the admitted facts. These fundamentals might take numerous shapes. Criminal fines, victim restitution, profit disgorgement, and forfeiture may be monetary penalties (Garrett, 2014). Other conditions may restrict a company's business activity, require major internal reforms, and establish a government-appointed monitor to ensure compliance with the agreement (Spivack & Raman, 2008). By increasing the corporation's criminal law compliance, the behavioural constraints discourage future illegal behaviour (Shiner, 2018).

Deferred Prosecution Agreement In The United States

The Department of Justice (DoJ) negotiated the first corporate DPAs in the 1990s, but the practice became much more widespread after 2000, when the DoJ began providing guidelines for their negotiation and implementation (Davis, 2022). In the United States, there are no legislative or rule-based criteria for evaluating corporate DPA. Rather, they were devised and vigorously developed by prosecutors and corporations because they produce beneficial results for both. In the dearth of any provision in the Federal Rules of Criminal Procedure addressing the handling of DPAs, courts who review DPAs have relied on two other sources of authority (Davis, 2022). The Speedy Trial Act (1974) has been the most commonly cited source (Lawlor, 2019). The STA's central tenet is that once federal criminal charges are filed, the case must proceed to trial on the timeframe specified in the legislation; absent statutory extensions or exclusions of time granted in accordance with its terms, a prosecution must be dismissed if a trial does not take place within the mandatory time limits (Davis, 2022).

The formal filing of information pursuant to a DPA seems to initiate the STA, subjecting prosecutors to the possibility of dismissal unless the court formally agrees that the DPA falls within one of the specified justifications for an extension of STA deadlines (Davis, 2022). Furthermore, the legislative history of the STA makes it clear that Congress did not intend for the parties to criminal prosecution, which is the prosecutor and a defendant, to agree to waive the Act's provisions; speedy trials are an important matter of public interest that cannot be left to the convenience of the parties (United States v. Saena Tech Corp, 2015). As a result, even if the prosecution and defence agree to an exclusion for the term of the DPA, they must present their request to the court, which can only grant an exclusion on one of the allowed grounds specified in the Act (United States v. HSBC Bank USA, 2017).

Section 3161(h)(2) provides that "*Any length of time during which prosecution is postponed by the attorney for the government subject to a written agreement with the defendant and court approval, in order to allow the defendant to demonstrate his good behaviour*" (Speedy Trial Act, 1974). This clause was written to provide a humane alternative for individuals, generally young first-time offenders, to avoid the consequences of a criminal conviction by demonstrating "good conduct" over an agreed-upon term, often under the supervision of a social services agency. While the legislative history is littered with references to similar "diversion programmes" for people, none of the legislators appears to have anticipated that this clause would later be aggressively employed by huge corporations. However, because the

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statute's terms conveniently apply to corporate DPAs, it has become typical for DPA agreements to state that the parties would jointly seek the Court for a time exclusion under the statute's requirements.

Separately, some judges have used the concept of the court's "supervisory powers" to justify the ability to review a DPA. The concept of judicial supervisory powers is an outlier in federal criminal law in the United States. It is not founded on any special statute that gives courts a general supervisory function over criminal procedures, because there is none. According to United States v. Payner (1980), the court emphasized that *"the supervisory power allows federal courts to supervise 'the administration of criminal justice' among the parties before the bar."* Courts have invoked this principle on several occasions when faced with the need to create a rule or procedure where none has been provided by Congress, arguing that the power to create "civilised standards of procedure and evidence" applicable to federal criminal proceedings is inherent in the judicial function (Beale, 1984). In the great majority of DPAs submitted, judges accept the mutual request for exclusion under section 3161(h)(2) of the STA without any discussion of the STA or their supervisory powers or even debate on the merits of the case (Reilly, 2017). However, in a few cases, prominent active judges have insisted on the power to evaluate the substance of a DPA. Noting that section 3161(h)(2) of the STA states that such an extension may only be granted "with the approval of the court," several judges have conditionally or unconditionally approved the DPA and its conditions (Davis, 2022). Such judicial intervention is often opposed by both the prosecution and the defence. This is not surprising; by definition, any publicly publicised DPA represents a settlement that the parties have agreed is in their best interests and having a judge question or potentially block that deal jeopardises both parties' interests (Davis, 2022).

In the United States, it can be concluded that the judicial department does not have statutory power to investigate the terms of the DPA entered between the prosecutor and the corporation. This is due to the absence of specific legislation providing such power. Courts also often reach different decisions in regard to their review power, where some judges referred to the STA, while others interpret their supervisory powers based on the concept of judicial supervisory powers.

DPA Cases in The United States

The court was petitioned in United States v. WakeMed (2013) to approve an STA time exclusion to allow a corporate defendant to complete its contractual duties under a DPA. Following two hearings with the parties, the court reviewed the circumstances, including the risk that the corporate defendant would go out of business if convicted and that "the needs of the underprivileged in the surrounding area would be drastically and inhumanely curtailed" if a prompt settlement could not be obtained. After assessing the seriousness of the defendant's offence against the possible harm to innocent individuals that could ensue if this prosecution proceeds, the court decided that a deferred prosecution is warranted in this situation. The parties to the agreement agreed to a periodic review by the court, and any reports relating to the defendant's compliance with the agreement shall be shared with the Court for its assessment. The judge, in this case, appeared to assume but did not evaluate the scope of his power to review the substance of a DPA as part of the required sign-off under the STA. The prosecutor did not appear to oppose the limited review cited here and did not seek an appeal or further review of the case.

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In United States v. Fokker Services, B. V. (2015), a European aerospace company negotiated a DPA with the DOJ on allegations of suspected unlawful shipment of items in violation of federal sanctions and export control regulations and sought a STA extension. In a lengthy opinion, the District Judge examined his DPA review jurisdiction. The judge felt the DPA was grossly disproportionate to Fokker Services' behaviour after studying it. The court believed that seeing a defendant tried so anemically for such heinous crime for such a long time and for the benefit of the country's sharpest opponents would weaken public trust in justice and increase lawlessness. Thus, the Court finds the arrangement an improper exercise of prosecutorial authority and rejects it. Both parties appealed, and the court ordered a law firm to write an amicus brief supporting the trial court's reasoning. The DOJ frequently claimed that the STA did not apply or could be made to apply. However, its main argument was that the courts should not evaluate DPAs since the Constitution gives the executive branch the right to determine whether they serve the public interest. "District courts have extensive jurisdiction to second-guess the prosecution's charge choices," the amicus brief states. The court found a DPA akin to a charging judgement because "A DPA's sole purpose is to help the defendant to avoid criminal guilt and penalty by demonstrating good conduct and lawfulness. Under the STA, a trial court's main duty is to determine whether "Instead of helping the defendant prove its good behaviour and lawfulness, the parties entered into the DPA to avoid short trial limits. The District Court overstepped its authority by rejecting the agreement because this was clearly not the case. The Circuit Court issued an unprecedented writ of mandamus, rejecting the District Court's order and remanding to allow the DPA to be filed.

The net result of the decisions discussed above is straightforward. The DOJ and a corporate defendant can freely negotiate the terms of a DPA and absent exceptional circumstances, a judge will not disturb the terms or review whether the agreement is in the public interest.

Deferred Prosecution Agreement In The United Kingdom

In the United Kingdom, deferred prosecution agreements are a relatively new phenomenon. Ten DPAs have been fully reported up to this point (Serious Fraud Office, 2022). The UK's DPA structure, in contrast to the U.S. model, is the result of particular, in-depth legislation that addresses several distinctively British difficulties, and the agreements have undergone extensive court review (Davis, 2022). As a signatory to the Organization for Economic Cooperation and Development's (OECD) enormously important Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, adopted in 1997 ("OECD Bribery Convention"), the United Kingdom was obligated to join the fight against overseas corruption by enacting and enforcing appropriate legislation (OECD Bribery Convention, 1997). The United Kingdom, on the other hand, adheres to the "directing mind" principle, also known as the "identification principle," which states that a corporation can be held liable for a crime only if relatively senior corporate officers (the "directing mind") were aware of and approved of the offending acts (Pinto & Evans, 2003). The current Director of the UK Serious Fraud Office (SFO), as well as her predecessor, have emphasised that the directing mind principle is a major impediment to corporate law enforcement: corporations are more difficult to convict, and thus have fewer incentives to cooperate with criminal investigations (NYU Law News, 2016)

The Bribery Act (2010) in the United Kingdom addressed this issue, at least in part, by enacting a new crime. Section 7 of that Act, known as the "corporate offence," states that if someone "associated" with the corporation commits bribery, the corporation is automatically guilty,

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except that "it is a defence for the corporation to prove that [it] had in place adequate procedures designed to prevent persons associated with the corporation from engaging in such conduct" (Bribery Act, 2010). The SFO has issued (and recently updated) guidelines defining what it considers "adequate procedures" for providing a defence under Section 7 of the Bribery Act 2010, albeit if not addressed through negotiation, the argument must be brought at trial. In 2014, the United Kingdom implemented the first-ever version of a corporate deferred prosecution agreement under the terms of Schedule 17 of the Crime and Courts Act 2013 ("Schedule 17") (Crime and Courts Act, 2013). The SFO and the Crown Prosecution Service (CPS) then released the Deferred Prosecution Agreements Code of Practice (DPA Code of Practice), which offers extensive detail on the procedures for negotiating a DPA (Deferred Prosecution Agreement Code of Practice, 2013). According to Schedule 17, it requires a prosecutor contemplating a DPA (whether the Director of the SFO or the Director of Public Prosecutions) to seek and gain judicial approval in two steps (Crime and Courts Act, 2013). First, according to Schedule 17, a prosecutor cannot even get into definite negotiations with a corporate defendant's counsel without judicial authorisation (Crime and Courts Act, 2013). The prosecutor must first decide whether to seek a negotiated DPA at all and then "invite" a corporation to see whether it would consider negotiating one. Before agreeing to the terms, based on paragraph 7, the prosecutor must apply to the Crown Court for a declaration that (a) entering into a DPA with the corporation is likely to be in the interests of justice, and (b) the proposed DPA terms are fair, reasonable, and proportionate (Crime and Courts Act, 2013). In addition, paragraph 7 requires the court to "provide reasons for its decision whether or not to make a declaration" as requested by the parties. Because the parties may not reach a final agreement, and primarily to protect the corporation's right to defend itself, both the hearing and the court's "reasons" at the preliminary approval stage under Paragraph 7 must be "given in private," to be made public only if (and when) a final approval is granted (Crime and Courts Act, 2013).

If the parties reach a definitive agreement after receiving "preliminary" approval under paragraph 7, the DPA cannot go into effect without obtaining the "Court approval at a final hearing" under paragraph 8, which states, among other things, that once the prosecutor and the corporation have agreed on the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that (a) the DPA is in the interests of justice, and (b) the DPA terms are fair, just and reasonable (Crime and Courts Act, 2013). Schedule 17 states that "the prosecutor must publish" the whole DPA following approval, as well as the court's declarations under paragraphs 7 and 8. Schedule 17 also specifies processes for later evaluating if a corporation has violated a DPA, which may only be determined by a court (Crime and Courts Act, 2013). While these rules provide reviewing judges with a lot of leeway, they do not let them settle factual disagreements, which must be settled upon by the parties before they may seek approval. According to Article 6.2 of the DPA Code of Practice, the parties must settle any factual disputes necessary for the court to agree on the provisions of the DPA on a clear, fair, and accurate basis. In DPA proceedings, the court lacks the authority to rule on factual disparities (Deferred Prosecution Agreement Code of Practice, 2013).

To date, all ten DPAs disclosed have been successful in securing court approval (SFO, 2022), without which they would have remained forever "private" in theory. This opens the door to the possibility that, in cases that are still "private," the prosecutor and a corporate defendant negotiated a preliminary or even final agreement, but the agreement was not approved in accordance with Paragraphs 7 or 8, respectively. Common sense suggests that any such judicial

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non-approval would be more likely to occur during the "preliminary" approval phase under Paragraph 7 rather than when the agreement was submitted for "final approval" under Paragraph 8, simply because preliminary approval requires a judicial finding of "likelihood" that the parties were on track to negotiate an appropriate agreement (Davis, 2022).

To summarise, in the United Kingdom's context, the DPA is governed by specific legislations, which require the DPA to be examined and approved by Court. Such requirement is deemed important to ensure that the terms of the agreement are fair, reasonable and in the public interest.

DPA Cases in The United Kingdom

In Serious Fraud Office v Standard Bank PLC (2015) (now known as ICBC Standard Bank Plc), it was charged with failing to prevent bribery in violation of Section 7 of the Bribery Act 2010. This indictment was immediately suspended on November 30, 2015, as part of DPA proceedings. As a result of the DPA, Standard Bank was ordered to pay $25.2 million in financial orders and an additional $7 million in compensation to the Government of Tanzania. The bank also agreed to pay £330,000 in reasonable costs to the SFO in connection with the investigation and subsequent resolution of the DPA. The DPA was approved in Southwark Crown Court by the President of the Queen's Bench Division, the Rt. Hon. Sir Brian Leveson. The Serious Fraud Office confirmed that Standard Bank PLC (now known as ICBC Standard Bank PLC) had completely complied with the provisions of the UK's first Deferred Prosecution Agreement (SFO, 2018). Judge Leveson listed fundamental elements of all DPAs. The UK DPA system was modelled after the American one, but it was distinct, notably because he was the reviewing judge. Instead, the parties' authorization requests would have to convince the judge that the proposed agreement was in the public interest and that the agreed-upon consequences were proportionate, depending on the case's particular facts (Serious Fraud Office v Standard Bank PLC, 2015). The Standard Bank arrangement was in the public interest, according to Judge Leveson. This is owing to the promptness of the self-report, Standard Bank's fully revealed internal inquiry and cooperation, the agreement for an independent review of anti-corruption procedures, and the fact that Standard Bank is now held by a different company with a majority shareholding. His lordship also recognised that the most difficult decision was the proper monetary penalty, which according to paragraph 5(4) of Schedule 17, has to be "broadly equal to the fine that a court would have imposed" after a guilty plea (Crime and Courts Act, 2013). Judge Leveson ruled the penalty fair. These steps were needed to approve a proposal and an agreement. Its provisions relied on the court. This requires a full examination of the offence and a financial penalty estimate for the Bank if found guilty.

In Serious Fraud Office v Serco Geografix Ltd (SGL) (2019), Mr Justice William Davis authorised a DPA between the parties. SGL pleaded guilty to three counts of fraud and two counts of false accounting for deceiving the Ministry of Justice (MoJ) regarding its parent firm, Serco Limited (SL), earnings from its electronic monitoring contract between 2010 and 2013. SGL precluded the MoJ from limiting SL's future earnings, retrieving past profits, negotiating better conditions, or risking SL's contract income by misrepresenting SL's profits. The DPA mandates SGL pay £19.2 million and the SFO's £3.7 million investigative costs. A £70 million lawsuit settlement with Serco paid the MoJ £12.8 million in 2013. SGL's £12.8 million compensation obligation was entirely offset by Serco Limited's 2013 Settlement Agreement with the UK Ministry of Justice (MoJ). Under the DPA, SGL must cooperate with the SFO and other international and domestic law enforcement and regulatory authorities, disclose fraud by

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itself or associated firms and individuals, and improve and report on its ethics and compliance programme periodically. SGL's parent firm, Serco Group, has undertaken to cooperate with the SFO and other law enforcement and regulatory agencies, report fraud by itself or associated companies and individuals, develop its Group-wide Ethics and Compliance activities and report on its assurance programme yearly. Justice William Davis questioned whether his permission would determine whether the corporation would be prohibited from future public service contracts, a "political" matter in his view. According to him, "*If the effective result of approving the proposed DPA would be that SGL could continue to provide services to government departments, whereas it would not be able to do so in the event of a conviction, I would be hesitant to offer my support. Public anxiety regarding the manner in which private firms perform public services is real. I would be making a quasi-political choice if I took action that would amount to a favourable determination of the status of a private corporation in relation to public procurement. This is not the role of a court in any circumstance, and especially not in the context of approving a course of action that prevents a firm from being prosecuted for significant fraud"*. In the end, Justice Davis determined that "my approval of this DPA will not determine what constitutes a political decision" and authorised the agreement.

From the cases demonstrated above, prior to the DPA being in action, it must first be reviewed by the court to determine whether the terms of the agreement are in the public interest. This is further affirmed by Sir Brian Leveson when he said that DPAs could not be agreed upon without judicial approval (House of Lords, 2019). The House of Lords (2019) further affirmed that the introduction of DPAs had been a beneficial development in connection to Bribery Act offences.

Findings and Recommendation

Based on the discussions above, corruption is still a major issue in Malaysia. Corruption does not only involve public officials and individuals but also corporations. Corporations are artificial. When their agents have authority, the corporation is bound by their actions (Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd). Thus, the corporation is liable for crimes committed by its agents or managers (Che Azmi, 2016).

The main issue that can be seen in combating corporate corruption is making the corporation itself liable (Mukwiri, 2015). This is because a corporation lacks mind, therefore unable to fulfil the vital element of proving a crime, that is mens rea. Realising the difficulties of this matter, Malaysia has enacted Section 17A under the MACC Act 2009, which essentially makes corporations liable for failure to prevent bribery, unless it can prove that adequate procedures have been implemented to combat corruption. This section was enacted based on the United Kingdom's Bribery Act, particularly Section 7. However, it is contended that Malaysia should adopt DPA before enforcing its failure-to-prevent bribery offences (Mlex a Lexis Nexis Company, 2019). Without a non–criminal alternative such as the DPA, this will leave the corporations to be strictly liable for the offence under Section 17A of the MACC Act. This is potentially dangerous as if the corporation is convicted, it will have to pay a fine ten times the amount of the bribery or serve twenty years of imprisonment. This will then lead to the corporation's operation being put on hold or worse, shut down altogether. If this does happen, it will then affect other innocent third parties and stockholders, leading to a financial crisis.

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The United States and the United Kingdom are among the countries that adopted the DPA to combat corruption in their respective countries. The main function of a DPA is to avoid the difficulty of prosecution and instead, the prosecutor and the corporation enter into an agreement where the corporation will agree to pay a fine and adopt remedial measures. It is said that DPA is an excellent tool to punish a corporation as it protects innocent third parties against corporate entity indictments while fulfilling criminal justice goals of punishment and deterrence (Senko, 2009). Though the main function of DPA remains equal, the process, however, differs from one state to another.

As seen in the United States, the prosecutor and the corporation can freely negotiate the terms of the DPA without judicial intervention, unless there is a special circumstance that requires the judge to do so. Based on the cases discussed, the lack of legislation on DPA has led the courts to different decisions as to their authority to review the DPA. On the other hand, the process of DPA is more systematic in the United Kingdom. The procedure for DPA is provided under the Crime and Courts Act 2013 and the Deferred Prosecution Agreement Code of Practice 2013. In short, in the United Kingdom, these legislations provide the court with judicial power to review the terms of the DPA to ensure that the terms of the DPA are fair, reasonable and in the public interest, that is ensuring that the agreement fulfils the criminal justice goals of deterrence and punishment. This systematic approach has led to all ten of the United Kingdom's DPA to date being successful.

From the discussions above, it is suggested that DPA shall be implemented as a new alternative to combat corruption in Malaysia. Compared to the United States, Malaysia should follow in the United Kingdom's footsteps in implementing DPA as it is more systematic and such a system has proved to be effective as it has led to all the DPA being a success.

Conclusion

Corruption is indeed dangerous as it brings many negative impacts to individuals and enterprises. It can cause many issues such as cost complications, reduced profitability, and inefficiency to the business community. Most importantly, it could also drive potential investors, both local and foreign, to invest in the country, which will lead to a negative impact on the country's economy. Due to this reason, the offender should be held accountable. Though it seems that criminally convicting a corporation that has committed corruption is an act of justice, there are problems in doing so as corporation lacks mind therefore unable to fulfil the element of mens rea. Besides that, criminalising corporations also brings injustice to others. The conviction can lead to the interests of innocent third parties, namely the employees, the customers, the shareholders and the communities being at stake. These people could lose their occupations, their income, and their resources. Therefore, non–criminal alternatives such as the DPA shall be implemented to protect the rights of innocent third parties and avoid the difficulty of prosecution.

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