Resolving Corporate Bribery through Deferred Prosecution Agreements: Lessons from the US, UK and France for China

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Abbreviations

AFA	Agence Française Anticorruption (French Anti-Corruption Agency)
AMR	Administration for Market Regulation in China
AUCL	Anti-Unfair Competition Law of People's Republic of China
CCP	Chinese Communist Party
CJIP	Convention judiciaire d'intérêt public (judicial agreement of public interest)
CPI	Corruption Perceptions Index
CPS	Crown Prosecution Service
CNP	Compliance Non-prosecution Program
DOJ	Department of Justice
DPA	Deferred prosecution agreement
FCPA	The Foreign Corrupt Practices Act of 1977
NPA	Non-prosecution agreement
NSC	National Supervisory Commission
OECD	Organization for Economic Cooperation and Development
PNF	Parquet National Financier (French National Financial Prosecutor's Office)
PRC	People's Republic of China
SASAC	State-owned Assets Supervision and Administration Commission
SCs	Supervisory Commissions
SEC	Securities and Exchange Commission
SFO	Serious Fraud Office
SOE	State-owned enterprise
SPP	Supreme People's Procuratorate
SPC	Supreme People's Court
UNCAC	United Nations Convention against Corruption
UKBA	UK Bribery Act 2010

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Chapter 1 Introduction

1.1 Research Background and Motivation

1.1.1 Background: The Fight against Corporate Bribery through Resolutions

Bribery allows the abuse of entrusted authority for unfair personal enrichment.[1] It undermines the market mechanism that rewards innovation and efficiency, erodes the integrity of public services and victimizes common citizens.[2] People living in a highly corrupt country have to pay more for poorer-quality products and services, suffer from slower economic development and endure a widening gap between the rich and the poor.[3] With a more in-depth understanding of the harms of bribery, criminalization of bribery has been emphasized as a key component of all major international anti-bribery instruments. State parties are obligated under the United Nations Convention against Corruption (UNCAC) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-bribery Convention) to promulgate criminal laws against bribery.[4] More and more jurisdictions have accordingly introduced or strengthened their anti-bribery laws, including most notably the U.S. Foreign Corrupt Practices Act of 1977 (FCPA), the UK Bribery Act 2010 (UKBA), the French Law on Transparency, Fight against Corruption and Modernization of Economic Life (*Sapin II* law), and the anti-bribery provisions under the Criminal Law of the People's Republic of China (the PRC Criminal Law).

The corporate world has been witnessing an ever-intensifying anti-bribery momentum. Though both natural and legal persons may be punished for bribery offenses, corporations generally possess greater power than individuals in terms of paying hefty bribes, engaging in systematic and effective avoidance activities and causing serious damage to society.[5] Not surprisingly, the FCPA and the later introduced anti-bribery laws in the UK and France all place particular emphasis on the pursuit of corporate criminal liability for bribery.[6] Armed with the expansive

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[1] John T Noonan, Jr., *Bribes* (New York: Macmillan Publishing Company, 1984), xi ("[t]he core of the concept of a bribe is an inducement improperly influencing the performance of a public function meant to be gratuitously exercised").

[2] Pranab Bardhan, "Corruption and Development: A Review of Issues," *Journal of Economic Literature* 35, no. 3 (1997): 1322-30 (discussing the effects of corruption on efficiency and economic growth).

[3] Elizabeth Spahn, "International Bribery: The Moral Imperialism Critiques," *Minnesota Journal of International Law* 18, no. 1 (2009): 155-56 (noting that bribery undermines product safety and quality standards, causes environmental damages, triggers egregious human rights violations such as international child sex trafficking, undermines the market and exacerbates the gap between the wealthy and the poor).

[4] United Nations Office on Drugs and Crime, *United Nations Conventions against Corruption*, October 31, 2003, Articles 15, 16 & 21 (mandating state parties to adopt "such legislative and other measures as may be necessary to establish as criminal offences", bribery of public officials and bribery of foreign public officials, and consider the criminalization of bribery in the private sector); OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, entered into force on February 15, 1999, Article 1 (requiring the member states to criminalize bribery of foreign public officials, including complicity in, incitement, aiding and abetting, or authorization of the bribery act, as well as the attempt and conspiracy to bribe).

[5] Nuno Garoupa, "The Economics of Business Crime," in Hans Sjögren and Göran Skogh (ed.), *New Perspectives on Economic Crime* (Cheltenham: Edward Elgar Publishing Limited, 2004), 11-12 (noting that business crime differs substantially from individual crime as corporations "are better organized, are wealthier and benefit from economies of scale in corruption"; "Corporations are better placed to manipulate politicians" through large grants, campaign contributions and lobbying organizations; "Corporate avoidance activities are more effective" owing to their access to lawyers who can explore legal loopholes, their control over information, and the better use of globalization and free movement of capitals).

[6] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. Article 78); UK Bribery Act 2010, c. 23, July 1, 2011, Article 7 (establishing the liability of commercial organization for the failure to prevent bribery); Loi Sapin II pour la transparence de la vie économique (Law on Transparency, Corruption and Modernization of the Economy), November 8, 2016,

anti-bribery laws, law enforcement authorities around the world are not hesitant about instituting criminal and civil investigations into bribery issues, implicating even the largest and most reputed enterprises. The aggressive enforcement of anti-bribery laws has led to a long list of enforcement actions against local and international corporations, demanding jaw-dropping financial penalties and extensive corporate structural reforms.[7] In the past two decades, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), the two principal enforcers of the FCPA, have respectively filed 409 and 237 FCPA enforcement actions and inflicted over $28 billion on the relevant corporations.[8] The Serious Fraud Office (SFO), which is responsible for investigating and prosecuting serious or complex fraud, bribery and corruption cases in the UK, and the French prosecutors' offices have also demonstrated their strength by resolving a number of high-profile bribery cases, including the coordinated settlement with Airbus that led to a stunning global financial penalty of €3.6 billion.[9]

A prominent feature of today's anti-bribery enforcement is that corporate enforcement actions are largely concluded via non-trial resolution mechanisms, involving active cooperation from the firm at issue and close coordination between the relevant enforcement agencies. In the U.S., deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), two forms of pre-trial resolution vehicles, have been used to resolve more than half of all FCPA corporate enforcement actions.[10] Benefiting from the resolution tools, the U.S. is leading the global anti-bribery enforcement with a high number of FCPA enforcement actions against both domestic and foreign firms.[11] The U.S. accounts for 155 of all the 264 legal persons that were sanctioned between 1999 and 2021 for overseas bribery in the 44 member states to the OECD Anti-bribery Convention, which creates legally binding obligations for the member states to criminalize the bribery of foreign public officials and to actively enforce the law.[12] In the face of the mounting international pressure on combating bribery, more jurisdictions, including common law countries such as the UK, Canada and Singapore, as well as traditional civil law countries such as France and Brazil, began to embrace DPA or DPA-like regimes in the hope of boosting corporate enforcement actions.[13] According to the publication of the OECD Working Group on Bribery in

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Article 17 (requiring companies incorporated in France and exceeding certain size and turnover threshold to have an anti-bribery compliance program that meets specified conditions).

[7] OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings and Sanctions,* December 20, 2022, https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf (accessed March 8, 2023) (264 legal persons have been sanctioned for foreign bribery in the 44 member states to the OECD Anti-bribery Convention, which account for 63.98% of world exports).

[8] Stanford Law School, Sullivan & Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse-Charts & Graphics, https://fcpa.stanford.edu/statistics-analytics.html (accessed January 10, 2023).

[9] "SFO Enters into €991m Deferred Prosecution Agreement with Airbus as Part of a €3.6bn Global Resolution," January 31, 2020, https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/ (accessed June 4, 2021); CJIP between PNF and Airbus SE, PNF-16159000839, January 29, 2020, https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20AIRBUS_English%20version.pdf (accessed June 4, 2021).

[10] Gibson Dunn, *2016 Year-End Update on Corporate NPAs and DPAs,* https://www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ (accessed July 6, 2019) (the percentage of corporate FCPA resolutions involving at least one NPA or DPA (whether parent- or subsidiary-level, DOJ- or SEC-driven) has averaged approximately 54% per year since 2004).

[11] John Ashcroft, and John Ratcliffe, "The Recent and Unusual Evolution of an Expanding FCPA," *Notre Dame Journal of Law Ethics & Public Policy* 26, no. 1 (2012): 27 (claiming that the increased international cooperation after 9/11, the promulgation of Sarbanes-Oxley Act, and the use of DPAs after the dismantling of Arthur Andersen account for the boom of FCPA enforcement actions).

[12] OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention*.

[13] Gibson Dunn, *2018 Mid-Year Update on Corporate NPAs and DPAs*, July 10, 2018, https://www.gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf (accessed June 16, 2021), 15-21 (tracking the international development of DPAs and surveying countries that have adopted, or are considering adopting, similar regimes).

2019, 78% of foreign bribery enforcement actions in the member states were concluded through various non-trial resolution vehicles.[14] Recognizing the trends and values of non-trial resolutions for the enforcement of anti-bribery laws, the OECD calls for its member states to "consider using a variety of forms of resolutions when resolving criminal, administrative, and civil cases with both legal and natural persons, including non-trial resolutions" in its latest Recommendation for combating foreign bribery.[15]

Inspired by the prevalence of DPAs in the U.S. and other jurisdictions, China's Supreme People's Procuratorate (SPP), the highest prosecuting authority in the country, has been actively promoting the pilot enterprise compliance non-prosecution program (CNP) around the country since October 2020. Under the CNP, local Procuratorates are directed to refrain from holding the directors of private enterprises in pre-trial custody, filing criminal charges or proposing jail sentences if the enterprise at issue commits to improving its compliance program and internal control and accepts the inspection of a specially designated third-party organization.[16] The aim of the CNP is to reduce the severe blow of pre-trial investigative measures and criminal conviction on the viability of the enterprise involved in criminal enforcement actions and to promote the development of a corporate compliance program.[17] Since March 2021, the pilot program has been expanded to over 100 local Procuratorates in ten provinces in China.[18] In April 2022, the SPP announced that the CNP would be rolled out to all Procuratorates across the country.[19]

1.1.2 Motivation: Three Seemingly Inexplicable Mysteries

My interest in China's anti-bribery and enforcement polices is sparked by three seemingly inexplicable mysteries. Firstly, why is bribery still rampant in the country after the decades-long anti-bribery campaign? The high-profile anti-bribery and corruption campaign over the past decade has led to a long list of investigations, prosecutions and convictions, yet the perceived level of corruption has not been significantly reduced. Secondly, multinational corporations are subject to exceptionally high risks of violating the U.S.'s FCPA when bribing Chinese public officials, yet they are rarely implicated in the criminal proceedings in China for the same misconducts. Make no mistake, bribery of state functionaries is a serious criminal offense under

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[14] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 19-20 (noting that 44 Parties to the Convention have successfully concluded 890 foreign bribery resolutions since 1999, out of which 695 were concluded through non-trial resolutions).

[15] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, adopted on November 26, 2009 and amended on November 26, 2021, at 9.

[16] Jun Zhang (Procurator General of SPP), 最高人民检察院工作报告 (Work Report of the SPP), March 15, 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed March 15, 2021) (re-emphasizing the policy in the economic criminal cases involving directors of private enterprises: don't take them into custody if it is possible, don't file criminal charges if it is possible and recommend suspended sentences if non-substantial sentences are applicable).

[17] Jianming Tong (Deputy Party Secretary, Executive Deputy Chief Procurator of the SPP), "充分履行检察职责 努力为企业发展营造良好法治环境 (Fulfill the Procuratorial Duties and Strive to Create A Good Legal Environment for the Development of Enterprises)," *检察日报 (Procuratorial Daily)*, September 22, 2020, https://www.spp.gov.cn/spp/llyj/202009/t20200922_480611.shtml (accessed March 30, 2021) (directing local Procuratorates to consider the necessity of protecting business operators and promoting development when approving the arrest requests and making charging decisions).

[18] "企业合规不起诉改革试点拟扩至 10 个省份，约上百家检察院 (Pilot Reform of Enterprise Compliance Non-Prosecution Planned to Be Expanded to about 100 Procuratorates in Ten Provinces)," March 14, 2021, https://www.sohu.com/a/455616516_114988 (accessed April 15, 2021); see also Gibson Dunn, *2021 Year-end FCPA Update*, January 25, 2022, https://www.gibsondunn.com/wp-content/uploads/2022/01/2021-year-end-fcpa-update.pdf (accessed March 10, 2022), at 28-29.

[19] Ridan Xu, "涉案企业合规改革试点全面推开！这次部署会释放哪些重要信号？(Pilot Program For Compliance Reform of Enterprises Involved in the Criminal Cases Fully Launched, What Important Signals Did this Deployment Release)," *SPP Online*, April 2, 2022, https://www.spp.gov.cn/zdgz/202204/t20220402_553256.shtml (accessed April 3, 2022).

the PRC Criminal Law. The recurring bribery scandals involving major international companies are often harshly condemned by the Chinese state media. Thirdly, why does China observe the UNCAC in terms of criminalizing foreign bribery, yet is reluctant to enforce its own criminal law against foreign bribery?

1.1.2.1 High-profile Anti-Corruption Movement versus Uncontrolled Corruption

The strong determination to combat the rampant corruption in China has become the personal signature of Xi Jinping since he assumed the presidency in 2012.[20] The current anti-bribery movement is distinct from previous ones as its targets include even the highest-level cadres, such as Zhou Yongkang, former member of the Politburo Standing Committee, Guo Boxiong and Xu Caihou, former Vice Chairmen of the Central Military Commission.[21] According to the five-year transcript submitted by the SPP for the year of 2012 to the year of 2017, 122 civil servants or military officials at the provincial and ministerial level and above had been investigated during the first term of Xi, including 6 national leaders and 32 members or alternate members of the Central Committee of the Chinese Communist Party (CCP). In addition, 2405 public officials at the bureau level and 15234 at the county level were brought down on suspicion of duty-related crimes.[22] Though the anti-corruption campaign seems to have lost its momentum against the background of the Covid-19 pandemic and the turbulent international situation, the fight against bribery and corruption is still on-going. In the year of 2021, 23 formal officials at the provincial-ministerial level were prosecuted, while the relevant number in 2020 is 12, 16 in 2019, and 32 in 2018.[23]

However, the massive and eye-catching campaign has not achieved the desired effect in curbing corruption. The figure below shows the score and rank of China in Transparency International's Corruption Perceptions Index (CPI), the most widely used tool to assess the perceived degree of corruption in the public sector in about 180 countries or territories, from 2012 to 2022.[24] Despite the long-lasting and high-profile anti-corruption campaign, China consistently scores around 40 on the scale of 0 (highly corrupt) to 100 (very clean) and falls into the category of corrupt countries (the global average score is 43). Surprisingly, China declined sharply in the CPI ranking during the first three years of the anti-graft campaign (2012-2014).[25]

[20] For the high-profile anti-corruption campaign initiated by the new leadership since 2012, see Anti-corruption Campaign under Xi Jinping, Wikipedia, https://en.wikipedia.org/wiki/Anti-corruption_campaign_under_Xi_Jinping (accessed February 10, 2023).

[21] Tania Branigan, "Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-corruption Drive," *The Guardian*, https://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption (accessed September 2, 2021).

[22] Jianming Cao (former Procurator General of SPP), 最高人民检察院工作报告 (Work Report of the Supreme People's Procuratorate), March 9, 2018, http://www.spp.gov.cn/spp/gzbg/201803/t20180325_372171.shtml (accessed September 2, 2021).

[23] See 最高检工作报告 (Work Report of SPP) in different years, https://www.spp.gov.cn/spp/gzbg/index.shtml (accessed March 21, 2022).

[24] Transparency International, *Corruption Perceptions Index*, https://www.transparency.org/research/cpi (accessed February 5, 2023).

[25] Euan McKirdy, "China Slips Down Corruption Perception Index, Despite High-profile Crackdown," *CNN*, December 3, 2014, https://edition.cnn.com/2014/12/03/world/asia/china-transparency-international-corruption-2014/ (accessed February 2, 2021).

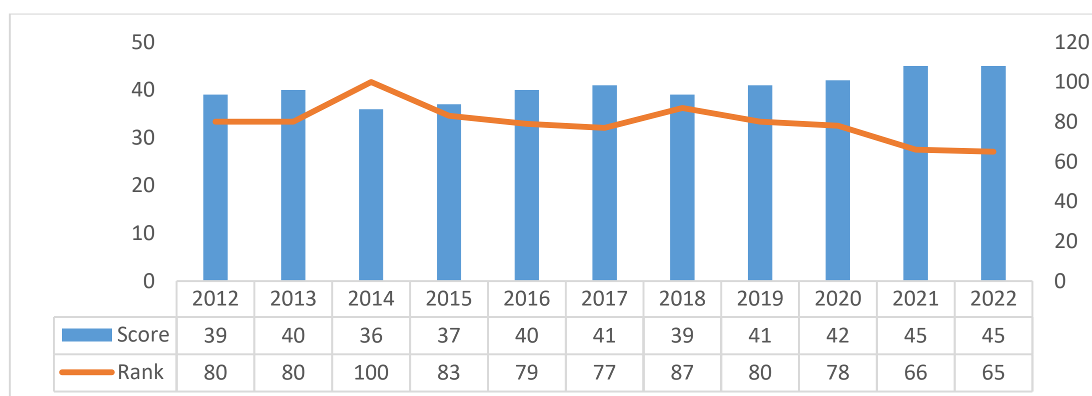

Figure 1 China Corruption Perceptions Index 2012-2022

1.1.2.2 High FCPA Risks for China-Originating Misconducts versus Low Enforcement Risks in China

The current anti-corruption campaign places special emphasis on the supply side of bribery, which is a departure from the traditional practices that focused purely on corrupted officials acting as bribe recipients.[26] The new move has not only subjected a large number of domestic companies to criminal and administrative investigations, but also resulted in sensational enforcement actions against multinational corporations. The record criminal fine of ¥3 billion ($489 million) awarded to GSK China Investment Co., Ltd (GSKCI), the Chinese subsidiary of the British pharmaceutical giant GlaxoSmithKline, and the conviction of four executives of Rio Tino, an Anglo-Australian mining group, for bribery-related charges demonstrate vividly the teeth of China's anti-bribery laws to the executives of multinational corporations.[27]

However, the GSKCI case seems to be a rare exception of foreign companies standing in the dock for bribery, serving mainly as a warning to other multinational companies doing business in China. As a matter of fact, foreign corporations engaging in bribery are subject to exceptionally low risks of criminal enforcement actions launched by the Chinese authorities. For example, Novartis, Pfizer, Carestream Health and a number of other foreign pharmaceutical companies were reported for paying bribes to Chinese doctors or public officials in furtherance of medical sales, while none have received their fair share of punishment in China.[28] In contrast, the U.S. FCPA that punishes bribery of foreign public officials and accounting violations presents a far more threatening statute for multinational corporations interacting with Chinese officials and

[26] Andrew Boutros, et al., "New Chinese Anti-Bribery Guideline Calls for Blacklisting and Expulsion of Foreign Companies That Pay Bribes in China," *JDSUPRA*, November 30, 2021, https://www.jdsupra.com/legalnews/new-chinese-anti-bribery-guideline-5022125/ (March 9, 2022) (discussing the anti-corruption guideline jointly released by the Central Commission for Discipline Inspection and the National Supervisory Commission, top anti-corruption watchdogs, aiming to strengthen the enforcement against bribery-givers, as opposed to the traditional focus on corrupt officials as bribe recipients).
[27] Adam Jourdan, and Ben Hirschler, "China Hands Drugmaker GSK Record $489 Million Fine for Paying Bribes," *Reuters,* September 19, 2014, https://www.reuters.com/article/us-gsk-china/china-hands-drugmaker-gsk-record-489-million-fine-for-paying-bribes-idUSKBN0HE0TC20140919 (accessed June 10, 2021); Zhao Hejuan, "Rio Tinto Executives Sentenced to Jail," *Caixin Global*, Mar 29, 2010, https://www.caixinglobal.com/2010-03-29/rio-tinto-executives-sentenced-to-jail-101018451.html (accessed June 10, 2021).
[28] "锐珂医疗行贿中国医生 67 万 步辉瑞在华贿赂丑闻后尘 (Following Pfizer Chinese Bribery Scandal, Carestream Health Offered Bribes of CNY 670,000 to Chinese Doctors)," May 10, 2017, http://finance.sina.com.cn/chanjing/gsnews/2017-05-10/doc-ifyeychk7227545.shtml (accessed August 20, 2018) (listing a number of foreign pharmaceutical companies that are reportedly implicated in bribery schemes in China, including GSK, Carestream Health, GE, AstraZeneca, Bayer, Sanofi, Pfizer, Johnson & Johnson and Medtronic).

executives of state-owned enterprises (SOEs).[29] With 72 FCPA enforcement actions related to bribery misconduct originating in China, China has a larger share on the list of FCPA enforcement actions than any other jurisdictions.[30] However, most of foreign enterprises charged with FCPA violations for bribery deals originating in China were not subsequently sanctioned by the Chinese government.[31] The low costs of committing bribery in China are widely blamed for the "double standards" adopted by the multinational corporations for their operation in China, compared with their practices in the western world, leading to the uncontrolled unethical behavior and bribery.[32]

1.1.2.3 A Bribery-Exporting Country with No Foreign Bribery Enforcement

In 2020, China became the largest investor worldwide, with the total amount of outward foreign direct investment reaching up to $133 billion.[33] The Belt & Road Initiative, which has been promoted by the Chinese leadership since 2013 to encourage overseas investment in the infrastructure industry, underpins the strong outflow performance.[34] The growing presence of Chinese-born companies in the international market brings new challenges to the global fight against foreign bribery. According to Transparency International's report on Bribe Payers Index in 2011, which ranks the world's 28 largest economies based on their companies' perceived likelihood to pay bribes abroad, China outperformed only Russia on the list.[35] Given that many countries alongside the Belt & Road Initiative are often economically underdeveloped and/or politically unstable, and that the infrastructure industry is notoriously prone to bribery and corruption, Chinese enterprises investing overseas are undeniably faced with overwhelming bribery risks.[36] In the report released by McKinsey & Company in 2017 on Chinese investment in Africa, 60 to 87 percent of Chinese firms said they paid a 'tip' or bribe to obtain a license.[37]

In order to fulfill the commitments under the UNCAC, to which China is an early signatory, China criminalizes bribery of foreign public officials and officials of public international organizations via the Amendment VIII to the PRC Criminal Law introduced in 2011.[38] The

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[29] Daniel Chow, "The Interplay between China's anti-Bribery Laws and the Foreign Corrupt Practices Act," *Ohio State Law Journal* 73, no. 5 (2012): 1015-37 (arguing that MNCs should treat commercial bribery in China with the same level of concern because the many overlapping elements of China's commercial bribery provision and FCPA mean that commercial bribery prosecutions in China could lead to collateral FCPA prosecutions, which are often more terrifying).

[30] Stanford Law School, Sullivan &Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse, Heat Maps of Related Enforcement Actions, http://fcpa.stanford.edu/geography.html (accessed April 30, 2023) (Brazil is second on the list with 33 FCPA enforcement actions).

[31] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," *法学 (Law Science)*, no. 9, (2014): 103-15 (providing a long list of multinational enterprises that received hefty penalties imposed by foreign regulators for bribery in China but were not pursued by the Chinese government).

[32] Lin Zhou, and Wei Zou, "中国已成跨国公司商业贿赂重灾区 (China has Become the Harder-hit Area of Commercial Bribery)," *Xinhua News Agency*, July 15, 2013, http://politics.people.com.cn/n/2013/0715/c1001-22196610.html (accessed August 20, 2021); Chong Yu, "在华外国公司商业贿赂犯罪的实证研究与刑法规制 (Empirical Research and Criminal Law Regulation of Commercial Bribery Crime Committed by Foreign Companies Operating in China)," *犯罪研究* (Criminal Research), no. 1 (2013): 49-54 (attributing pervasive commercial bribery scandals of foreign companies to lax regulation owing to investment and tax concerns).

[33] United Nations Conference on Trade and Development, *World Investment Report 2021*, https://worldinvestmentreport.unctad.org/world-investment-report-2021/ch1-global-trends-and-prospects/ (accessed March 9, 2022), Figure 3.

[34] OECD, *China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*, 2018.

[35] Transparency International, *Bribe Payer Index 2011*, at 5, Figure 1.

[36] Preetam Kaushik, "Why China's Belt & Road Initiative Faces Overwhelming Odds in its Fight Against Corruption," May 6, 2021, https://www.arachnys.com/why-chinas-belt-road-initiative-faces-overwhelming-odds-in-its-fight-against-corruption/ (accessed March 9, 2022).

[37] Irene Yuan Sun, Kartik Jayaram, and Omid Kassiri, "Dance of the Lions and Dragons: How are Africa and China Engaging, and How will the Partnership Evolve?" McKinsey & Company, June 2017, at 15 ("[i]n five of the eight countries in which we conducted fieldwork, 60 to 87 percent of Chinese firms said they paid a 'tip' or bribe to obtain a license").

[38] United Nations Convention against Corruption, Article 16 (mandating State Party to criminalize bribery of foreign public officials and officials of public international organizations); Amendment VIII to the PRC Criminal Law, promulgated on February 25, 2011 and became effective as of

Amendment was believed to have juxtaposed China against the U.S. and the UK in terms of expanding jurisdiction over bribery violations that occurred beyond the national border.[39] After over a decade, however, there has been no publicly-known investigation or prosecution in China based on the foreign bribery provision, despite countless opportunities to do so.[40] Given China's important role in the supply of foreign bribery and the global trends in the increasingly aggressive foreign bribery enforcement, China is facing stronger international criticisms for intentionally putting the foreign bribery provision on the shelf.[41] The lack of foreign bribery enforcement is in contravention of China's treaty obligations under the UNCAC. It may ultimately damage the Chinese authorities' attempts to repatriate corrupt officials fleeing overseas and recover stolen assets, which are commonly believed to be the driving forces behind China's active engagement in the international anti-corruption efforts under the framework of the UNCAC.[42] Moreover, the recurring bribery scandals also damage the image of the Belt & Road Initiative and undermine its sustainable development.[43]

1.2 Research Questions and Objectives

1.2.1 Research Questions

The central research question of this study is:

Should DPA be introduced into China to resolve corporate bribery cases and, if so, how to design the Chinese model of DPA and complementary regimes?

In order to address the central research question, three sub-questions will be addressed:

(1) Is China's CNP effective in tackling the existing challenges associated with corporate bribery enforcement for the purpose of deterring future corporate bribery and promoting corporate compliance? If not, is the introduction of DPA mechanism into China likely to achieve the desired results?

(2) If DPA is introduced into China, what lessons and experience can be drawn from the DPA enforcement policies and practice in the U.S., UK and France regarding the designing and application of the DPA regime?

(3) Do China's existing legal and institutional systems provide a proper context for the effective application of the DPA regime?

May 1, 2011, Article 29 (adding the foreign bribery provision as para. 2 of Article 164 of the PRC Criminal Law that also criminalizes commercial bribery).

[39] Chow, "The Interplay between China's anti-Bribery Laws and the Foreign Corrupt Practices Act," 1034 (perceiving this Amendment as the Chinese version of the FCPA).

[40] Samuel R. Gintel, "Fighting Transnational Bribery: China's Gradual Approach," *Wisconsin International Law* 31, no. 1 (2013): 10 (acknowledging that it takes time to investigate and build a case, while noting that the authority has ample opportunity to test new law "given that the Chinese appear to be significant contributors to the global supply of the type of bribery that the provision supposedly prohibits").

[41] *Ibid,* 10 ("[i]ts international commitment to fight these bribes under the UNCAC, as well as a recent growing 'trend' of more aggressive extraterritorial application and enforcement of foreign official bribery laws by certain other countries, almost demand a more aggressive stance").

[42] Margaret K. Lewis, "Corruption Spurring China to Engage in International Law," *China Rights Forum*, no. 1 (2009): 92-93 ("Beijing's immediate hopes for UNCAC are clear: the return of assets and fugitives fleeing overseas").

[43] "Bribery Scandal Sounds Alarm to Nations Along 'New Silk Road'," Bloomberg, Nov. 21, 2018, http://timesofindia.indiatimes.com/articleshow/66730252.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed October 25, 2022); See also the Project of United Nations Office on Drugs and Crime, "Fostering Sustainable Development by Supporting the Implementation of UNCAC in Countries along the Silk Road Economic Belt," https://track.unodc.org/track/en/resources-by-thematic-area/anti-corruption-network-along-silk-road-economic-belt/index.html (accessed October 25, 2022).

1.2.2 Research Objectives

There are three primary objectives of this research project. The first is to design the Chinese version of the DPA mechanism with the aim of empowering the Chinese authorities to combat corporate crimes in an effective and efficient way and fostering corporate compliance development. Furthermore, this study attempts to explore whether and how the traditionally inquisitorial jurisdictions may leverage DPA or similar mechanisms to enforce their anti-bribery laws and to promote long-term corporate compliance. The second objective is to decipher why China's long-lasting and costly anti-bribery and corruption campaign fails to control the rampant bribery in the market. After establishing the relevant reasons, this study will propose recommendations for the reform of China's anti-corruption policies and enforcement strategies. The third objective is to have a better understanding of the DPA programs in the U.S., UK and France, including their rationales and goals, the structural design and application, and most importantly, the extent to which, as well as the conditions under which, DPAs help the authorities in these jurisdictions to improve the enforcement of anti-bribery laws in the corporate context.[44]

1.3 Clarification of Key Terms

As this study touches upon some topics and regimes that are ambiguous in the meaning or structure or are new to those not specialized in the specific areas, it is useful to clarify several key terms in this introductory chapter.

1.3.1 Bribery: Definition, Types and Harms

The term of **bribery** is often used together and sometimes interchangeably with **corruption**.[45] Though the two terms have considerable overlaps in their connotation and denotation, it is crucial to point out their differences and define the concept of bribery used in this thesis to avoid any misunderstandings. Corruption is defined by Transparency International and many scholars as "*the abuse of entrusted power for private gain*".[46] The types of corruption include embezzlement, misappropriation of public resources for personal use, bribery, extortion, influence peddling and favoritism.[47] As a major type of corruption, bribery is generally defined as *the offering, promising, giving, accepting, or soliciting of an undue advantage as an inducement for an action or inaction which is illegal, unethical or a breach of trust*.[48] Bribes

[44] Michael Tonry, "Is Cross-National and Comparative Research on the Criminal Justice System Useful?" *European Journal of Criminology* 12, no. 4 (2015): 506 (noting that a major aim of the comparative research on the criminal justice system is "to examine the extent to which, and the conditions under which, countries successfully import ideas from elsewhere").

[45] Jan Wouters, Cedric Ryngaert, and Ann Sofie Cloots, "The International Legal Framework against Corruption: Achievements and Challenges," *Melbourne Journal of International Law* 14, no. 1 (2013): 238 (noting that "[m]ost international instruments use the term 'corruption' in their titles, though the focus lies (sometimes exclusively) on bribery").

[46] Transparency International, *What is Corruption*, https://www.transparency.org/en/what-is-corruption (accessed March 10, 2022); U. Myint, "Corruption: Causes, Consequences and Cures," *Asia-Pacific Development Journal* 7, no. 2 (2000): 35 (defining corruption as "the use of public office for private gain" and listing a number of examples of corrupt behaviors).

[47] *Ibid*; Wouters, Ryngaert, and Cloots, "The International Legal Framework against Corruption," 238 (providing a non-exhaustive list of types of corruption).

[48] United Nations Office on Drugs and Crime, *United Nations Conventions against Corruption*, October 31, 2003, Article 15 (defining bribery of domestic public officials as "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"); Transparency International, *Global Anti-Bribery Guidance, -5. What is Bribery*? https://www.antibriberyguidance.org/guidance/5-what-bribery

may take various forms, including money, expensive meals, all-expenses-paid trips, internships and sexual favors, and be disguised as gifts, loans, donations, sponsorships, or consulting fees.[49] Nonetheless, as pointed out by John T. Noonan in his seminal book titled *Bribes*, the core of bribe is "an inducement improperly influencing the performance of a public function meant to be gratuitously exercised".[50]

Different criteria can be used to group the various acts of bribery. As bribery generally involves two parties, the supply side and the demand side, a common classification of bribery is active bribery from the perspective of bribe-givers and passive bribery from the perspective of bribe recipients. Notably, the terms of active bribery and passive bribery do not necessarily indicate that the bribery deal is always initiated by bribe-givers, as both parties could benefit from the scheme and have the incentives to initiate it.[51] Besides, bribery can occur in both public and private sectors. While bribery involving public officials receives more attention in general, private-to-private bribery is no smaller issue in modern society, especially when powerful corporations and executives are involved.[52] Moreover, bribery occurs within or across national borders. With the development of technology and the globalization of financial markets, bribery transactions are increasingly crossing borders and the fight against bribery has also international dimensions.[53] Though bribery is a universal problem, it is more widespread in the developing nations that are suffering from the lack of rule of law.[54] Given the legal and diplomatic hurdles to the prosecution of foreign public officials for the acceptance of bribes, the current legal regime in the foreign bribery context concerns mainly the pattern of corporations from industrialized countries offering bribes to officials in the emerging economies.[55] Many are calling for the reform of the anti-bribery international instruments to cover foreign commercial bribery and the recipients of foreign public bribery beyond the exclusive focus on the active bribery of foreign public officials.[56] This study takes a broad view of bribery, including bribery in the private and public sectors, as well as bribery in the domestic and transnational settings, while limiting its

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(accessed March 12, 2022) (defining bribery as "the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust").

[49] Barbara Crutchfield George, and Kathleen A. Lacey, "A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives," *Cornell International Law Journal*, 33 (2000): 551-52 (discussing different forms of bribes).

[50] Noonan, *Bribes*, xi.

[51] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion," *Annual Review of Law and Social Science* 6, no. 1 (2010): 222 (noting that the distinction between passive and active bribery is not a viable one as "[n]either side is truly passive because both parties must agree before corruption can occur").

[52] Stuart P. Green, and Matthew B. Kugler, "Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud," *Law and Contemporary Problems* 75, (2012): 46 (finding that nearly eighty percent of respondents believed that bribery accepted by the board member of large company should be treated as a crime, though the U.S. federal statute in the anti-bribery context does not criminalize such behavior).

[53] Myint, "Corruption: Causes, Consequences and Cures," 43 ("(l)ike terrorism, the drug menace, AIDS, and environmental degradation, it [corruption] is one of those problems that has no respect for national boundaries").

[54] *Ibid*, 33 ("a consensus has now been reached that corruption is universal. It exists in all countries, both developed and developing, in the public and private sectors, as well as in non-profit and charitable organizations"); George, and Lacey, "A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations," *Cornell International Law Journal*, 33 (2000): 555 (identifying the symbiotic relationship between government officials in developing countries and businesses within industrialized nations, which leads to the vicious cycle of corruption).

[55] Lucinda A. Low, Sarah R. Lamoree, and John London, "The 'Demand Side' of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough," *Fordham Law Review* 84, no. 2 (2015): 580 (noting that there has been no prosecution of foreign public officials for accepting bribes, which is often left for host countries).

[56] *Ibid,* 588–99 (proposing ways to enhance the accountability against the demand side of transnational bribery); Günter Heine, Barbara Huber and Thomas O. Rose (eds.), *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures* (Freiburg im Breisgau: Edition Iuscrim, 2003) (conducting a systematic study of the law on private-sector bribery in 13 countries, aiming to lay basis for the OECD to determine whether to criminalize international bribery in the private sector).

focus to corporations as the supply side of bribery in search of effective strategies to combat corporate bribery.

The harms of bribery have been increasingly realized and demonstrated. Bribery was once conceived as not only a profitable deal, but also a useful means to grease the rigid bureaucratic wheel.[57] Bribes paid overseas were even tax deductible in some countries as a cost of doing business abroad.[58] With more research conducted on the harms of bribery and the development of international and domestic anti-bribery laws, it is now widely accepted that bribery is both morally condemnable and economically harmful.[59] Bribery hampers economic development by reducing efficiency, misallocating resources, distorting fair competition, and discouraging foreign investment.[60] Bribery further undermines the integrity of civil officials, erodes the public's trust in democracy and justice, and could ultimately damage political stability.[61] Apart from the economic and political consequences, the damaging costs of bribery on the human rights have also been increasingly recognized as a result of the growing attention paid to the victims of bribery.[62] The costs of bribery often fall more heavily on the poor by depriving their access to appropriate education, affordable healthcare and food, and making them suffer from shoddy buildings and bridges, poor roads and railways, as well as environmental pollution.[63]

1.3.2 Corporate Bribery and Criminal Enforcement against Corporate Bribery

Though bribery may be committed by both individuals and corporations, bribery involving corporations stands out due to its sheer size and social harms. Corporations are generally more organized and resourceful than individuals. Hence corporations can bribe in a grander scale and cause much more devastating consequences to the market and society than individual criminals.[64] With the assistance of legal and financial consultants, big corporations are also more

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[57] Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale U. Press, 1968), 386 ("In terms of economic growth, the only thing worse than a society with a rigid, over-centralized, dishonest bureaucracy is one with a rigid, over-centralized, honest bureaucracy").

[58] OECD Council, *Recommendations of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, adopted on April 11, 1996.

[59] Spahn, "International Bribery," (2009): 155-226 (rejecting the argument that foreign bribery laws are imposing Western moral values on developing countries); Bardhan, "Corruption and Development," 1322-30 (refuting the concept of efficiency-improving corruption, and discussing the adverse effects of corruption on efficiency, investment and economic growth); Myint, "Corruption: Causes, Consequences and Cures," 45-52 (delineating the damaging consequences of corruption on income distribution, consumption patterns, investment, the government budget and economic reforms).

[60] Paolo Mauro, "Corruption and Growth," *The Quarterly Journal of Economics* 110, no. 3 (1995): 681–712 (discovering that corruption reduces investment and lowers economic growth, including in countries with burdensome bureaucratic regulations); Shang-Jin Wei, "How Taxing Is Corruption on International Investors?" *The Review of Economics and Statistics* 82, no. 1 (2000): 1-11 (finding that an increase in either the tax rate on multinational firms or the corruption level in the host government would reduce inward foreign direct investment).

[61] Christopher J. Anderson, and Yuliya V Tverdova, "Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies," *American Journal of Political Science* 47, no. 1 (2003): 91–109 (demonstrating that "high levels of corruption reduce citizen support for democratic political institutions across mature and newly established democracies around the globe"); Mitchell A. Seligson, "The Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America," *World Development* 34, no. 2 (2006): 399-402 (finding that corruption erodes the perceived legitimacy of, and the public support for, the political system).

[62] International Council on Human Rights Policy, and Transparency International, *Corruption and Human Rights: Making the Connection*, 2009 (arguing for the necessity of linking corruption with human rights in order to mitigate the direct, indirect and remote negative impacts of corruption on human rights); Cecily Rose, "The Limitations of a Human Rights Approach to Corruption," *International and Comparative Law Quarterly* 65, no. 2 (2016): 405–38 (however, identifying the limitations of relying on human rights laws to address the misconducts of corruption or to describe the harms of corruption on social and economic rights).

[63] Daniel Kaufmann, "10 Myths About Governance and Corruption (Back to Basics)," *Finance & Development* 42, no. 3 (2005), 42 ("[i]n many developing countries, corruption represents a 'regressive tax' on the household sector as well: lower income families pay a disproportionate share of their incomes in bribes to have access to public services (compared with higher income groups), and often end up with less access to such services because of corruption"); Myint, "Corruption: Causes, Consequences and Cures," 46-47 (noting that the privileged enjoy economic rent under a corrupt system while the poor pay the costs of corruption as they cannot afford to pay the required bribes to gain access to decent school, proper healthcare, and adequate government-provided services).

[64] Garoupa, "The Economics of Business Crime," 11-12 (noting that business crime differs substantially from individual crime as corporation "are better organized, are wealthier and benefit from economies of scale in corruption").

capable of engaging in effective avoidance measures to disrupt the authority's efforts in detecting and investigating bribery.[65]

Corporate crimes are largely considered as a problem of agency costs. Owing to the artificial nature of corporate organizations, corporate bribery is actually carried out by relevant individuals within the scope of their employment.[66] In most cases, individuals commit corporate crimes to serve the short-term corporate interests and, consequently, their own interests, despite the fact that such crimes and the following corporate sanctions would ultimately hurt the interests of corporate shareholders.[67] Under the principal-agent framework, corporations can facilitate or prevent the commission of crimes by relevant individuals.[68] On the one hand, the corporate structure and culture may lower the sense of caution for individuals, encouraging or even pressurizing them to resort to bribery in order to meet the set targets or to serve the "home team".[69] The complex structure of modern organizations, characterized by decentralization and delegation of authority, creates the perfect conditions for such bribery violations to continue and remain unnoticed.[70] The corporate context makes it difficult for the enforcement agencies to identify culpable individuals or to link specific bribery schemes executed by rank-and-file employees with top managers.[71] On the other hand, corporations may design their internal control system, rewarding and disciplinary measures in a way that makes it more difficult and less profitable for individuals to engage in bribery schemes.[72] Corporations may further enhance

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[65] Louis Kaplow, and Stephen Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," *Harvard Law Review* 102, no. 3 (1989): 613-15 (questioning the social values of legal service provided in the course of litigation on the selection of evidence, as it reduces the expected sanctions and undermines deterrence).

[66] Nicholas Lord, *Regulating Corporate Bribery in International Business Anti-corruption in the UK and Germany* (Farnham: Ashgate Publishing Limited, 2014), 18 (defining corporate bribery as "bribery involving individuals within corporations carried out for the benefit of the corporation in the context of business").

[67] Cindy R Alexander, and Mark A Cohen, "Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost," *Journal of Corporate Finance* 5, no. 1 (1999): 32 (finding that "corporate crime reflects an agency cost limited but not eliminated by the costly efforts of top management"); Jennifer Arlen, and Refier Kraaman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *New York University Law Review* 72, no. 4 (1997): 688 (noting that corporations can be held liable for the employees' misconducts that intend to benefit the firm, even though the net effect actually injures the firm once corporate sanctions are considered).

[68] Pamela H Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," *Minnesota Law Review* 75, no. 4 (1991): 1127 ("the formal and informal structure of a corporation can promote, or discourage, violations of the law").

[69] Seth Maxwell, "The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability," *UCLA Law Review* 29, no. 2 (1982): 454-56 (noting that the corporate context can lessen the individual's sense of personal responsibility for the criminal acts, and the corporate goal set for the employee may necessitate a criminal act on his part); Eugene Soltes, *Why They Do It: Inside the Mind of the White-Collar Criminal* (NY: PublicAffairs, 2016), 134 (claiming that executives are often motivated by a desire to serve the "home team", especially with the firm culture that prioritizes financial performance); Marshall B. Clinard, *Corporate Ethics and Crime: the Role of Middle Management* (Beverly Hills: Sage Publications, 1983), 141 ("unethical corporate behavior can usually be traced to internal rather than external forces", and such internal forces include prominently top management and the internal pressure on middle management to generate profits and maintain satisfactory employee relations).

[70] Pamela H. Bucy, "Corporate Criminal Liability: When Does it Make Sense," *American Criminal Law Review* 46, no. 4 (2009): 1438 (noting that corporations pose unique opportunities for unlawful behaviors to occur, as the "group dynamics can cause individuals to suspend their own judgment and disregard their usual sense of caution", and "the diffuse nature of organizations creates conditions where violations of the law can occur, and continue undetected").

[71] John C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 397-99 (noting that the decentralized corporate structure is often misused to insulate the headquarter responsibility, while putting pressure on middle-level managers to choose the operational tactics to meet profit quotas assigned by the headquarter); "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed July 1, 2020) ("blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme").

[72] Arlen, and Kraaman, "Controlling Corporate Misconduct," 693 (noting that corporations can take preventive measures in the form of personnel policies, financial controls, screening procedures to make it more difficult or expensive for agents to commit misconducts); Mitchell Polinsky, and Steven Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" *International Review of Law and Economics* 13, no. 3 (1993): 240 ("[i]f firms are made strictly liable for their harms, they will design rewards and punishments for their employees that will lead employees to reduce the risk of causing harm, since firms will want to reduce their liability payments").

deterrence for individual wrongdoers by increasing their probability of getting prosecuted and sanctioned externally through corporate self-policing measures.[73] The corporate policing measures include self-monitoring and detection, internal investigations, self-reporting the detected misconduct to the public authorities, and collaborating with the authorities in the investigation of any individual wrongdoers.[74]

Compared with individual crimes and other white-collar offenses, corporate bribery poses extra hurdles for detection, investigation and prosecution. Bribery is especially difficult to detect owing to its clandestine nature with the collusion between bribe givers and recipients, exacerbated by the absence of an easily identifiable victim that is eager to report.[75] Unlike the mainstream criminal activities, the government frequently possesses little evidence even to determine whether bribery has occurred in the very beginning of the investigation, let alone to identify the responsible individuals.[76] Obtaining testimony from the employees directly involved in the scheme is thus a big challenge for the authority without the use of the costly alternative of immunity, in light of the individuals' right against compelled self-incrimination.[77] The identification, access to and subsequent analysis of the massive amount of documents and data associated with corporate bribery require substantial resources and a high degree of expertise, which are not possessed by the public enforcement agencies in most countries.[78] Moreover, compared with price-fixing and other white-collar offenses, bribery is typically executed by low-level employees. It is demanding, if not impossible, to prove the *mens rea* of high-ranking executives and link them with a specific bribery scheme, which is required under the identification-based doctrine to hold the corporation criminally liable for bribery.[79] Even if all the barriers are crossed, the authorities might refrain from pressing charges against the corporation due to the fear of the collateral consequences of corporate criminal prosecution and

[73] Arlen, and Kraaman, "Controlling Corporate Misconduct," 693 (noting that firms can increase the probability for wayward agents to get prosecuted by monitoring and investigating the agents' misconducts and reporting the misconduct to the government).
[74] *Ibid* (defining the "policing measures" as a variety of corporate actions that increase the probability for wayward agents to be sanctioned, including monitoring, investigations, self-reporting and cooperation).
[75] Tanja Rabl, and Torsten M. Kuhlmann, "Understanding Corruption in Organizations – Development and Empirical Assessment of an Action Model," *Journal of Business Ethics* 82, (2008):477–478 (claiming that the absence of direct victims and secrecy are the two essential dimensions of corruption); Coffee, "'No Soul to Damn: No Body to Kick'," 390-91 (believing that the prevalent unwitting victims render corporate crimes more concealable than classically under-reported crimes such as rape or child abuse); OECD, *The Detection of Foreign Bribery*, 2017, www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf, 9 (noting that there is hardly an identifiable, direct victim in foreign bribery cases, let alone victims armed with sufficient information to come forward).
[76] Samuel W. Buell, "Criminal Procedure Within the Firm," *Stanford Law Review* 59, no. 6 (2007): 1627-1629 (noting that unlike the investigation into street crimes that suffers the most from determining the identity of the wrongdoers, corporate investigation is challenging as to whether a crime has been committed).
[77] Jennifer Arlen, and Samuel W. Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," *Southern California Law Review 93, no.* (2020): 716-719 (noting that in the intimal stage of investigation, the government typically has little evidence to implicate the witness for the purpose of compelling the witnesses to talk, making witness immunity a costly option available for the prosecutors to obtain information from the informed); *Kastigar v. United States*, 406 U.S. 441 (1972) (ruling that the government can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity).
[78] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 52-57 (noting that Airbus's internal investigation covered more than 1,750 entities across the world and generated over 30.5 million documents).
[79] Vikramaditya S. Khanna, "Should the Behavior of Top Management Matter?" *Georgetown Law Journal* 91, no. 6 (2003): 1215-1256 (noting that management-based corporate liability rule incentivizes senior managers to invest in measures to alienate themselves from criminal activities); "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law," September 17, 2014, https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law (accessed July 11, 2022) ("in some instances, it is simply not possible to establish knowledge of a particular scheme on the part of a high-ranking executive who is far removed from a firm's day-to-day operations"); Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1825 ("individuals may have spoken to lawyers or accountants and received advice that their planned conduct was legal. Such evidence may not be an outright defense to a crime like fraud in which intent to defraud must be shown, but it may be strong evidence of 'good faith' conduct").

conviction.[80] Though all criminal prosecutions may cause collateral consequences to certain extent, "individual convictions rarely produce systemic risk, layoffs, or permanent shareholder losses".[81] This is especially true in bribery cases as corporate prosecution for other offenses that do not harm outsiders or involve moral judgement incurs relatively low reputational costs for the corporation.[82]

1.3.3 Plea Agreements *versus* Deferred Prosecution Agreements

As a way to promote efficiency and to avoid the costs and uncertainty of jury trials, plea bargaining is a key feature of the common-law system and is gaining momentum in a growing number of jurisdictions with civil law tradition.[83] According to the U.S. Sentencing Commission statistics, plea bargaining accounts for 90% of all convictions in the U.S. federal system.[84] Plea bargaining involves negotiation between the prosecution and the defense on the facts and circumstances (fact bargaining), the nature and count of charges (charge bargaining), and the severity of sentences (sentence bargaining).[85] The defendant agrees to waive his or her constitutional right to trial by jury and other procedural safeguards, admits the incriminating facts, and pleads guilty or *nolo contendere* to the criminal charge(s) in exchange for lesser charges or lower sentences than otherwise if the case proceeds to trial. The plea agreement should be reviewed by the court regarding the factual basis for the plea, the voluntariness of the defendant's plea, and the appropriateness of the sentence.[86] An approved plea leads to criminal conviction of the defendant, and may subject the defendant to debarment, reputational loss and other collateral consequences.

The criminal enforcement of anti-bribery laws in the corporate context follows not only the traditional indictment-trial-conviction process involving pleas, but also, and increasingly more frequently, the pre-trial settlement procedure.[87] The DPA mechanism allows the negotiation between the prosecutors and defendants to conclude corporate investigations at the charging

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[80] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed May 5, 2022) ("I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor").

[81] Nick Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review," *The Yale Law Journal* 128, no. 1 (2019): 1378 ("the strategic implications of a conviction's collateral consequences depend on its political-economy context: individual convictions rarely produce systemic risk, layoffs, or permanent shareholder losses").

[82] Cindy R. Alexander, and Jennifer Arlen, "Does conviction matter? The Reputational and Collateral Effects of Corporate Crime," in *Research Handbook on Corporate Crime and Financial Misdealing*, ed. Jennifer Arlen (Northampton: Edward Elgar Publishing, Inc., 2018), 101-02 (noting that fraud may incur high reputational costs on firms as it harms outsiders, while environmental crimes that only harm the residents in the vicinity are unlikely to trigger strong responses from the customers or suppliers).

[83] George Fisher, "Plea Bargaining's Triumph," *The Yale Law Journal* 109, no. 5 (2000): 867 (noting that plea bargaining helps relieve the mounting caseload for the prosecutors and judges, and protects them from humiliating failure in conviction or reversal of judgment); Máximo Langer, "Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions," *Annual Review of Criminology* 4, no. 1 (2021): 378-82 (documenting the diffusion of plea bargaining and trial-avoiding conviction mechanisms around the globe since the 1970s).

[84] U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics*, Table 12 and Figure 5, at 56-60 (In 2020, 97.8% of the 64,565 convictions reported to the U.S. Sentencing Commission cases were achieved via plea and 2.2% via trial).

[85] William L. Gardner, and David S. Rifkind, "A Basic Guide to Plea Bargaining under the Federal Sentencing Guidelines," *Criminal Justice* 7, no. 2 (1992): 15 (believing that there are four types of plea agreements: charge agreements; recommendation agreements; specific sentence agreements; and fact stipulation agreements).

[86] See U.S. FRCrP, Article 11 (2020).

[87] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 19-22 (noting an increasing use of non-trial resolutions to resolve foreign bribery cases among the members to the OECD Anti-bribery Convention).

stage.[88] Under the terms of DPAs, the corporate defendants are generally required to admit the criminal facts (not the admission of guilt), agree to continually cooperate with the relevant authorities, accept the monetary sanctions, and reform the corporate compliance and governance program.[89] The corporate charges are filed with the court and deferred in the meantime to allow the corporation at issue to fulfill all the requirements imposed under DPAs, the successful completion of which will ultimately lead to the dismissal of charges.[90] In cases of breach, the prosecutors reserve the right to withdraw DPAs and demand the corporations to plead guilty.[91] NPAs are otherwise the same with DPAs but the charges under NPAs are not filed with the court, thus eliminating the possibility of any judicial scrutiny of NPAs.[92]

DPAs have gained popularity in the new millennium with the growing recognition of the severity of the undesired collateral consequences of corporate prosecution following the collapse of Arthur Andersen after a criminal conviction.[93] DPAs are similar to plea agreements in terms of the structural design, but their legal and policy implications are vastly different.[94] The biggest difference between DPAs and pleas is that the conclusion of DPAs does not amount to the finding of guilt, nor does it result in a conviction if the agreement is respected. Therefore, DPAs could protect the defendant from the collateral consequences associated with criminal conviction, including mandatory debarment that is believed to be the *de facto* corporate death penalty.[95] In addition, though plea agreements can be utilized to resolve both corporate and individual matters, the use of DPAs is largely confined to the corporate context due to the enhanced challenges inherent in the corporate prosecution and the magnitude of the collateral consequences of corporate conviction.[96] As DPAs are concluded at the pre-trial stage, the judicial oversight of DPAs is much more restricted than that of pleas, which is true even in jurisdictions that allow substantial judicial involvement in the DPA program.[97]

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[88] Brandon L. Garrett, "Structural Reform Prosecution," *Virginia Law Review* 93, no. 4 (2007): 861 (identifying four stages of the criminal process for the prosecutors to seek organizational structural reforms: prevention, charging, plea bargaining, and probation stage, and noting that DPAs are based on the prosecutorial discretion at the charging stage).

[89] Gibson Dunn, *2018 Year-end Update on Corporate NPAs and DPAs*, https://www.gibsondunn.com/wp-content/uploads/2019/01/2018-year-end-npa-dpa-update.pdf, at 8-9 (listing the substantive elements of corporate N/DPAs).

[90] David M. Uhlmann, "Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability," *Maryland Law Review* 72, no. 4 (2013): 1301 ("[t]he terms of the agreements are attractive to the government, because they often provide large penalties, far-reaching corporate compliance programs with outside monitors approved by the Department, and promises of cooperation by the companies involved").

[91] Christopher A. Wray, and Robert K. Hur, "Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice," *American Criminal Law Review* 43, no. 3 (2006): 1105 ("the government would proceed to trial, armed with the company's admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion").

[92] Government Accountability Office, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 5, 2009, https://www.gao.gov/assets/130/122853.pdf, at 10-11 (noting that a commonly accepted distinction between DPA and NPA is whether charges are filed with the court).

[93] Greenblum, "What Happens to a Prosecution Deferred?" 1875 (noting that many attribute the increase in DPAs to the collapse of Arthur Anderson as a result of the criminal conviction).

[94] Cindy R. Alexander, and Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea-agreements," *American Criminal Law Review* 52, no. 3 (2017): 538-42 ("[w]hile structurally similar, the legal and policy implications of NPAs, DPAs and plea agreements differ in significant respects").

[95] Greenblum, "What Happens to a Prosecution Deferred?" 1895 ("[t]he adverse publicity and collateral consequences of a conviction are tantamount to death penalty for corporations).

[96] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 22-27 (noting that non-trial resolutions are used to settle with legal persons in a higher proportion than with natural persons, and legal persons show much stronger resistance with non-trial resolution resulting in a conviction); Public Citizen, *Soft on Corporate Crime: DOJ Refuses to Prosecute Corporate Lawbreakers, Fails to Deter Repeat Offender*s, September 26, 2019, 11 (though DPAs in the U.S. may theoretically be applied to individuals, noting that "the proportion of noncorporate pre-trial diversions decreased from nearly 3% in 2003 to 0.6% in 2018").

[97] Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements," *Journal of Legal Analysis* 8, no. 1 (2016): 217-224 (noting that compared with pleas, judges have considerably less authority to oversee DPAs); Garrett,

1.4 Research Scope

1.4.1 Why the U.S., UK and France?

The choice of the DPA programs in the U.S., UK and France as the main object of research and reference in this study is due to their pioneering and representative status, as well as the outstanding performance in facilitating corporate enforcement actions.

Firstly, the U.S., UK and France are undisputedly the pioneers and most active actors in the exploration of using DPAs to resolve corporate criminal matters. DPA has its origins in the U.S. and has become a major way of concluding corporate criminal investigations since 2003.[98] According to the publicly available information, the U.S. DOJ and SEC have entered into 603 D/NPAs in total by the end of 2021.[99] The UK and France adopted their own versions of DPAs in, respectively, 2013 and 2016 and have increasingly relied on the settlement mechanism to ramp up their enforcement of foreign bribery laws. As of the end of 2022, the UK's SFO has become a party to 12 DPAs, while the French prosecutors have entered into 31 pre-trial agreements.[100] DPA or DPA-like mechanisms are also available for prosecutors in Canada and Singapore since 2018. However, only one remediation agreement, the Canadian version of DPA, has been approved in Canada and no agreement has so far been concluded by prosecutors in Singapore.[101] Considering the relatively high number of DPAs in the U.S., UK and France, the authorities in these jurisdictions have accrued valuable experience in terms of developing sophisticated DPA policies and leveraging DPAs to effectively combat corporate crimes.

Secondly, the DPA programs in the U.S., UK and France represent three unique models of DPAs. The DPA programs in the three jurisdictions show major divergence in terms of the statutory basis, the scope and threshold of application, the compliance monitoring and judicial scrutiny mechanism.[102] The U.S. model of DPAs and the UK model of DPAs, which mainly differ in the extent of judicial involvement, are extensively discussed and referred to by other jurisdictions that are considering the adoption and designing of DPAs.[103] The inclusion of the French model is useful for understanding whether and how the traditional civil-law jurisdictions may employ

"Structural Reform Prosecution," 906-07 ("[f]ederal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential").

[98] See Chapter 3, Section 3.2.1.

[99] Gibson Dunn, *2021 Year-end Update on Corporate NPAs and DPAs*, https://www.gibsondunn.com/wp-content/uploads/2022/02/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf, at 2.

[100] For the existing UK DPAs signed by the SFO, see Deferred Prosecution Agreements, Current SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed January 14, 2023); For the existing French DPAs, see Agence Française Anticorruption, La convention judiciaire d'intérêt public, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public (accessed January 14, 2023), and Ministère de la Justice, La convention judiciaire d'intérêt public (CJIP), http://www.justice.gouv.fr/publications-10047/cjip-13002/ (accessed January 14, 2023).

[101] Léon Moubayed, Davies Ward Phillips & Vineberg LLP, et al, "First Remediation Agreement under the Canadian Criminal Code: Key Takeaways," June 15, 2022, https://www.jdsupra.com/legalnews/first-remediation-agreement-under-the-8657831/ (accessed December 2, 2022); Gibson Dunn, *2021 Year-end Update on Corporate NPAs and DPAs*, at 15 (noting that "prosecutors … Singapore have yet to enter into such an agreement since both countries passed legislation authorizing the practice in 2018").

[102] See Chapter 3, Section 3.4.

[103] For example, Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, at 225-41 (discussing extensively the models of DPA in the U.S. and UK when considering the introduction of a DPA regime in Ireland); Australian Government, Attorney's General's Department, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia - Public Consultation Paper,* March 2017, 17.

DPAs to reinforce their corporate enforcement performance.[104] My limited French proficiency makes it a challenging task to have a thorough understanding and analysis of the French legal system in general. Fortunately, a great deal of information about the French DPA regime, including the legislative history, the prosecuting guideline, several major settlement agreements, scholarly research, and law firms' reports, is available in English. With the help of translation tools, other useful information that is accessible online can also be gathered and analyzed.

Thirdly, the three jurisdictions are exceptionally laudable in the foreign bribery enforcement area. According to the statistics from the OECD Working Group on Bribery, the U.S., France and UK had respectively sanctioned 155, 16 and 23 legal persons for foreign bribery violations, being the top three of all state members to the OECD Anti-bribery Convention, by the end of 2021.[105] The availability of DPAs, which are strategically designed and applied to incentivize corporate self-reporting and cooperation, to hold individual wrongdoers accountable and to reform the corporate compliance program, is worthy of applause for the impressive record of foreign bribery enforcement in these jurisdictions.[106] The large number of settlements concluded in the U.S., UK and France, involving exorbitant fines and extensive corporate structural reforms, are inspiring more and more jurisdictions to explore the possibility of incorporating DPAs in their prosecutors' tool-box for the fight against corporate bribery.[107] It is expected that the analysis of the DPA programs in the three selected jurisdictions would offer valuable lessons for China in terms of designing its version of DPAs for the purpose of strengthening the anti-bribery enforcement and promoting the corporate compliance development.

1.4.2 Why Corporate Bribery?

The selection of corporate bribery as the area of study to examine the optimal DPA policies is based on two key concerns. Firstly, bribery is the most important type of corporate offense resolved via DPAs in the U.S., UK and France. Although the U.S. DPAs may be used to settle almost all corporate charges, domestic bribery and FCPA violations account for a larger number of DPAs in practice than any other types of offenses.[108] This observation is even more prominent in the UK and France. The introduction of the DPA mechanism in the UK and France was part of their broad efforts of reforming the anti-bribery legal framework and enforcement regime.[109] In practice, an overwhelming majority of DPAs have been negotiated to resolve bribery cases, especially foreign bribery cases in both the UK and France.[110]

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[104] Fred Einbinder, "Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice," *International Comparative, Policy & Ethics Law Review* 3, no. 3 (2020): 773-81 (demonstrating that innovations in the French regime could also be useful for reflections on the American anticorruption practice).

[105] OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention*.

[106] Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," *U.C. Davis Law Review* 49, (2015): 497-565 (acknowledging that the use of NPAs and DPAs has contributed to large quantities of FCPA enforcement actions); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report - United Kingdom*, 2017, para 133 ("the 2010 Bribery Act and the introduction of DPAs in 2014, in particular, have given the SFO greater legal powers than ever before to deal with corporate offending"); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report - France*, 2021, para. 22-23 (documenting how CJIPs reinforce the France's enforcement of corporate liability for foreign bribery).

[107] See Chapter 3, Section 3.3.

[108] Gibson Dunn, *2019 Year-End Update on Corporate NPAs and DPAs* (categorizing the variety of offenses to which DPAs and NPAs are used, while FCPA violations accounted for 22.6% of the total agreements in 2019, compared with 29.2% in 2018 and 22.7% in 2017).

[109] See Chapter 3, Section 3.3.

[110] Out of the twelve DPAs that have been negotiated by the SFO, all but three DPAs concern bribery and corruption, particularly the offense of failure to prevent bribery under Article 7 of the UKBA, see Current SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed December 26, 2022); 11 out of

Secondly, China's anti-corruption strategy and the corporate enforcement mechanism are in dire need of reform. As will be discussed in detail in Chapter 2, the fight against bribery and corruption in China takes the form of frequent legislative reforms and periodical enforcement campaigns, which have only stretched the limited enforcement resources and failed to effectively control bribery.[111] In addition, against the background of the U.S.-China trade war and the Covid-19 pandemic, the misgivings about the collateral consequences of corporate prosecution on corporate viability and economic recovery have severely affected the prosecutors' will to bring corporate prosecutions, which triggers the procuratorial initiative of the CNP.[112] The study on DPAs for the resolution of corporate bribery matters combines the two prominent issues on the agenda of Chinese policy makers and is likely to contribute to the reform of both the anti-bribery strategy and the corporate enforcement regime in China.

1.4.3 Why Criminal Law Approach?

Labelling bribery as a criminal offense while punishing it with criminal penalties is just one approach to the control of bribery. The authorities may impose administrative sanctions or bring civil suits against the corporations involved in bribery or allow the victims of bribery to file private actions.[113] For example, the FCPA provides both criminal and civil penalties for legal and natural persons in violation of its anti-bribery provisions or the accounting provisions.[114] DPA as a resolution vehicle in the U.S. is not reserved for the DOJ in resolving criminal matters, but also available to the SEC in the civil enforcement context.[115] Besides, commercial bribery is outlawed in China as both a criminal offense and an administrative offense, depending on the amount and form of bribes, the mental state of the bribe-givers, the social harms and consequences, etc.[116] Beyond the court-imposed sanctions, corporations engaged in bribery may also be penalized by the market in the form of reputational penalty.[117] The corporations might suffer distrust from the consumers, suppliers and employees, lower credit rating and share loss after the bribery scheme is exposed.[118] Such reputation penalty could complement the public sanctions and force the corporations to behave in a more responsible manner.

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the 31 French CJIPs concern the allegations of domestic or foreign bribery, see Agence Française Anticorruption, La convention judiciaire d'intérêt public, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public (accessed January 2, 2023); Ministère de la Justice, La convention judiciaire d'intérêt public (CJIP), http://www.justice.gouv.fr/publications-10047/cjip-13002/ (accessed January 2, 2023).

[111] See Chapter 2, Section 2.3.

[112] See Chapter 2, Section 2.4.

[113] Anthony Ogus, "Enforcing Regulation: Do We Need the Criminal Law?" in Hans Sjögren and Göran Skogh (ed.), *New Perspectives on Economic Crime* (Cheltenham: Edward Elgar Publishing Limited, 2004), 44 (comparing the different enforcement regimes for the regulatory violations: criminal law, civil private law, civil public law and administrative law); Low, Lamoree, and London, "The 'Demand Side' of Transnational Bribery and Corruption," 564 (noting that the prevention, detection, and punishment of corruption extend beyond the criminal area, as they are also the focus of civil and administrative measures at the national and international levels).

[114] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. Article 78); DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 9-46.

[115] Press Release, "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," January 13, 2010, https://www.sec.gov/news/press/2010/2010-6.htm (accessed March 18, 2022).

[116] For a comprehensive and updated introduction of China's anti-bribery legal framework, see Bribery & Corruption Laws & Regulations 2022, Global Legal Insights, https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/china (accessed March 18, 2022).

[117] Benjamin Klein, and Keith Leffler, "The Role of Market Forces in Assuring Contractual Performance," *Journal of Political Economy* 89, no. 4 (1981): 615-41; Carl Shapiro, "Premiums for High Quality Products as Returns to Reputations," *The Quarterly Journal of Economics* 98, no. 4 (1983): 659-79; John R. Lott, Jr., "An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation," *The Journal of Legal Studies* 21, no. 1 (1992): 159-87.

[118] Cindy R. Alexander, "On the Nature of the Reputational Penalty for Corporate Crime: Evidence," *Journal of Law and Economics* 42, (1999): 489-526 (measuring a significant –2.84% abnormal return over a 2-day period around the announcement of a wide range of corporate illegalities

This study focuses on the criminal law approach to bribery and the use of DPAs in the criminal context for a number of reasons. Firstly, with the growing realization of the harms of bribery and the difficulty in detecting bribery, criminalization has been a central component of almost all major anti-bribery instruments, including the UNCAC and the OECD Anti-bribery Convention.[119] Under the enhanced international pressure, almost all jurisdictions have laws in place that criminalize bribery in the domestic context, while an increasing number of countries are also criminalizing the bribery of foreign public officials as well as foreign commercial bribery.[120] As the toughest response to bribery, criminalization is believed to be crucial to deterring natural and legal persons from engaging in bribery, complementing the efforts in the detection and prevention of bribery, and disgorging the illegal proceeds of bribery for the compensation of victims.[121]

Secondly, DPA is foremost a prosecutorial tool to settle criminal matters. In the UK and France, DPA is designed as a corporate resolution mechanism to bypass the costly and risky criminal trial procedure only.[122] Though DPAs are occasionally utilized by the SEC to settle civil charges with corporations, a predominantly large number of DPAs in the U.S. have been entered into by the DOJ to conclude criminal investigations.[123] Moreover, the rules promulgated by the SEC governing the application of DPAs largely resemble the DOJ policy in terms of the policy goals and the structural design.[124] Therefore, it is believed that a criminal law approach would suffice to gain important insights into the structural design and practical application of DPAs in the corporate bribery context for the purpose of exploring whether and how DPAs can empower China's fight against corporate bribery.

In addition to the focus on the criminal law approach to bribery and the use of DPAs in the criminal context, this study also pays attention to the existence of the reputational penalty and its impacts on the optimal use of public sanctions.[125] Furthermore, how to coordinate the different

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and attributing the difference beyond the legal penalties to the reputation penalty); Peter-Jan Engelen and Marc van Essen, "Reputational Penalties in Financial Markets: An Ethical Mechanism?" in W. Vandekerckhove et al. (eds.), *Responsible Investment in Times of Turmoil*, Issues in Business Ethics 31 (Dordrecht: Springer, 2011), 67 (speculating that reputational penalty in the case of corporate bribery might be much less significant than accounting fraud as bribery could be considered as "good business practice to obtain important business contracts in certain countries (increase of cash flows)").

[119] Wouters, Ryngaert, and Cloots, "The International Legal Framework against Corruption," 216-37 (discussing several major international anti-corruption instruments); ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *The Criminalization of Bribery in Asia and the Pacific: Frameworks and Practices in 28 Jurisdictions Thematic Review – Final Report*, 2010, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46485272.pdf, at 15 ("[c]riminalisation is a key component of a comprehensive anti-corruption strategy").

[120] UNCAC, *State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Cooperation* (Second edition), 2017, at 13 ("all States parties have adopted measures to criminalize both the active and passive bribery of domestic public officials, in most cases long before the Convention came into force"); OECD, *Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery*, 2018, https://www.oecd.org/corruption/Fighting-the-crime-of-foreign-bribery.pdf, at 3 (noting that bribery is a crime in all the 44 state Parties to the OECD Anti-bribery Convention).

[121] ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *The Criminalization of Bribery in Asia and the Pacific: Frameworks and Practices in 28 Jurisdictions Thematic Review – Final Report*, 2010, https://www.oecd.org/site/adboecdanti-corruptioninitiative/46485272.pdf, at 15 (noting the criminalization of corruption "deters individuals and officials from engaging in corrupt behaviour. It can also disgorge the profits of the crime and recompense the victim and the state. Criminalisation is thus a vital complement to other anti-corruption efforts such as prevention and detection").

[122] See Chapter 3, Section 3.3.

[123] Gibson Dunn, *2021 Year-end Update on Corporate NPAs and DPAs*, at 2 (noting that out of all the 603 publicly available U.S. D/NPAs since 2000, the SEC has entered into 10 agreements so far, including one each in 2010, 2012, 2013, 2014 and 2015, 3 in 2011 and 2 in 2016).

[124] Gibson Dunn, *2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, January 4, 2011, https://www.gibsondunn.com/2010-year-end-update-on-corporate-deferred-prosecution-and-non-prosecution-agreements/ (accessed March 18, 2022) (noting that the import of D/NPAs in the civil enforcement context, championed by the Director of Enforcement for SEC, a formal federal prosecutors, brings the SEC enforcement more in line with the DOJ's prosecutorial model).

[125] Alexander, "On the Nature of the Reputational Penalty for Corporate Crime: Evidence," 492 (noting that "commitments to higher court-imposed penalties through the use of federal sentencing guidelines may lead to offsetting reductions in market-based penalties in some cases").

types of sanctions to avoid over-deterrence or "piling-on" penalties will also be discussed in this study.

1.5 Methodology

As pointed out by Professor Mark Van Hoecke, the choice of methodology is mainly dependent on the research questions and research aim.[126] It was clarified above that the primary research question of this study is whether DPA should be introduced into China to resolve corporate bribery cases and how to design the Chinese DPA regime. This study aims to answer the research question by identifying the challenges confronting the Chinese enforcement authorities, seeking solutions from the experience of other jurisdictions and identifying the best practices in structuring and applying DPAs. Accordingly, it is decided that three types of research methods will be adopted to conduct this research project, namely, the comparative approach, the legal doctrinal analysis, and the law and economics approach.

1.5.1 Comparative Approach

The main research method adopted in this study is comparative method. The comparative analysis helps to understand why many jurisdictions have turned to the DPA mechanism to resolve the problems inherent in the detection, investigation and prosecution of corporate bribery, while structuring their DPA programs in a different way. It also serves the research aim by situating China's anti-bribery campaign in the transnational context and exploring whether DPA should be introduced into China and how to design China's DPA regime from the experience of foreign authorities.[127] Such values of comparative approach are of particular importance for China as international pressure has been a driving force behind many of China's recent legal reforms, and the international trends are often closely watched and studied by Chinese legal scholars and policy makers for the reform of China's own legal systems.[128]

In carrying out the comparative study, three methods will be employed for determining the level and elements for comparison: the historical method, the functional method, and the law-in-context method.[129] Firstly, the historical method will be used to understand and compare the historical contexts underlying the introduction and development of DPAs in the selected jurisdictions. It is useful to identify the dilemmas facing the authorities in different jurisdictions regarding the enforcement of anti-bribery laws and the evolving policy goals of their DPA programs. Secondly, the functional method will be adopted to look into how "the functional equivalents at the level of the solutions" are employed and developed in different jurisdictions to

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[126] Mark Van Hoecke, "Methodology of Comparative Legal Research," *Law and Method* (December 2015): 1 ("the aim of the research and the research question that will determine which methods could be useful").

[127] Tonry, "Is Cross-National and Comparative Research on the Criminal Justice System Useful?" 506 (noting that the most important aim of comparative research is "to put national policies and practices into cross-national contexts in order to know what differences they make in national patterns of crime and punishment").

[128] Tomomi Kawasaki, "Review of Comparative Studies on White-Collar and Corporate Crime," in Tomomi Kawasaki, and Rorie, Melissa L (ed.), *The Handbook of White-Collar Crime* (Hoboken, NJ: John Wiley & Sons, Inc., 2019), 441 ("it is popular among criminologists and government officials to refer to other countries' experiences when they consider problems and reforms of their systems or when they want to introduce a new approach or mechanism"); Gintel, "Fighting Transnational Bribery," 7 (noting that "many of the recent adjustments to China's anti-corruption legal framework over the past several years have been expressly grounded in, and influenced by, international law").

[129] Van Hoecke, "Methodology of Comparative Legal Research," 8-21 (identifying and discussing six methods for conducting comparative research, i.e., the functional method, the structural method, the analytical method, the law-in-context method, the historical method and the common-core method).

address the common problems.[130] Though all the selected jurisdictions have turned to pre-trial resolution mechanisms to mitigate the challenges inherent in the traditional indictment-prosecution-trial process, the structural design of their DPA programs and the enforcement records show wide divergence. This study will introduce and compare the DPA or DPA-like mechanisms in the U.S., UK and France in multiple aspects to identify and assess the different approaches to DPA. Last but not least, a contextual approach will be utilized to understand the contextual basis and conditions for the smooth-functioning of the DPA mechanism.[131] A carbon-copy transplant of foreign DPA regimes into China will hardly achieve the desired results unless the new resolution tool adapts to China's broader legal system and culture. This study will identify the contextual basis for the success of DPA regimes in the selected countries, examining whether such basis already exists in China and, if not, how to reform China's broader legal system to ensure that the desired results are achieved following the introduction of DPAs in China.

1.5.2 Doctrinal Legal Approach

In addition to the comparative analysis, doctrinal legal analysis will also be an important part of this study. Doctrinal legal method, which is often referred to as black letter law or the library-based method, is one of the most primitive and fundamental methodologies in conducting legal research.[132] Generally speaking, legal doctrinal analysis focuses on the law on paper, rather than the law in practice.[133] It is important to understand what the law is, including the evolution of law, on a particular issue.[134] The doctrinal approach serves this study by ascertaining the legislative roots for the challenges to corporate bribery enforcement in various jurisdictions. In addition, doctrinal legal analysis is needed to interpretate the underlying rationales and policy goals of the DPA mechanism, which can be used as a benchmark to assess the extent to which the DPA regimes are effectively applied in practice. Therefore, doctrinal legal analysis will be a useful starting point for this study and lay the foundation for the comparative analysis.

As classified by Kestemont, there are seven principal types of traditional legal research, including description, classification, comparison, theory building, explanation, evaluation and recommendation.[135] The forms of research have an important implication for the choice of legal

[130] *Ibid*, 10 (noting that the "functional method is looking for such 'functional equivalents' at the level of the solutions" to practical problems in different societies); Oliver Brand, "Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies," *Brooklyn Journal of International Law* 32, no. 2 (2007): 409-410 (introducing the functional approach to comparative legal research and discussing the three premises of functionalism).

[131] Van Hoecke, "Methodology of Comparative Legal Research," 30 ("[s]uccessful legal transplants will require a law-in-context method. What seems to work well in another legal system may indeed fail to do so in one's own legal system because of a different context").

[132] Mark van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in Mark van Hoecke (ed.), *Methodologies of Legal Research What Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2013), 4 ("interpreting texts has been the core business of legal doctrine since it started in Roman Empire"); Terry Hutchinson, and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (2012): 85 ("[t]he doctrinal method lies at the basis of the common law and is the core legal research method").

[133] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," *Erasmus Law Review*, no. 3 (2015): 130 (noting that doctrinal researchers usually confine themselves to a critical analysis and synthesis of the law, yet more and more began to include interdisciplinary insights into their research); Christopher Mccrudden, "Legal Research and the Social Sciences," *Law Quarterly Review* 122, (2006): 633 (noting that research on law using reason, logic and argument over the past few decades "is not simply textual analysis, at least in common law systems, for the idea of law as a practice is deeply embedded").

[134] Terry Hutchinson, "Vale Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era," *Law Library Journal* 106, no. 4 (2014): 584 ("the essential features of doctrinal research involve a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation").

[135] Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Cambridge: Intersentia), 9-18.

methodology.[136] For example, doctrinal legal method will be a reasonable choice if the research concerns the interpretation of legal texts and documents, identification of legal issues, exploration and evaluation of possible solutions and proposal of legal reforms, which fall exactly into the scope of this study.[137] By analyzing the anti-bribery laws, corporate criminal liability and criminal procedure rules in the selected jurisdictions via a doctrinal approach, this study attempts to trace the enforcement challenges in the corporate bribery context back to the legislative sources. Such attempts are useful for evaluating the authorities' current responses to corporate bribery scandals and policy reforms. Moreover, they are fundamental to any policy recommendations proposed to facilitate the prevention and deterrence of corporate bribery, including the designing and application of the DPA mechanism.

The success of doctrinal legal research hinges on the quality and diversity of sources, including both normative sources and authoritative sources.[138] In terms of conducting legal doctrinal analysis, this study will collect, analyze and evaluate not only statutory texts, policies and guidelines, legislative history documents, but also relevant cases and judgements, speeches of enforcement officials, scholarly literature and publications. In addition to academic literature, there are a great deal of publications prepared by international organizations and for-profit entities that are relevant and useful for this study. For example, the OECD has issued a series of guidelines and reports in order to guide and monitor the member states' implementation of the OECD Anti-bribery Convention.[139] Besides, a number of well-known law firms, such as Gibson, Dunn & Crutcher LLP and Sherman & Sterling, are active in tracking and analyzing the legislative changes and enforcement trends in the anti-bribery filed and corporate enforcement area.[140] Based on all the valuable and informative sources mentioned above, this study is able to have a comprehensive and critical understanding of the anti-bribery laws and corporate enforcement mechanism in the selected jurisdictions.

1.5.3 Law and Economics Approach

One of the major aims of comparing the DPA programs in the selected jurisdictions is to look for an ideal model of DPA regime as part of the broader enforcement policy to effectively address the challenges in combating corporate bribery. To that end, in addition to the comparative and doctrinal analysis of DPA regimes and corporate bribery laws in the selected jurisdictions, this study will further analyze the different DPA programs by adopting a law and economics approach.[141] The law and economics analysis aims to provide objective criteria and a benchmark

[136] Hutchinson, and Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," 106 ("[d]ifferent forms of legal research necessitate variations in the method").

[137] Kestemont, *Handbook on Legal Methodology,* 19.

[138] Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" 11 (identifying two categories of sources for legal doctrine, i.e., "(a) normative sources, such as statutory texts, treaties, general principles of law, customary law, binding precedents, and the like; (b) authoritative sources, such as case law, if they are not binding precedents, and scholarly legal writings").

[139] The relevant OECD publications for this study include: *Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions* (annual report); *Implementing the OECD Anti-Bribery Convention* (phase report for different member states); *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019; *The Detection of Foreign Bribery*, 2017; *OECD Foreign Bribery Report: An Analysis of The Crime of Bribery of Foreign Public Officials*, 2014; *Typologies on the Role of Intermediaries in International Business Transactions*, 2009.

[140] Relevant law firm reports include Gibson & Dunn, *(Bi-)Annual Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*; Sherman & Sterling, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practice Act*.

[141] Rose-Ackerman, "The Law and Economics of Bribery and Extortion," 217 (noting that "economic principles can help one assess the laws and policies against bribery to see whether they deter payoffs effectively").

for evaluating the comparative findings and forming policy recommendations as to the development of the Chinese version of DPAs.

Given that laws aim at regulating the society and shaping human behavior, an accurate understanding of the way in which people behave and make decisions is fundamental to the assessment of the existing legal policies and the proposal of alternative legal solutions.[142] The law and economics method provides a powerful tool for understanding and predicting how people behave and make choices, as well as assessing the impact of legal rules.[143] The classical law and economics scholarship starts with the rational choice theory, which posits that market actors are rational utility maximizers. They make choices by calculating the costs and benefits of alternative behavioral options and selecting the one that maximizes their utility.[144] The application of the rational choice theory in the context of enforcement and compliance has led to the development of the deterrence theory.[145] According to the deterrence theory, rational persons are deterred from committing a misconduct if the expected costs of the misconduct, subject to the probability and severity of sanctions, outweigh its expected benefits. The state can therefore influence the behaviors of market actors and achieve the desired level of deterrence and compliance by adjusting the probability (associated with the enforcement costs) and the severity of punishment.[146]

In addition, this study also borrows some insights from a more novel approach: the real option model.[147] The real option theory is based on the belief that "all criminal decisions can in fact be seen as real options, i.e. they confer the possibility but not the obligation to commit a crime in the future."[148] The theory considers some features of the criminal decisions that are analogous to the options investment decisions, including uncertainty, irreversibility, and certain freedom of choice on the timing of crimes.[149] Four additional variables, including "the time to expiration, the risk free interest rate, the volatility of the return of the crime and the opportunity cost by not committing the crime immediately", are introduced in the criminal option model compared with the classical law and economics model that focuses on the costs and benefits of the crimes.[150] The real option model provides an useful framework, which is more dynamic and closer to the

[142] Julie De Coninck, "Behavioural Economics and Legal Research?" in Mark van Hoecke (ed.), *Methodologies of Legal Research What Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2013), 257 ("[i]f one takes the view that law aims to regulate human behaviour, one would expect legal scholars to take a natural interest in how people actually behave").
[143] Mccrudden, "Legal Research and the Social Sciences," 639 (acknowledging the power of law and economics given "its apparent universality, its testability and its importance in a wide range of social situations").
[144] For a general discussion of the rational choice theory, see Ronald L. Akers, "Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken," *Journal of Criminal Law and Criminology* 81, no. 3 (1990): 653-76; Michael Allingham, Rational Choice (Hampshire: Macmillan Press, 1999).
[145] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 169-217 (promoting the deterrence theory and believing that when the expected costs of crimes, namely, the magnitude of sanctions multiplied by the probability of getting sanctioned, are set equal to or higher than the expected benefits of crimes, rational persons will be effectively deterred from committing crimes).
[146] Considering the costs of law enforcement and the values of economic activities, the optimal level of white-collar crime is not zero, and over-deterrence is just as much undesired as under-deterrence. Once the costs of enforcement are taken into consideration, the level of deterrence is optimal when the marginal benefits of enforcement equal the marginal costs. See Rose-Ackerman, "The Law and Economics of Bribery and Extortion," 221-22.
[147] Peter-Jan Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," *European Journal of Law and Economics 17,* (2004): 329-52; Danny Cassimon, Peter-Jan Engelen, and Luc Van Liedekerke, "When do Firms Invest in Corporate Social Responsibility? A Real Option Framework," *Journal of Bus Ethics* 137, (2016): 15-29.
[148] Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 332-34.
[149] *Ibid*, 333.
[150] *Ibid*.

real-life scenarios, to understand the decision-making process from the perspective of the criminals in the context of committing a crime, as well as self-reporting to and cooperating with the authorities. To the extent that the model is used by the criminals to determine whether and when to commit crimes, it is also valuable for the policy makers in terms of developing an effective criminal enforcement policy to prevent crimes and reduce the enforcement costs.[151]

Deterrence, together with rehabilitation, is widely considered as a general purpose of criminal law.[152] As an alternative resolution mechanism, DPA is more justified if it is structured and applied to promote the general purposes of criminal law just as guilty pleas, rather than merely providing white-collar offenders with an easy way out of conviction.[153] Based on the deterrence theory, this study analyzes whether the enforcement policies governing the application of DPAs in the selected jurisdictions could optimally deter the commission of corporate crimes and promote corporate rehabilitation. The analysis will be undertaken from the perspective of both corporations and individuals within the principal-agent framework. On the one hand, in light of the corporations' great power and control over employees' behaviors through remuneration policy and internal control, the success of a DPA program in deterring individuals from engaging in corporate bribery largely depends on its impacts on corporate decisions.[154] By focusing on the costs and benefits facing corporations under the DPA regimes, this study aims to examine whether, in which way and under what conditions, DPA can effectively incentivize corporations to join the fight against bribery. On the other hand, it is the individual rather than the corporation that actually commits the misconducts.[155] Moreover, the interests of corporate management may diverge from the interests of corporate shareholders, leading to the emergence of agency costs.[156] Under the influence of agency costs, the DPA policy that is optimal in shaping corporate behaviors may not be desirable in impacting management choices.[157] This study will thus also zoom in on the individual employees and managers in order to analyze the effects of different DPA regimes on the individual incentives to engage in or to prevent bribery.

It is worth mentioning that my capability deficit in economics and mathematics prevents me from designing an optimal corporate enforcement regime, involving the use of DPAs and other resolution tools. Neither is it necessary to do so as the law and economics scholarship has come a

[151] *Ibid*, 339-44 (analyzing from the perspective of the criminal and the legislators, respectively, on how to use the criminal option model to better manage the criminal options, and to design an adequate criminal enforcement policy).
[152] V. S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" *Harvard Law Review* 109, no. 7 (1996): 1494 (noting that the treatment of deterrence, rather than retribution, as the aim of corporate liability accords with the position of many commentators and judges); Peter J. Henning, "Corporate Criminal Liability and the Potential for Rehabilitation," *American Criminal Law Review* 46, (2009): 1421 (claiming that rehabilitation of the organization shall be the proper goal for applying criminal law to corporations); US Justice Manual, 9-28.200 – General Considerations of Corporate Liability (directing prosecutors making corporate charging decisions to ensure that "the general purposes of the criminal law—appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims—are adequately met").
[153] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed November 16, 2021) (touting DPA as having "the same punitive, deterrent, and rehabilitative effect as a guilty plea").
[154] Arlen, and Kraaman, "Controlling Corporate Misconduct," 693 (noting that corporations can take preventive measures in the form of personnel policies, financial controls, screening procedures to make it more difficult or expensive for agents to commit misconducts).
[155] *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("the only way in which a corporation can act is through the individuals who act on its behalf").
[156] Alexander, and Cohen, "Why Do Corporations Become Criminals?" 1–34 (noting that managers commit corporate crimes not to benefit shareholders, as a reflection of the agency costs).
[157] Polinsky, and Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" 239-57 (demonstrating the social desirability of punishing employees when corporations themselves face liability from the perspective of the economic theory of deterrence).

long way in this aspect.[158] This study will therefore mainly analyze and borrow insights from relevant law and economics literature regarding the features of optimal corporate enforcement policies for the sake of assessing the DPA programs in the U.S., UK and France, as well as proposing recommendations for the development of the Chinese version of DPAs.[159]

1.6 Academic and Social Relevance and Limitations

1.6.1 Academic Relevance

The majority of literature in English discusses anti-bribery laws and enforcement strategies from the perspective of western capital-exporting countries.[160] As domestic bribery in these countries is largely under control, more attention has been paid to bribery in the foreign context, especially bribery of foreign public officials in the emerging economies by corporations from the western industrialized countries.[161] As a major capital exporter and importer and also a country with rampant bribery within its border, China presents an exception to this pattern and thus an interesting object of study.[162] This study aims to contribute to the current academic debates by building a useful understanding of the hurdles Chinese authorities face in the enforcement of anti-bribery laws and exploring ways to empower China in the fight against bribery in the domestic and foreign arena.[163] In addition, it also complements the existing research on the DPA mechanism by discussing the possibility and conditions for its application in China.[164] Such discussion could offer a useful path for other scholars that are keen on drawing experience from the DPA programs in the U.S., UK and France for the reform of corporate enforcement mechanisms in other jurisdictions.[165]

The academic relevance of this study is further reflected by its potential contribution to the current heated debate within Chinese legal scholarship on the anti-bribery and corruption

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[158] Maurice Adams, "Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law," in Mark van Hoecke (ed.), *Methodologies of Legal Research What Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2013), 239 (believing that stepping out of the legal domain is required for explanatory purposes, but comparatist does not have to become fully versatile in another academic domain).

[159] For example, I. Ayres, and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); Steven Shavell, "The Optimal Structure of Law Enforcement," *The Journal of Law & Economics* 36, no. 1 (1993): 255-87; Luigi Alberto Franzoni, "Negotiated Enforcement and Credible Deterrence," *The Economic Journal* 109, no. 458 (1999): 509-35; Karen Yeung, *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing, 2004).

[160] For example, see Elizabeth K. Spahn, "Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention against Corruption," *Indiana International & Comparative Law Review* 23, no. 1 (2013): 1-33; Andrew Brady Spalding, "Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets," *Florida Law Review* 62, no. 2 (2010): 351-427; Stuart H. Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014).

[161] George, and Lacey, "A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations," 550 ("corruption is not as common between companies in developing nations and the government officials in developed countries, presumably because their current economic relationship does not provide the opportunity").

[162] Lewis, "Corruption Spurring China to Engage in International Law," 90 ("as a rising power and country plagued with endemic corruption, China is a key player in the fight to address corruption on a global scale").

[163] Bertram Lang, and Marina Rudyak, *Cooperation with Chinese Actors on Anti-Corruption: Environmental Governance as a Pilot Area*, Chr. Michelsen Institute U4, (2022), https://www.cmi.no/publications/file/8122-cooperation-with-chinese-actors-on-anti-corruption-environmental-governance-as-a-pilot-area.pdf, at 42-43 (noting the importance for the Sino-Western cooperation to be built on an understanding of bottlenecks in the Chinese system).

[164] For example, Peter Reilly, "Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts," Arizona State Law Journal 50 (2019): 1113-70; Colin King, and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Cham: Palgrave Pivot, 2018); Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 667-800.

[165] Arlen, and Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," 701-03 (noting that countries motivated to have a greater presence in corporate enforcement are reforming their laws and institutions following the U.S. corporate enforcement approach, involving expansive corporate criminal liability and the use of negotiated resolution mechanisms).

strategies and the criminal justice reform for the promotion of corporate compliance development. Against the background of the ever-intensifying anti-corruption campaign, bribery has long been a hot topic among Chinese legal scholars in search of effective ways to combat bribery, especially the supply side of bribery that was previously overlooked.[166] With the global trends of relying on corporate liability regimes to incentivize corporate compliance, Chinese scholars are now actively exploring ways to leverage the corporate criminal liability to foster the development of corporate compliance programs.[167] The popularity of the concept of corporate compliance has sparked a renewed interest in the corporate liability rules and the criminal procedure law specific to the prosecution of organizations.[168] Though DPA is widely believed by Chinese scholars as a useful way to reform the corporate criminal justice, their understanding of foreign DPA regimes, including the policy goals, rationales and structural design, is relatively limited and incomplete.[169] In addition, few attempts have been made to utilize DPAs to specifically reform and strengthen China's anti-bribery and corruption movement, which is a major area of application for DPA programs in the U.S., UK and France.[170] This study will contribute to the current debate among Chinese scholars by providing a comprehensive introduction and critical analysis of the DPA regimes in the U.S., UK and France, and linking the corporate compliance development with the anti-bribery movement.

1.6.2 Social Relevance

This study is socially relevant for multiple parties. Chinese policy makers are expected to be the main audience of this study. This study intends to propose recommendations for Chinese policy makers regarding whether to transplant foreign DPA regimes into China and how to design the Chinese version of DPAs. The ultimate aim is to reform the corporate criminal justice system in China, strengthen the anti-bribery regimes and facilitate corporate compliance development in the country. Secondly, this study also benefits the international community in the fight against bribery and corruption on a global scale. Owing to China's rising role in foreign investment on both the providing-end and receiving-end, China's fight against bribery is not only a domestic

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[166] Jiejiao Liu, and Dehua Wang, "Spread of Commercial Bribery and Private Sector Responsibilities in China," *China Economist* 10, no. 5, (2015): 97-98 (noting that China's anti-bribery laws punishes the supply side of bribery more lightly than the demand side and has not paid enough attention to the private sector's role); Andrew Wedeman, "The Challenge of Commercial Bribery and Organized Crime in China," *Journal of Contemporary China* 22, no. 79 (2013): 18–34 (discussing the expansion of China's anti-corruption move, from the mere focus on corrupt officials as bribe recipients, to bribe-paying activities, private-to-private business corruption and corruption-linked organized crime).

[167] For example, Langxiao Tao, "A Study on China's Corporate Crime Enforcement: An Emerging Reprieve Approach," *US-China Law Review* 17, no. 5 (2020): 175-188; Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," *中国刑事法杂志 (Criminal Science)*, no. 1 (2021): 78-96; Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," *比较法研究 (Journal of Comparative Law),* no. 1 (2020): 19-33.

[168] For example, see Yan'an Shi, "合规计划实施与单位的刑事归责 (Implementation of Compliance Plan and Criminal Imputation to A Unit)," *法学杂志 (Criminal Science)*, no. 9 (2019): 20-33; Bencan Li, "单位刑事责任论的反思与重构 (Reflection and Reconstruction of the Theory of Corporate Criminal Responsibility)," *政法论坛 (Tribune of Political Science and Law),* no. 4 (2020): 39-60; Yuhua Li, "企业合规与刑事诉讼立法 (Corporate Compliance and Criminal Procedure Legislation)," *政法论坛 (Tribune of Political Science and Law)* 40, no. 5 (2022): 91-102.

[169] Yuhua Li, "企业合规本土化中的 '双不起诉' ('Double Non-Prosecution' in the Domestication of Corporate Compliance)," *法制与社会发展 (Law and Social Development)*, no. 1 (2022): 39 (noting that at the beginning stage of the pilot program of the CNP, the understanding of its subject of application and its difference with the Leniency System is yet ambiguous); Ruihua Chen, "企业合规制度的三个维度——比较法视野下的分析 (Three Dimensions of Corporate Compliance System: Analysis from the Perspective of Comparative Law)," *比较法研究 (Journal of Comparative Law)*, no. 3 (2019): 62 (noting that the discussion and analysis of corporate compliance is still fragmented and incomplete).

[170] For one of the few articles discussing the application of the CNP to corporate bribery cases, see Yuguan Yang, "企业合规案件不起诉比较研究——以腐败案件为视角 (Comparative Study on Criminal Non-prosecution of Corporate Compliance Cases: From the Perspective of Anti-corruption Cases)," *法学杂志 (Law Science Magazine)*, no. 1 (2021): 26-41.

issue but also an international concern.[171] Engaging China in the fight against transnational bribery is essential to creating a level playing field for all corporations in the international market.[172] The capability of Chinese authorities to control corruption in its domestic market and to regulate the actions of overseas Chinese enterprises has a crucial impact on the success of the global anti-corruption movement. However, China has not yet been an active player in the area of foreign bribery enforcement.[173] A clear understanding of the key concerns and challenges facing the Chinese leadership in the anti-corruption movement is fundamental to designing any effective strategies for engaging China in the global fight against bribery.[174] Thirdly, this study is also valuable for multinational corporations, who are frequently implicated in bribery schemes regarding their operation in China and subject to parallel enforcement actions in multiple jurisdictions, especially in the U.S.[175] A Chinese version of DPA with appropriate focus on corporate compliance would provide such corporations with not only a useful mechanism to settle bribery charges without being labeled as criminals, but also a less corruption-prone business environment. The comparative study of corporate enforcement regimes in the U.S., UK and France also helps multinational corporations to develop an effective compliance program that takes into account the trans-national differences in the regulation and resolution of corporate crimes.[176]

1.6.3 Boundaries and Limitations

This study addresses the question of whether DPA should be introduced into China and how to design the Chinese DPA regime to strengthen the fight against bribery. To this end, it aims to develop a better understanding of the manner in which, and the conditions under which, DPAs assist the U.S., UK and French authorities in deterring corporate crimes and rehabilitating corporate offenders.

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[171] Transparency International, *Exporting Corruption Progress Report 2020: Assessing enforcement of the OECD Anti-Bribery Convention-Short Version,* 2020, https://files.transparencycdn.org/images/A-slim-version-of-Exporting-Corruption-2020.pdf (accessed March 23, 2022), at 30 ("[a]s the world's leading exporter, with more than 10 per cent of global exports annually, China has a special responsibility with respect to the practices of its companies and businesspeople abroad"); Ann-Sofie Isaksson, and Andreas Kotsadam, "Chinese Aid and Local Corruption," *Journal of Public Economics* 159, (2018): 146-59 (suggesting that Chinese-aid project fuels corruption in African countries).

[172] Bertram Lang, *Engaging China in the Fight against Transnational Bribery: 'Operation Skynet' as a New Opportunity for OECD Countries*, 2017 Global Anti-Corruption and Integrity Forum, at 3-4 (noting that the growing competition from non-compliant Chinese enterprises makes OECD countries more reluctant to punish their own companies for foreign bribery to protect their competitiveness, and that China fails to provide corruption-free access to its own market for foreign businesses).

[173] Gerry Ferguson, "China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End," *The International Lawyer* 50, no.3 (2017): 504 (claiming that China is pursuing inconsistent approaches to combatting domestic and foreign bribery, and the non-enforcement of foreign bribery laws is inconsistent with its international obligations); Gintel, "Fighting Transnational Bribery," 31 (noting that China's adoption of the foreign bribery provision, in spite of the lack of will to enforce it any time soon, is a step forward in its gradual approach to the fight against corruption); OECD, *Active with the People's Republic of China*, 2012, https://www.oecd.org/china/50011051.pdf (accessed March 23, 2022) (discussing the cooperation between the OECD and China in the promotion of public integrity and fight against transnational corruption).

[174] Lewis, "Corruption Spurring China to Engage in International Law," 90 ("the volatile situation on the ground in China presents an underappreciated opportunity for greater participation in the international legal arena.... [as] Beijing is acutely aware that it must harness all available means to quell this outcry that could shake, or even dislodge, the Party's grip on power"); Lang, *Engaging China in the Fight against Transnational Bribery*, 8-13 (claiming that China's focus on extraditing corrupt officials has provided the western country with an opportunity to engage China in the fight against transnational bribery).

[175] Mike Koehler, "The Unique FCPA Compliance Challenges of Doing Business in China," *Wisconsin International Law Journal* 25, no. 3 (2007): 416-25 (discussing the unique FCPA compliance challenges in China given the prevalence of SOEs in China and the special cultural norms and expectations of doing business in China); Chow, "The Interplay between China's anti-Bribery Laws and the Foreign Corrupt Practices Act," 1015-37 (identifying special FCPA concerns involving China, and claiming that multinational corporations shall "raise their level of awareness of the seriousness of commercial bribery actions in China", which may trigger collateral FCPA prosecution that may even threaten the corporate viability and continual existence).

[176] Kawasaki, "Review of Comparative Studies on White-Collar and Corporate Crime," 442 (noting the importance of comparative study on corporate crimes to help organizations to develop effective compliance programs that accommodates the trans-national differences of corporate crimes at the times of globalization).

Notably, this study attempts to identify the best practices in terms of the structural design of the DPA regime, rather than measuring the effectiveness of DPAs are in achieving deterrence and rehabilitation. It is straightforward to assess the impact of DPAs on the robustness of law enforcement actions by comparing the number of investigations and prosecutions and the amount of sanctions before and after the introduction of DPAs.[177] However, opinions are divided among scholars regarding the deterrent and rehabilitative values of DPAs. Those in favor of DPAs believe that DPAs replace declination of prosecution in face of the dire collateral consequences of corporate conviction.[178] In contrast, the criticis claim that DPAs merely offer white-collar criminals an easy way out of conviction while failing to prevent recidivism or ensure the development of effective corporate compliance program.[179] The difficulties of evaluating the effectiveness of DPAs in deterring and combating corporate crimes have been acknowledged by the U.S. Government Accountability Office.[180] In the context of bribery, the attempt to measure the effectiveness of DPAs is even more challenging given the secreacy of the bribery schemes, as well as the opacity in most aspects of the corporate bribery enforcement.[181] Research also demonstrates the challenges of assessing the effectiveness of a corporate compliance program, which is often a major concern of prosecutors in the use of DPAs despite the growing number of compliance evaluation guidelines released by the authorities.[182] In view of these difficulties, this study will address the question of whether and how DPAs should be introduced into China by analyzing whether a Chinese DPA mechanism could mitigate the existing hurdles confronting Chinese authorities in the enforcement of anti-bribery laws, and identifying the best practices for fashioning the DPA regime to increase its efficacy in deterrence and rehabilitation. It will be left for future research to determine the degree to which DPAs are effective in deterrence and

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[177] Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," 500-57 (recognizing the impact of D/NPAs on the quantity of FCPA enforcement actions in terms of the number of enforcement actions and the amount of settlements, and attempting to assess the impact on the quality of FCPA enforcement actions by comparing the relevant individual enforcement actions).

[178] Greenblum, "What Happens to a Prosecution Deferred?" 1882 ("deferral of corporate offenders is replacing declination, not prosecution").

[179] Public Citizen, *Soft on Corporate Crime: Justice Department Refuses to Prosecute Corporate Lawbreakers, Fail to Deter Repeat Offenders,* September 26, 2019, https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/(accessed June 16, 2021) (criticizing the DOJ's over-reliance on DPAs and its failure to prosecute big corporations even after the breach of DPAs for being soft on corporate crimes); Cristie Ford, and David Hess, "Can Corporate Monitorships Improve Corporate Compliance?" *Journal of Corporation Law* 34, no. 3 (2009): 695-737 (questioning whether the current compliance monitorships, which are often imposed under DPAs to ensure that corporation fulfills the compliance requirements, could achieve the desired goals of improving corporation's development and implementation of effective compliance program).

[180] U.S. Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness*, GAO-10-110, 2009, https://www.gao.gov/assets/300/299781.pdf, at 20 ("DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness"); Garrett, "Structural Reform Prosecution," 933 ("[t]he DOJ has not publicly reviewed the efficacy of its agreements").

[181] Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," 500-57 (recognizing the challenges of measuring the impact of DPAs on the FCPA enforcement given that "most aspects of corporate FCPA enforcement are opaque" and attempting to assess the impact on the quality of FCPA enforcement actions by comparing the relevant individual enforcement actions).

[182] Sean J. Griffith, "Corporate Governance in an Era of Compliance," *William & Mary Law Review* 57, no. 6 (2016): 2106 (citing the statement of a CCO from a major financial company: 'We do have our metrics around surveillance and testing, but in the end, do we know if we have an effective program? We haven't figured that out yet'); Eugene Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms," *New York University Journal of Law and Business* 14, no. 3 (2018): 965-1012 (acknowledging the challenges of assessing the effectiveness of corporate compliance program by both the external parties and the corporate managers themselves, while proposing to us data and empirical analysis to assess the difficult elements of a corporate compliance program); Karin van Wingerde, and Lieselot Bisschop, "Measuring Compliance in the Age of Governance: How the Governance Turn Has Impacted Compliance Measurement by the State," in Melissa Rorie, and Benjamin van Rooij (eds.) *Measuring Compliance: Assessing Corporate Crime and Misconduct Prevention* (Cambridge University Press, 2022), 55-70 (discussing how the governance turn from the state-centered governance to networks of governance including a wide variety of public and private actors has made compliance measurement by regulatory authorities more challenging).

rehabilitation and compare the effectiveness of DPAs with other law enforcement tools, such as guilty pleas and civil actions.[183]

In addition, when identifying the contextual basis for the legal transplant of DPA regime, this study limits its focus to the authorities' ability to detect, investigate and successfully prosecute corporate bribery to form a meaningful threat, and the procedural basis in terms of the prosecutorial discretion to settle and the corporations' ability and risks of conducting internal investigations. A broader context, including the civil or administrative enforcement regimes, societal or legal culture and corporate management practice, may also impact the acceptance of the DPA regime, its adaptability in the legal system and the extent of its effectiveness in a specific jurisdiction.[184] For example, the attitudes towards whistleblowing vary greatly across jurisdictions, affecting the informants' incentives and choice of whistleblowing.[185] For jurisdictions where whistleblowing is despised, more efforts need to be taken to incentivize corporations to self-report in the designing and application of DPAs.[186] However, I choose not to dive into these issues as they do not fall squarely into my area of expertise, and they are too complicated to be covered in one study.

1.7 Research Structure

This thesis is structured in three major parts corresponding to the three sub-questions and consists of seven chapters in total. **Part I**, which follows this introductory Chapter and includes Chapters 2 and 3, addresses the first sub-question, i.e., whether China's CNP is effective in tackling the existing challenges associated with corporate bribery enforcement, and if not, whether the introduction of DPAs into China would achieve the desired results. **Part II**, consisting of Chapters 4, 5 and 6, answers the second sub-question regarding the lessons and experience that can be drawn from the DPA policies and practices in the U.S., UK and France. The goal is to seek the best practices in the designing of the DPA regime for the purpose of effectively incentivizing corporate self-reporting and cooperation, including cooperation in the individual proceedings, and promoting effective corporate compliance program. **Part III**, which includes Chapters 7 and 8, addresses the third sub-question by attempting to analyze in which way China's existing legal system affects the smooth functioning of DPAs. Moreover, in light of the lessons drawn from the foreign DPA regimes in Part II, policy recommendations are

[183] Reilly, "Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System," 1169 (noting the need for "more research and investigation into the degree to which DPAs are effective (or not) as tools of law enforcement", while acknowledging that even "it is found that DPAs are in fact less effective than other crimefighting tools, it might nevertheless be decided that economic and other efficiencies stemming from their use are worth the tradeoff in decreased law enforcement").

[184] Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 673-730 (analyzing the role played by legal professionals in evidence gathering and corporate investigations, plea bargaining, third party intervention in the legal process, administrative agencies, whistleblowing, business culture and corporate governance in evaluating the potential for success of the French anti-corruption law and regime); Arlen, and Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," 705 (noting that other elements would influence the efforts of transplanting DPA regime and corporate criminal liability, such as "laws and institutions controlling prosecutorial discretion, the extent to which civil regulatory and liability regimes are available alongside corporate criminal liability, the scope of liability for white-collar offenses, laws governing whistleblowers, and norms that influence management and employee behavior").

[185] Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 716-19 (discussing the social norms over whistleblowing and how they impact the design of whistleblowing provisions under the *Sapin* II law and the development of compliance program in the cross-national companies).

[186] Jennifer Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," in Tina Søreide, and Abiola Makinwa (ed.), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Northampton, MA: Edward Elgar Publishing, 2019), 182 (claiming that the UK shall leverage its DPA policy to actively incentivize corporate self-report given its lack of robust bounty regime).

proposed for the designing of the DPA regime in China and the reforming of the broader legal system in support of the application of the new regime. Final concluding remarks are provided in the end.

In Part I, **Chapter 2** identifies the challenges confronting the Chinese authorities in the enforcement of anti-bribery laws against corporations. It also introduces and analyzes the CNP that has been actively promoted by China's SPP to induce corporate compliance development and mitigate the adverse consequences of corporate criminal enforcement. Until recently, the anti-bribery laws in China were designed and enforced with the main focus on corrupt officials acting as the demand side of bribery. The current leadership is now paying more attention to bribe-givers by undertaking a wave of legislative reforms and periodical enforcement campaigns. Compared with individual offenders, however, corporations engaged in bribery are subject to exceptionally low risks of criminal prosecution. This Chapter first outlines China's anti-bribery laws and enforcement trends, followed by an analysis of the reasons for the inactive corporate criminal enforcement and the impacts on the success of the anti-bribery enforcement in general. Subsequently, the procuratorial initiative of the CNP is introduced in terms of its structural design and socio-economic background. Meanwhile, the potential effectiveness of the CNP in achieving the goals of promoting corporate compliance development and addressing the corporate enforcement challenges is also examined. This Chapter serves the whole study by identifying the problems in China's anti-bribery enforcement strategies and highlighting the need for improving the corporate resolution mechanism.

As China's CNP is modelled on foreign DPA regimes, **Chapter 3** turns to the DPA programs in the U.S., UK and France. It examines the values of DPAs for the corporate bribery enforcement actions and the (dis)advantages of transplanting the DPA regime into China. This Chapter provides a general overview and comparison of the DPA programs in the three selected jurisdictions regarding the historical development, the conditions for an access to DPA, the typical terms of DPA, external oversight mechanism and the application in practice. In light of the active corporate enforcement actions in the U.S., UK and France since the introduction of DPAs, this Chapter further assesses the values of DPAs in addressing China's corporate enforcement challenges, while comparing China's CNP with the DPA programs in the three selected jurisdictions. It is believed that DPAs, if introduced in China, present a promising solution to the corporate enforcement problems confronting the Chinese authorities. Though China's CNP shares some similarities with DPAs, it falls short of the key rationales and safeguard mechanisms inherent in the DPA programs, which may undermine its legitimacy and effectiveness. The key argument is that the existing CNP should be reformed on the basis of the lessons drawn from the foreign experience in the designing and application of DPAs to build a more effective enforcement strategy against corporate bribery.

Importantly, the availability of DPAs does not necessarily enhance deterrence and rehabilitation. Instead, the DPA mechanism could be counter-productive and increase the incidence of corporate crimes if it is inadequately designed and operates only to reduce the liability for white-

collar criminal offenders.[187] In order to empower the public enforcement agencies to detect and sanction corporate bribery more effectively and efficiently, DPA should be structured to induce corporations to take self-policing measures, including voluntarily monitoring and disclosing corporate wrongdoings, cooperating with the state's investigations, including the investigations into relevant individuals, and remediating corporate compliance risks.[188] **Chapters 4, 5 and 6** respectively discuss the use of DPAs to incentivize corporate self-reporting, hold individual wrongdoers accountable with corporate cooperation, and demand corporate compliance obligations and monitorships. The social values of corporate self-reporting and cooperation, individual liability in the context of corporate resolutions, and supervised corporate compliance reforms are identified and examined. Following that, the DPA programs in the U.S., UK and France are assessed in terms of their effectiveness in incentivizing corporate self-policing activities. It is expected that the discussion and analysis of DPA programs in the three selected jurisdictions could offer valuable lessons for China in improving CNP and strengthening the anti-bribery movement.

In light of the lessons identified in the previous Chapters regarding the designing and application of DPAs, **Chapter 7** analyzes China's existing legal system that underlies the corporate criminal enforcement and would have an impact on the application of DPA mechanism if DPA is introduced in China. It attempts to examine the reasons for the inactive role played by corporations in the anti-bribery movement, and to identify the factors that might hinder the public efforts of inducing optimal corporate self-policing measures via DPAs. Following that, **Chapter 8** summarizes the research findings and proposes policy recommendations for the Chinese authorities in terms of designing the Chinese version of DPA and reforming the broader legal system. The main findings are presented, focusing on the importance of engaging corporations in the fight against bribery, strengthening individual accountability in the context of corporate DPAs and promoting corporate compliance, as well as the strategical designing of DPAs to incentivize corporate self-policing measures. Based on the lessons drawn from the DPA policies and practices in the U.S., UK and France and the assessment of China's legal system, this Chapter proposes recommendations for the Chinese policy makers as to the improvement of the CNP to establish a Chinese version of DPA, and the reform of the broader legal system to provide a favorable environment for the well-functioning of the CNP.

The Final Concluding Remarks are provided after Chapter 8 and a short summary of the thesis is provided in the end.

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[187] Nuno Garoupa, "Optimal Law Enforcement and Criminal Organization," *Journal of Economic Behavior and Organization* 63, no. 3 (2007): 470 (noting that plea-bargaining reduces costs of detecting and prosecuting the principal, it also reduces the opportunity costs for the agents and may generate more crime); Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 158 ("improperly designed DPA statutes can, instead, undermine deterrence if they operate primarily to reduce the sanctions imposed on companies for corporate crime").

[188] Arlen and Kraaman, "Controlling Corporate Misconduct," 693 (identifying the corporate's ability to "undertake a variety of actions that increase the probability that wayward agents will be sanctioned", which is termed as policing measures).

Chapter 2 Corporate Criminal Enforcement: A Missing Piece in China's Anti-corruption Enforcement

2.1 Introduction

Stringent anti-bribery criminal laws have been in place since the founding of the People's Republic of China (PRC) in 1949.[1] The PRC Criminal Law criminalizes all types of bribery, including passive and active bribery, public and commercial bribery, bribery in the domestic context and bribery of foreign public officials.[2] In spite of the broad reach, the PRC Criminal Law pays particular attention to bribery-accepting offenses committed by public officials, while bribe-giving activities in the private sector are largely overlooked. Puzzled by the limited success of the high-profile anti-corruption campaigns, the Chinese authorities have gradually realized the harms of commercial bribery and the significance of cutting off the supply-side of bribery. A series of legislative reforms have thus been promulgated to strengthen the legal framework governing active bribery and commercial bribery.[3]

Following a similar pattern as the legislative development, the enforcement of anti-bribery law has also been developed from an emphasis on the officials who accepted bribes to a dual focus on both the demand side and the supply side of bribery.[4] China's high-profile anti-corruption crackdown targeting both "tigers" (high-ranking officials) and "flies" (low-level officials) for bribery-related offenses has received close attention from the international community.[5] Regarding the supply side of bribery, the criminal conviction of GSK China Investment Co. Ltd (GSKCI), leading to a record fine of ¥3 billion ($441 million) and the imprisonment of five senior executives, represents one of the most sensational examples demonstrating the Chinese authorities' determination to fight corporate bribery.[6] However, corporations beyond the intensively-regulated industries such as the financial, healthcare and energy industries are subject to relatively low criminal enforcement risks for bribery-related offenses.[7] A noticeable pattern of China's corporate bribery enforcement is that the individuals are often criminally charged, while the corporations themselves are subject to only administrative sanctions. Even when the

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[1] Information Office of the State Council, *中国的反腐败和廉政建设 (China's Efforts to Combat Corruption and Build a Clean Government)*, December 2010, unofficial English translation at http://www.lawinfochina.com/display.aspx?lib=dbref&id=72 (accessed February 1, 2022).

[2] For a more comprehensive introduction of the anti-bribery provisions under the PRC Criminal Law, see Hui Xu, Sean Wu, and Chi Ho Kwan, "Bribery & Corruption Laws and Regulations 2022-China," *Global Legal Insights*, December 3, 2021, https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/china (accessed March 31, 2022).

[3] See Chapter 2, infra-Section 2.2.1.

[4] Andrew Wedeman, "The Challenge of Commercial Bribery and Organized Crime in China," *Journal of Contemporary China* 22, no. 79 (2013): 18 ("[u]ntil approximately 2005-2006, Chinese prosecutorial practice largely conformed to the spirit of the classic definition of corruption," which focuses on the demand side of bribery and bribery in the public sector).

[5] Tania Branigan, "Xi Jinping Vows to Fight 'Tigers and Flies' in Anti-corruption Drive," *The Guardian*, https://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption (accessed February 1, 2021).

[6] "GlaxoSmithKline Fined $490 m by China for Bribery," *BBC*, September 19, 2014, https://www.bbc.com/news/business-29274822 (accessed February 1, 2021).

[7] Key industries that are severely plagued by bribery or/ have a direct impact on common people's livelihood are typically designated by the enforcement authorities as their main focus for the anti-corruption campaign. Zhenchuan Wang (former deputy chief prosecutor), "关于治理商业贿赂的若干问题 (Several Issues on the Management of Commercial Bribery)," *中国法学 (China Legal Science)*, no. 4 (2006): 105 (claiming that in the background of widespread commercial bribery in all industries, it is necessary to highlight the priority and strive to address the outstanding problems).

corporations are prosecuted and convicted, the only type of criminal penalty they will face is a criminal fine. Moreover, the criminal fine is generally so petty in reality when compared with the value of bribes that it tends to be no more than a slap on the wrist.[8]

As a result of the unbalanced anti-bribery approach, the corporate world is largely missing in the efforts of combating bribery in China.[9] The public enforcement of anti-bribery laws has been undeniably costly, while its efficacy is at best questionable. The periodically intensified enforcement campaigns demand enormous input of enforcement resources and may even call for the mobilization of the entire Party-state at the expense of other governance goals. With the booming number of bribery cases and other criminal cases, the judicial authorities (the term that is commonly used to refer to both the People's Procuratorates and the People's Courts in China) are suffering from an acute shortage of personnel and resources.[10] In spite of the massive investment of resources, the prolonged anti-bribery campaign has failed to substantially improve the (perceived) degree of bribery and corruption in the country.[11] The expensive yet ineffective anti-bribery strategy is in dire need of reform.

In the background of the ever-escalating Sino-U.S. trade conflict and the Covid-19 pandemic, the promotion of economic recovery has become the top priority of the Chinese government.[12] Law enforcement agencies are becoming increasingly uneasy about putting firms and executives in the dock for the fear of paralyzing corporate operation and hurting employment.[13] Moreover, a rising number of China-based tech companies, such as Huawei, Tiktok, ZTE and Tencent, have been implicated in the enforcement actions in the U.S., making it an imperative task for the Chinese authorities to improve the governance and compliance system in the Chinese corporations.[14] In this context, China's SPP is betting on the pilot Compliance Non-prosecution Program (CNP) to address the corporate enforcement challenges and promote corporate compliance. Drawing lessons from the DPA program in the U.S. and other jurisdictions, the CNP is designed to allow local Procuratorates to use their power of approving arrest requests, making charging decisions and giving sentencing suggestions to the court to incentivize corporate compliance development and monitor corporate compliance progress. After the inception in October 2020, the pilot program was later rolled out in over 100 local Procuratorates in China.[15]

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[8] See Chapter 2, infra-Section 2.3.1.
[9] See Chapter 2, infra-Section 2.3.
[10] See Chapter 2, infra-Section 2.3.3.
[11] See Chapter 2, infra-Section 2.3.4.
[12] "三次地方考察，习近平推动复工复产提速扩面 (Xi Jinping Promotes the Acceleration and Expansion of the Recovery of Work and Production during Three Local Inspections)," *Xinhua News Agency*, April 23, 2020, http://www.xinhuanet.com/politics/xxjxs/2020-04/23/c_1125893244.htm (accessed March 30, 2021).
[13] Jianming Tong, "充分履行检察职责 努力为企业发展营造良好法治环境 (Fulfill the Procuratorial Duties and Strive to Create a Good Legal Environment for the Development of Enterprises)," *检察日报 (Procuratorial Daily)*, September 22, https://www.spp.gov.cn/spp/llyj/202009/t20200922_480611.shtml (accessed March 30, 2021) (directing local Procuratorates to consider the pragmatic necessity of protecting business operators and promoting development when approving the arrest request and making charging decisions).
[14] "FCC Designates Huawei and ZTE as National Security Threats," June 30, 2020, https://www.fcc.gov/document/fcc-designates-huawei-and-zte-national-security-threats (accessed March 30, 2021); Kari Paul, "Trump's Bid to Ban TikTok and WeChat: Where are We Now?" September 29, 2020, The Guardian, https://www.theguardian.com/technology/2020/sep/29/trump-tiktok-wechat-china-us-explainer (accessed March 30, 2021); Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," *法学杂志 (Law Science Magazine)*, no. 1 (2021): 59 (noting that the passive situation in the foreign compliance lawsuits forces Chinese authorities and scholars to search for solutions).
[15] "企业合规不起诉改革试点拟扩至 10 个省份，约上百家检察院 (Pilot Reform of Enterprise Compliance Non-Prosecution Planned to Be Expanded to about 100 Procuratorates in Ten Provinces)," March 14, 2021, https://www.sohu.com/a/455616516_114988 (accessed April 15, 2021).

In April 2022, the SPP announced that the pilot program of CNP would be launched nationwide and open to all Procuratorates.[16]

This Chapter aims to identify the challenges confronting the Chinese authorities in the enforcement of anti-bribery laws and introduce the CNP. In addition, it will also examine the CNP and identify the unresolved issues and concerns in the designing and implementation of the program. It proceeds as follows. Following the Introduction, Section 2.2 touches upon the Chinese authorities' increasing emphasis on the supply side of bribery in the form of legislative reforms and enforcement campaigns. The next Section identifies the practical challenges faced by the Chinese enforcement authorities in corporate criminal enforcement and the impacts on the anti-bribery campaigns. After that, Section 2.4 introduces the procuratorial initiatives of promoting corporate compliance through the CNP under domestic and international pressures. This Section aims to clarify the goals of the CNP and analyze whether the program is effective in achieving its goals and addressing the previously-identified corporate enforcement challenges. Section 2.5 concludes with the necessity to improve the CNP based on the lessons drawn from the foreign DPA programs.

2.2 China's Anti-bribery Criminal Laws and Enforcement: Greater Attention to Bribe-givers

A significant feature of China's anti-bribery provisions under the PRC Criminal Law is that greater emphasis is placed on the regulation of public officials as bribe recipients, while bribe-giving offenses are relatively neglected. This unbalanced approach has been widely criticized for the low costs of giving bribes and the failure to combat bribery and corruption, which might ultimately endanger social stability and the ruling status of the CCP.[17] In response, the anti-bribery laws have been strengthened through a series of legislative amendments, significantly expanding the scope of bribery offenses covered by the PRC Criminal Law and raising the bar for the leniency awarded to bribe-givers. While corrupt officials remain the focus of the anti-corruption agencies, bribe-givers have been increasingly targeted by the authorities in order to cut off the supply side of bribery and complement the anti-corruption campaign.[18]

2.2.1 Anti-bribery Provisions under the PRC Criminal Law

In China, a patchwork of laws and regulations include anti-bribery provisions. The primary provisions regulating bribery can be found in the PRC Criminal Law and Anti-Unfair Competition Law (AUCL). The PRC Criminal Law criminalizes both "active bribery" involving individual and organizational wrongdoers, as well as "passive bribery" in both the private and public sectors. AUCL makes commercial bribery a regulatory offense. Business operators in

[16] "检察机关全面推开涉案企业合规改革试点 (Procuratorial Organs Comprehensively Launched the Pilot of Compliance Reform of Enterprises Involved in the Criminal Cases)", *人民日报 (People's Daily)*, April 6, 2022, http://paper.people.com.cn/rmrb/html/2022-04/06/nw.D110000renmrb_20220406_4-10.htm (accessed April 10, 2022).

[17] Shaoping Li, "行贿犯罪执法困局及其对策 (Law Enforcement Dilemma of Bribery Crimes and the Countermeasures)," *中国法学 (China Legal Science)*, no. 1 (2015): 10-12 (noting that the leniency shown to active bribery has contributed to the growing public discontent, the failure to curb the occurrence and expansion of bribery, and the undermining of criminal justice).

[18] Shengping Xu, "行贿罪惩治如何走出困境 (How to Get Bribery Crack-down Out of Dilemma)," *人民检察 (People's Procuratorial Semimonthly)*, no. 16 (2012): 51 (claiming that with the exception of the extortion of bribery, bribe-giving activities are the root and source of bribe-accepting activities).

violation of the commercial bribery provisions of AUCL may be punished with civil liability and administrative liability.[19] Though both the criminal and administrative approaches to bribery are undeniably valuable, this Section chooses to focus on China's anti-bribery provisions in the criminal context in accordance with the scope of this research.

2.2.1.1 Categories of Criminal Offenses of Bribery

The bribery provisions under the PRC Criminal Law criminalizes both "active bribery" (the giving of bribes) and "passive bribery" (the acceptance of bribes). The bribery offenses can be divided into three categories based on the nature of bribe recipients. Giving bribes to, and accepting bribes by, state functionaries,[20] persons close to former or current state functionaries,[21] and public entities[22] are covered by the public bribery provisions (Articles 385-393). Bribery involving staff of companies, enterprises or other entities[23] and bribery of foreign public officials are covered, respectively, by the commercial bribery provisions (Articles 163 and 164, para. 1) and the foreign bribery provision (Article 164, para. 2).

Types of Bribery	Passive Bribery	Active Bribery
Commercial bribery and foreign bribery	Acceptance of bribes by non-state functionaries (Art. 163)	Giving bribes to non-state functionaries (Art. 164, para. 1)
	N/A	Giving bribes to foreign officials (Art. 164, para. 2)
Public Bribery	Acceptance of bribes by state functionaries (Art. 385, 386, 388)	Giving bribes to state functionaries by individuals (Art. 389, 390)
		Giving bribes to state functionaries by entities (Art. 393)
		Brokering bribes to state functionaries as an intermediary (Art. 392)
	Acceptance of bribes by influential persons (Art. 388-	Giving bribes to influential persons (Art. 390-1)

[19] 中华人民共和国反不正当竞争法 (Anti-Unfair Competition Law of the PRC), promulgated in 1993 and revised twice respectively in 2017 and 2019. Article 7 of the AUCL, which was originally Article 8 of the Law, outlaws commercial bribery and subjects the violator to both administrative (Article 19) and civil penalty (Article 17). Under Article 2 of AUCL, it defines the term "business operators" as referring to natural persons, legal persons and unincorporated organizations engaging in commodity production or marketing or the provision of service.

[20] The PRC Criminal Law, Article 93 (defining "state functionaries" as the personnel performing official duties in the state organs. In addition, the personnel listed below are viewed as state functionaries for the purpose of the PRC Criminal Law: (i) personnel performing official duties in state-owned companies, enterprises, institutions or people's organizations; (ii) personnel delegated by state organs, state-owned companies, enterprises or institutions to perform official duties in non-state-owned companies, enterprises, institutions or social groups; (iii) other personnel performing official duties in accordance with laws).

[21] Retired state functionaries, close relatives of current or former state functionaries and others in close relationship with such functionaries, such as distant relatives, friends, lovers, fellow villagers, drivers, school mates, comrade-in-arms and others sharing common interests with the state functionaries are collectively referred to as influential persons. See Guoqing Chen, and Yurong Lu, "利用影响力受贿罪法律适用问题探讨 (Discussion on the Application of Law as to the Crime of Acceptance of Bribes by Utilizing Influence)," *中国刑事法杂志 (Criminal Science)*, no. 8 (2012): 1-2.

[22] Perhaps the most distinctive and confusing feature of China's anti-bribery criminal laws compared with foreign anti-bribery laws is the criminalization of passive and active bribery of public entities, which are not individual persons but organizations. The primary rationale for criminalizing bribery of public entities is that public entities are considered as the fiduciary of the state or the collective, while the acceptance of bribes subordinates the collective's interests to the benefits of small groups. See Jing Xie, "商业贿赂犯罪研究：竞争法和刑法的双重视角 (Research on Commercial Bribery: Dual Perspectives of Competition law and Criminal law)," *刑事法评论 (Criminal Law Review)* 20, no. 1 (2007): 105.

[23] SPC and SPP, 关于办理商业贿赂刑事案件适用法律若干问题的意见 (Opinions on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery), No. 33 [2008] of the SPC, November 20, 2008 ("The 2008 Judicial Interpretation"), Article 2 (interpreting other entities as including permanent organizations such as institutions, people's organizations, villagers' committee, residents' committee and groups of villagers, and temporary organizations such as organization or preparation committee for sports events, theatrical performances or other legitimate activities as well as engineer contracting teams).

	1)	
	Acceptance of bribes by public entities (Art. 387)	Giving bribes to public entities (Art. 391)

Table 1 Types of Bribery Offenses under the PRC Criminal Law

Chinese law-makers have given top priority to the public bribery offenses. The PRC Criminal Law includes a comprehensive and complicated system composed of eleven articles covering all kinds of bribery in the public sector, including direct bribery, bribery of persons who may influence the decisions of state functionaries, and bribery brokerage.[24] In contrast, indirect bribery and bribe-brokering involving non-state functionaries and foreign public officials are beyond the scope of criminalized activities.[25] Moreover, the law also sets severer penalties and/or a lower prosecutorial threshold[26] for persons in violation of public bribery provisions.[27] For example, individuals giving bribes over ¥30,000 (€3846) to state functionaries constitute criminal offenses and face up to life imprisonment.[28] In contrast, bribery of non-state functionaries will only incur criminal punishment if the bribes are over ¥60,000 (€7692) and the highest punishment is 10-year imprisonment.[29]

China ratified the UNCAC in early 2006.[30] Meanwhile, the harms of commercial bribery and the legislative insufficiency in this aspect have been increasingly recognized by the authorities.[31] The ratification of UNCAC and the rising focus on bribery beyond the public sector have resulted in a wave of legislative amendments. Following the high-profile scandals in the healthcare and sports sectors, the Amendment VI to the PRC Criminal Law was introduced in 2006, expanding the commercial bribery provisions to cover bribery of all types of non-state functionaries.[32] The Amendment VIII to the PRC Criminal Law, introduced in 2011,

[24] Hongxian Mo, and Yu Zhang, "我国刑法中的商业贿赂犯罪及其立法完善 (Crime of Commercial Bribery in China's Criminal Law and the Legislative Improvement)," *国家检察官学院学报 (Journal of National Prosecutors College)* 21, no. 2 (2013): 107-108 (claiming that the minor status of commercial bribery in the PRC Criminal Law is incompatible with the ever-complicated and diversified commercial bribery schemes in the society).
[25] Samuel R. Gintel, "Fighting Transnational Bribery: China's Gradual Approach," *Wisconsin International Law* 31, no. 1, (2013): 23-24.
[26] The PRC Criminal Law imposes a minimum monetary threshold for commencing a criminal investigation into suspected bribery violations. Bribes below the prosecutorial threshold will not trigger the criminal investigation or prosecution, though it may be punished as regulatory offenses under AUCL's commercial bribery provision.
[27] However, one exception is bribery of non-state functionaries by entities (Article 164) versus bribery of state functionaries by entities (Article 393). In terms of the penalty against the responsible personnel, the former is punishable with ten-year imprisonment, while the highest penalty for the latter is five-year imprisonment. Mingcan Yin, "单位行贿的立法完善 (On Legislative Improvement to Entity Bribery)," *江西警察学院学报 (Journal of Jiangxi Police Institute)*, no. 5 (2014): 97 (noting that entities were first introduced as a type of bribe-givers in 1987, when the state-owned enterprises accounted for 98.48% of all enterprises. In order to protect state-owned enterprises, the law makers set significantly lower penalties for entity bribery).
[28] The PRC Criminal Law, Article 390; SPC and SPP, 最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释 (Interpretation of the SPC and the SPP on Issues Concerning the Application of Law in the Handling of Criminal Cases of Embezzlement and Bribery), Interpretation No. 9 [2016] of the SPC, April 18, 2016 ("The 2016 Judicial Interpretation"), Article 7.
[29] The PRC Criminal Law, Article 164; SPC and SPP, *The 2016 Judicial Interpretation*, Article 11, para. 3.
[30] See the UN Convention against Corruption, Signature and Ratification Status, https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed March 24, 2021) (China signed the UNCAC on December 10, 2003 and rectified the Convention on January 13, 2006).
[31] Wedeman, "The Challenge of Commercial Bribery and Organized Crime in China," 18 ("[u]ntil approximately 2005–2006, Chinese prosecutorial practice largely conformed to the spirit of the classic definition of corruption," which focused on the demand side of bribery and bribery in the public sector).
[32] Amendment VI to the PRC Criminal Law, adopted on June 29, 2006, Article 16 (the new commercial bribery provisions criminalize not only bribery involving personnel of companies and enterprises, but also bribery involving personnel of "other entities"); Jian An, "关于《中华人民共和国刑法修正案（六）（草案）》的说明 (Instructions on Amendment VI to the PRC Criminal Law)," December 24, 2005, http://www.npc.gov.cn/wxzl/gongbao/2006-07/20/content_5350751.htm (accessed March 24, 2021) (noting that the judicial authority and other relevant departments suggested to criminalize non-state functionaries in entities other than companies or enterprises that engaged in collusion

criminalized bribery of foreign public officials in accordance with the requirements of UNCAC.[33] In December 2020, Amendment XI to the PRC Criminal Law was promulgated to raise the criminal sanctions for non-public officials convicted of the acceptance of bribes, increasing the maximal penalty from fifteen-year fixed imprisonment to life imprisonment.[34]

2.2.1.2 Elements of Bribery Offenses

A prominent feature of the PRC Criminal Law, as identified by a leading Chinese criminal law scholar Chu Huaizhi three decades ago, is that the consequences of violations are severe, yet the scope of prohibited acts is restricted and not comprehensive.[35] Despite continual efforts to expand the scope of offenses and reduce the application of extreme penalty, the PRC Criminal Law is still widely criticized as being excessively tough in the punishment yet overly restrictive in terms of the criminal elements.[36]

In terms of the bribery provisions, the PRC Criminal Law is limited in the scope of prohibited acts when compared with the UNCAC and foreign anti-bribery laws, such as the FCPA in the U.S. and the UKBA. Firstly, the bribery provisions under the PRC Criminal Law deal only with the actual "giving" of bribes, while "promising" or "offering" undue advantages is not covered.[37] Secondly, bribes are narrowly interpreted as including only cash, property and property benefits. Non-property benefits whose value could not be directly measured in the scale of money, such as the provision of sex services, assistance in school entrance or job promotion, are not recognized as a form of bribes and will thus not trigger criminal liability under the PRC Criminal Law.[38] Thirdly, the PRC Criminal Law imposes a minimum monetary threshold for commencing a criminal investigation into suspected bribery violations. Bribes below the prosecutorial threshold will not trigger criminal enforcement, though they may be punished as regulatory offenses under AUCL's commercial bribery provision or other special laws regulating bribery in specific industries.[39] Lastly, the anti-bribery laws set restrictive rules for establishing the intent in the

between power and money, for example, commercial bribery occurred in the medical entities in the drug and medical equipment purchase process).

[33] The PRC Criminal Law, Article 164, para. 2.

[34] Amendment XI to the PRC Criminal Law, adopted in December 2020 and became effective as of March 1, 2021, Article 16, http://npc.people.com.cn/n1/2020/1227/c14576-31980014.html (accessed March 24, 2021); The PRC Criminal Law, Article 163, para. 1.

[35] Huaizhi Chu, "严而不厉：为刑法修订设计政策思想 (Comprehensiveness without Excessive Severity: Designing Policy Ideas for the Revision of Criminal Law)," *北京大学学报哲学社会科学版 (Journal of Peking University (Philosophy and Social Sciences)),* no. 6 (1989): 99-107; Huanzhi Chu, "再说刑事一体化 (Again on the Integration of Criminal Law)," *法学 (Law Science)*, no. 3 (2004): 74-80 (believing that the PRC Criminal Law still features severe sanctions with flawed scope of prohibited acts).

[36] Jianjun Bai, "犯罪圈与刑法修正的结构控制 (Criminal Circle and the Structural Control on the Revision to the Criminal Law)," *中国法学 (China Legal Science),* no. 5 (2017): 87-88 (documenting that over the past two decades, 56 new charges have been added to the PRC Criminal Law and 60 charges have had their criminal elements relaxed); Jianping Lu, and Chuangao Liu, "法治语境下犯罪化的未来趋势 (The Future Trend of Criminalization in the Context of the Rule of Law)," *政治与法律 (Political Science and Law)*, no. 4 (2017): 45 (noting that the PRC Criminal Law still features the narrow criminal circle with overly severe sanctions).

[37] Dong Wei, "约定受贿定性处理的法理研讨 (A Legal Theory Study on the Definition of Agreed Bribery)," *河南社会科学 (Henan Social Sciences)* 25, no. 2 (2017): 73-86 (noting that though the crimes in preparation and attempted crimes are generally penalized under the PRC Criminal Law, in rare cases were the promising or offering of bribes punished as an unaccomplished form of the offense of giving bribes).

[38] Jinwen Feng, "《关于办理商业贿赂刑事案件适用法律若干问题的意见》的理解与适用 (Interpretation and Application of Opinions on Several Issues Concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery)," *人民司法（应用） (The People's Judicature (Application)),* no. 23 (2008): 23-27; Gintel, "Fighting Transnational Bribery," 28-30.

[39] This existence of prosecuting threshold is often criticized for causing the illusion that bribes below the threshold is tolerated, see Jianping Lu, "贿赂犯罪十问 (Ten Inquires into Bribery Crime)," *人民检察 (People's Procuratorial Semimonthly)*, (2005): 24-26; Jianping Lu, and Chuangao Liu, "法治语境下犯罪化的未来趋势 (The Future Trend of Criminalization in the Context of the Rule of Law)," 46 (identifying that the dual regulatory model, i.e., using Criminal Law to punish the most serious violations of law while subjecting misdemeanors to the regulatory laws, is an outstanding feature of China's regulatory framework).

bribery cases. In order to charge a person with bribery offenses, prosecutors need to prove that the act of giving bribes is committed in the hope of seeking *improper* benefits.[40] For cases where bribes are given to a government official yet no explicit or implicit request is made, which is dubbed as "relationship investment", it is difficult to connect the link between the giving of bribes and the intention of obtaining improper benefits for the purpose of establishing the bribery offense.[41]

2.2.1.3 Criminal Liability for Bribery Offenses

Both individuals and entities can be held criminally liable for active bribery offenses under the PRC Criminal Law.[42] Individuals that are found guilty of bribery may be sentenced up to life imprisonment.[43] If entities are convicted of bribery, the double sanctioning mechanism will apply. Not only the entities themselves, but also the personnel who are directly in charge of the matter in question and other personnel who are directly responsible for the crime (collectively referred to as "responsible personnel"), will receive criminal sanctions.[44] The only type of criminal penalty applicable to entities is a fine, which ranges between ¥100,000 (€12,821) and twice the sum of bribes in the bribery cases.[45] In addition, entities convicted of bribery may also face consequences that are often perceived as more frightening than a criminal fine, such as exclusion from governmental procurement or World Bank-funded projects, loan ban and rejection of public listing.[46] Responsible personnel charged with corporate crimes, compared with pure individual defendants that are accused of individual crimes, are subject to much lower criminal sanctions and/or higher prosecutorial threshold.[47] For example, an individual convicted of bribery of state

[40] See, e.g., The PRC Criminal Law, Article 389 (any act of giving state functionaries any money or property in order to seek any improper benefits shall be punished as a crime of giving bribes).

[41] SPC and SPP, *The 2008 Judicial Interpretation*, Article 10 (asking judicial agents to consider the following elements that distinguish bribes from gifts: (i) the background of the exchange of properties, such as the relationships between the parties and their historical acquittance and degree of interaction; (ii) the value of properties that were exchanged; (iii) the reasons, timing and method of the property exchange, and whether property-giver made any specific request to the recipient in connection with his/her official duties; and (iv) whether the recipient sought benefits for the property-giver by taking advantage of his/her position).

[42] Notably, the PRC Criminal Law uses the concept of entity crimes or unit crimes instead of corporate crimes. Entities or units include not only corporations (limited liability companies, joint stock companies, wholly state-owned companies and one-person limited liability companies) and enterprises (individual proprietorships and partnerships), but also public institutions, (state) organs and organizations (people's organizations and social organizations).

[43] The PRC Criminal Law, Article 390.

[44] The PRC Criminal Law, Article 31; SPC, 全国法院审理金融犯罪案件工作座谈会纪要 (Summary of the National Court Symposium on Financial Crime Cases), January 21, 2001 (clarifying that the personnel who are directly in charge of the matter in question is the person who plays the role of decision, approval, instruction, indulgence or command in the commission of entity bribery. It generally refers to the person in charge of the entity, including the legal representative. Other personnel who are directly responsible are the persons who play a great role in the entity crime, including both the manager and the staff of the entity); Hong Li, "完善我国单位犯罪处罚制度的思考 (Reflections on Perfecting the Punishment System for Entity Crimes in China)," *法商研究 (Studies in Law and Business)*, no. 1 (2011): 80-81 (claiming that it is actually triple sanctioning mechanism, involving the entity, the personnel who are directly in charge of the matter in question, and other personnel who are directly responsible for the crime).

[45] It is worth to note that section 64 of the PRC Criminal Law also provides the option of collecting disgorgement or restitution from all convicted offenders, which are assumed to include both individuals and entities. However, disgorgement and restitution are not considered as criminal penalties but civil measures. Hong Li, "完善我国单位犯罪处罚制度的思考 (Reflections on Perfecting the Punishment System for Entity Crimes in China)," 84-86 (criticizing this single type of penalty against entity as not sufficient and overlapping with the fine imposed on responsible personnel); SPC and SPP, *The 2016 Judicial Interpretation*, Article 19.

[46] SPP, 最高人民检察院关于行贿犯罪档案查询工作的规定 (Provisions of the SPP on Inquiries about the Archives on the Crime of Offering Bribes), June 2, 2013, Article 17 (mandating local Procuratorates to provide bribery records to government authorities or other agencies in charge of qualification screening for bidding, procurement … and loan screening); Andrew Boutros, et al., "New Chinese Anti-Bribery Guideline Calls for Blacklisting and Expulsion of Foreign Companies That Pay Bribes in China," *JDSUPRA*, November 30, 2021, https://www.jdsupra.com/legalnews/new-chinese-anti-bribery-guideline-5022125/ (accessed March 9, 2022); For Chinese enterprises and individuals backlisted by the World Bank, see "Procurement - World Bank Listing of Ineligible Firms and Individuals," https://www.worldbank.org/en/projects-operations/procurement/debarred-firms (accessed March 9, 2022).

[47] Zhihui Zhang, "单位贿赂犯罪之检讨 (Reexamination of Crime of Entity Bribery)," *政法论坛 (Tribune of Political Science and Law)* 25, no. 6 (2007): 147 (criticizing the legitimacy of leniency shown to entity crimes for going against the principle of market economy); Xiaonong Liu,

officials may face life imprisonment in the worst scenario, while the highest penalty is five-year imprisonment if the same individual is believed to be acting on behalf of an entity.[48]

China's corporate criminal liability rule is extremely narrow. In order to successfully prosecute a corporation for criminal violations, the prosecuting agency must prove that the crimes (i) were committed in the name of the corporation, namely, the criminal schemes have been collectively discussed and decided within the corporation, or have been decided or approved by the person in charge of the corporation or other authorized persons, and (ii) the majority of criminal proceeds went to the corporation.[49] Considering the fact that authority in modern corporations is often delegated and decentralized, such a liability rule is especially weak for holding medium and large-sized corporations criminally liable for misconducts committed by low-level employees.[50] According to a recent court decision, a corporation may further insulate itself from criminal liability by showing that it has an effective compliance program in place, which demonstrates that the employees' wrongdoings are committed purely for personal benefits rather than out of the corporate will.[51]

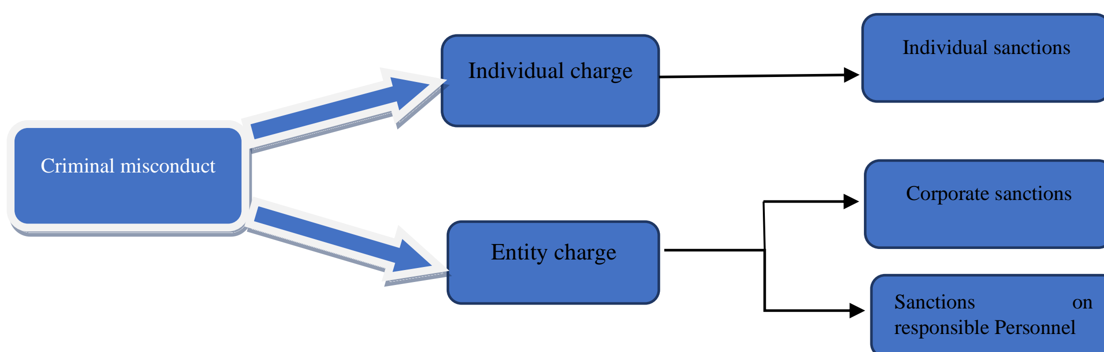

Figure 2 Corporate Liability and Individual Liability under the PRC Criminal Law

and Ping Ye, "论我国单位行贿犯罪的治理 (On the Control of Entity Bribery Crimes in China)," *山东社会科学* (*Shandong Social Sciences*), no. 12 (2018): 166-69 (criticizing the imbalance between the punishment on entity bribery and that on individual bribery for increasing the incidence of entity bribery and complicating the judicial decisions as to the joint bribery between entities and individuals).

[48] The PRC Criminal Law, Article 390 and 393.

[49] See 全国法院审理金融犯罪案件工作座谈会纪要(Summary of the National Court Symposium on Financial Crime Cases), January 21, 2001, (claiming that crimes committed in the name of the entity are entity crimes if the illegal gains belong to the entities); 办理走私刑事案件适用法律若干问题的意见 (Opinions on Some Issues Concerning the Application of Law for Handling Cases of the Crime of Smuggling), jointly released by the SPC, SPP and General Customs Administration on July 8, 2002, Article 18 (interpreting the element of "in the name of the entity" as upon the collective decision of the entity or upon the decision or approval from the person in charge of the entity or other persons with authorization; while adding another element of "seeking illegal profits for the entity or the majority of illegal gains went to the entity").

[50] Hong Li, "单位犯罪中单位意思的界定 (Defining the Intent of the Entity in Entity Crimes)," *法学 (Legal Science)*, no. 12 (2013): 53-160 (criticizing the requirement of collective or leadership decisions as improperly expanding or limiting the responsibility of entity, and being unsuitable for large modern enterprises); James J. Gobert, and Maurice Punch, *Rethinking Corporate Crime* (London: Butterworths/LexisNexis, 2003), 63 ("the identification doctrine propounds a test of corporate liability that works best in cases where it is needed least (small businesses) and works worst in cases where it is needed most (big business)").

[51] Crime of Sale and Illegal Providing Citizen's Personal Information, Criminal Final Written Order No. 89 of 2017 of Lanzhou Intermediate People's Court of Gansu Province; Ken Dai, "'Nestlé Case': Increasing Criminal Enforcement against Infringing Personal Information and Enhanced Data Compliance is Required," August 28, 2017, https://www.linkedin.com/pulse/nestl%C3%A9-case-increasing-criminal-enforcement-against-infringing-dai (accessed August 3, 2019).

A series of judicial interpretations issued by the SPC and SPP enumerate a list of "aggravating circumstances" and "mitigating circumstances" that should be taken into account by the authorities in the prosecution or sentencing of bribery cases.[52] The "aggravating circumstances", which could lower the threshold for the criminal prosecution or the range of punishment, include

(i) offering bribes to three or more persons;
(ii) using illegal gains to bribe;
(iii) offering bribes to public officials responsible for the supervision and management of food, drugs, safe production and environmental protection, etc., for the commission of illegal activities;
(iv) offering bribes to judicial staff to influence judicial decisions; or/and
(v) causing economic losses over ¥500,000 (€6,4103).[53]

On the other hand, the PRC Criminal Law specifies two general mitigating circumstances for all offenses, i.e., voluntary surrender (*zi shou*) and meritorious performance (*li gong*), and includes two special leniency provisions respectively for bribery offenses in the public and private contexts. According to Article 67 of the PRC Criminal Law, those who "voluntarily surrender themselves to the authority" after committing crimes and "truthfully confess the criminal acts" may be given a lighter (within the statutory range of punishment) or mitigated penalty (within the lower range of punishment), or be exempt from punishment if the crime is minor.[54] Article 68 provides that criminals who perform meritorious service, such as reporting crimes committed by other persons to the authority, or providing crucial information for the investigation into other criminal cases, may be given lighter or mitigated penalty or be exempt from punishment if the meritorious service is significant.[55] In order to incentivize confession and cooperation from bribe-givers, the PRC Criminal Law offers more leniency in the bribery context by lowering the bar for voluntary surrender from bribe-givers. Bribe-givers could gain a lighter or mitigated penalty or even the exemption from punishment by making a voluntary confession before a charge is made, even when the authority is already aware of the specific wrongdoing.[56]

2.2.2 Anti-bribery Criminal Enforcement Proceedings and Trends in China

The legislative Amendments were introduced not only to align the domestic laws with the international standards, but also, and more importantly, to boost the anti-corruption campaign. The fight against bribery and corruption has been constantly declared as the priority of the CCP leaderships over the past decades. Even so, the anti-corruption campaign launched by President

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[52] Chinese statutory laws are often very abstract, thus the judicial interpretations issued by the SPP and SPC clarifying the criminal statutes often present the most important guidance for local Courts and Procuratorates.
[53] SPC and SPP, *The 2016 Judicial Interpretation*, Article 7, para. 2.
[54] The PRC Criminal Law, Article 67 (providing that the one who surrenders himself or herself after committing crimes and truthfully confesses the criminal acts may be given lighter or mitigated penalty, or be exempt from punishment if the crime is minor).
[55] The PRC Criminal Law, Article 68; SPC, 关于处理自首和立功具体应用法律若干问题的解释 (Interpretation on Several Issues Concerning the Application of Law in the Handling of Voluntary Surrender and Meritorious Behaviors), Interpretation No. 8 [1998] of the SPC, May 9, 1998, Article 5 (explaining that meritorious service includes prevention of criminal activities of other persons and assistance in arresting other criminal suspects).
[56] The PRC Criminal Law, Article 390, para. 2 (providing lighter or mitigated punishment for bribe-giver involved in public bribery and choosing to voluntarily confess the bribery acts before the prosecution. If the crime is relatively minor and the bribe-giver plays a crucial role in resolving an important case or performs major meritorious performance, a mitigated penalty or even the exemption from penalty may be granted); The PRC Criminal Law, Article 164, para. 4 (offering mitigated punishment or even exemption from punishment for bribe-givers involved in commercial bribery and choosing to voluntarily confess the bribery acts before the prosecution).

Xi Jinping since 2012 is unprecedented in terms of the seniority of officials incriminated and the sweeping scope.[57] An outstanding feature of the current anti-corruption movement is that the legal and institutional footings are emphasized, which helps strengthen the legal framework and promote the institutional reform in the anti-bribery and corruption field.[58] In spite of the legislative and institutional reforms, cracking down on passive bribery involving corrupt officials remains the top priority of China's anti-corruption agencies, a common feature shared by all the anti-corruption campaigns launched by the CCP in the past.[59] Meanwhile, enforcement authorities have initiated several campaigns targeting commercial bribery in several core industries, resulting in a booming number of enforcement actions against or involving corporations.

2.2.2.1 Anti-bribery Enforcement Agencies and Criminal Procedures

Before discussing the trends of China's anti-bribery enforcement actions, it is beneficial to provide some background information as to the enforcement agencies and procedures. In China, the agency responsible for investigating public bribery cases is different from the agency investigating private bribery cases, while the investigating authority is also different from the prosecuting authority. A super anti-corruption agency, National Supervisory Commission (NSC), was set up in 2018 following an amendment to the PRC Constitution and the promulgation of the PRC Supervision Law.[60] The task of investigating criminal bribery offenses involving public officials, which was previously undertaken by the People's Procuratorates, is now within the authority of NSC and local supervisory commissions (SCs).[61] The public security bureau (PSB) is mainly responsible for investigating commercial and foreign bribery cases.[62] However, SCs may take charge of the criminal investigations into commercial or foreign bribery cases if any public officials are involved and play a major role in the bribery scheme. Corporations and executives are thus likely to find themselves under the investigation of SCs in light of the great intervention of political force in economic affairs in China and the dominant presence of SOEs in

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[57] Yongnian Zheng, "十九大与反腐制度建设 (Nineteenth National Congress of CCP and the Anti-corruption System Construction)," *Zao Bao*, September 26, 2017, https://www.zaobao.com.sg/forum/expert/zheng-yong-nian/story20170926-798167 (accessed February 25, 2021) (claiming that the anti-corruption movement since 2012 is unprecedented in terms of the breadth, depth and height).

[58] "习近平：加强反腐倡廉法规制度建设 让法规制度的力量充分释放 (Xi Jinping: Strengthen the Construction of Anti-corruption Legal System, Fully Release the Power of Legal System)," *Xinhua News Agency*, June 27, 2015, http://cpc.people.com.cn/n/2015/0627/c64094-27217702.html (accessed February 25, 2020) (claiming that a comprehensive legal framework is fundamental to eradicating unhealthy work style and corruption); Ling Li, "Politics of Anticorruption in China: Paradigm Change of the Party's Disciplinary Regime 2012–2017," *Journal of Contemporary China* 28, no. 115 (2019): 55-58 (noting that the current campaign stays at a high level throughout Xi's first term, and attributing its impactful and enduring feature to the mutual and endemic relationship between campaign and institutional reform).

[59] Gintel, "Fighting Transnational Bribery," 25 ("China has also historically focused most of its anti-bribery efforts on cracking down on passive bribery rather than active forms of the offense, and it has further concentrated those energies on investigating and punishing domestic officials, as opposed to non-officials, that received the bribes"); Zengke He, "Corruption and Anti-corruption in Reform China," *Communist and Post-Communist Studies* 33, (2000): 243–70 (exploring the causes, features and consequences of corruption and anti-corruption campaigns initiated by the CCP and the Chinese government).

[60] Amendment to the PRC Constitution, adopted on March 11, 2018, Articles 123-127. For the unofficial English version, see Changhao Wei, Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0), NPC Observer, March 11, 2018, https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/ (accessed February 25, 2021).

[61] CCDI and NSC, 国家监察委员会管辖规定（试行） (Provisions on the Jurisdiction of the State Supervisory Commission (for Trial Implementation)), No. 1 Order [2018] of NSC, issued and became effective as of April 16, 2018, Article 12 (providing that the supervisory commissions have jurisdiction over all kinds of bribery offenses, including both public bribery and commercial bribery cases involving civil servants).

[62] The PRC Criminal Procedure Law, Article 19 (providing that the public security organs are the default investigators for all criminal offenses, unless it is specified otherwise); CCDI and NSC, 国家监察委员会管辖规定（试行） (Provisions on the Jurisdiction of the State Supervisory Commission (for Trial Implementation)), Article 21, para. 2 (specifying that the public security organs have jurisdiction over commercial and foreign bribery cases involving non-civil servants).

the socialist market.[63] Following the investigation, cases that are considered by the investigative agencies to be criminal violations will be handed over to the People's Procuratorate for examination and prosecution.[64] According to the Legality Principle, the Procuratorate[65] is required to file a criminal indictment for court trial when the criminal facts have been established, evidence is reliable and sufficient, and the criminal liability of the suspect is to be pursued.[66]

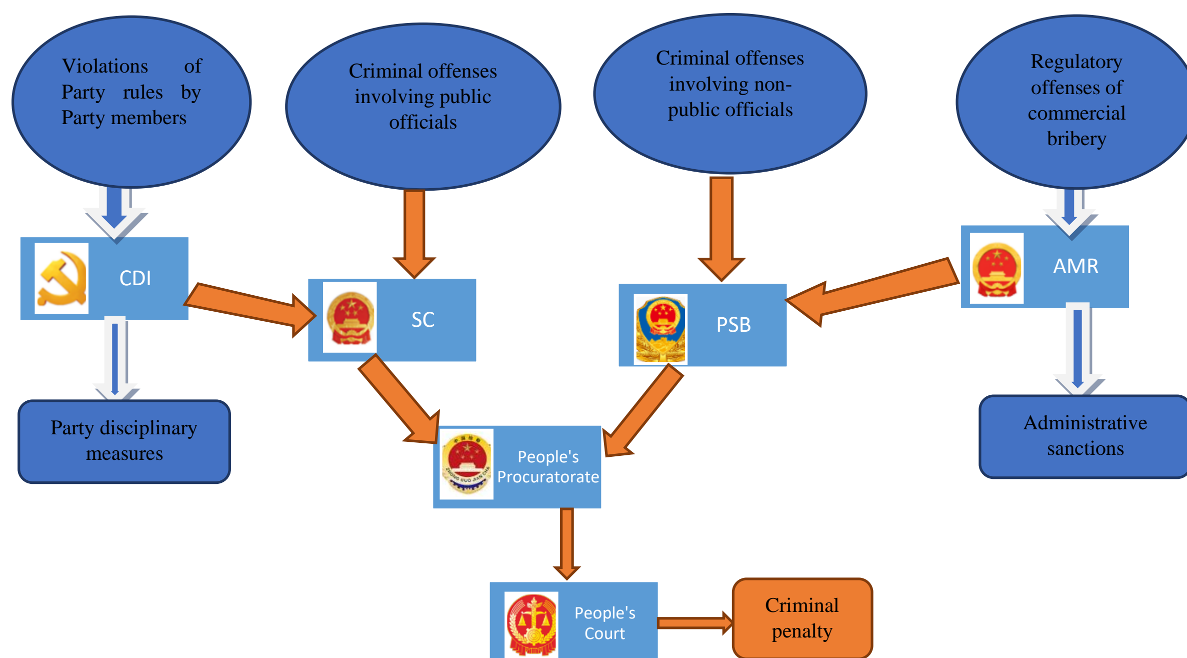

Figure 3 Anti-bribery Enforcement Agencies and Procedure in China[67]

2.2.2.2 Anti-Corruption Campaign: Cracking Down on Corrupt Officials

The strong determination to crack down on corruption is believed to a distinct personal signature of President Xi Jinping. The far-reaching anti-corruption campaign features its target on "tigers" and "fliers" alike, i.e., high-ranking public officials and rank-and-file civil servants.[68] Six national leaders, including Zhou Yongkang, former member of Politburo Standing Committee

[63] Zhenchuan Wang, "关于治理商业贿赂的若干问题 (Several Issues on the Management of Commercial Bribery)," 104 (claiming that given the dominant presence of public-ownership in China's economic system, public officials in charge of resource distribution are the principal recipients of bribes in commercial bribery); Eric Carlson, "Expect More Anti-corruption Enforcement in China," *The FCPA Blog*, March 29, 2018, http://www.fcpablog.com/blog/2018/3/29/eric-carlson-expect-more-anti-corruption-enforcement-in-chin.html (accessed February 25, 2021) (claiming that the establishment of NSC is likely to have an indirect impact on international corporations as more investigations into public officials will lead to more evidence on the source of bribes and NSC is capable of collecting evidence from the private actors).
[64] The PRC Criminal Procedure Law, Article 162; 中华人民共和国监察法 (The PRC Supervision Law), Order No. 3 of the President, promulgated and became effective as of March 20, 2018, Article 45 (4). For the unofficial English translation, see https://www.lawinfochina.com/display.aspx?id=27600&lib=law&SearchKeyword=&SearchCKeyword= (accessed February 25, 2021).
[65] The Constitution and the PRC Criminal Procedure Law entrust the prosecutorial power to the Procuratorate as a whole rather than to individual prosecutors.
[66] The PRC Criminal Procedure Law, Article 176.
[67] AMR refers to Administration for Market Regulation, which replaces the previous Administration for Industry and Commerce (AIC) and is responsible for investigating and sanctioning regulatory offenses under the AUCL, including commercial bribery.
[68] Branigan, "Xi Jinping Vows to Fight 'Tigers and Flies' in Anti-corruption Drive".

(PSC), Guo Boxiong and Xu Caihou, former vice-presidents of the military, have been convicted of corruption and abuse of power.[69] Such high-profile indictments distinguish the current anti-corruption campaign from previous ones by breaking the unwritten rule of "the PSC Immunity" that had been commonly accepted since the Cultural Revolution.[70] In January 2021, Lai Xiaomin, the former secretary of the Party committee and board chairman of China Huarong Asset Management, was executed for accepting bribes of an astounding amount of ¥1.79 billion (€229.5 million), highlighting the severe consequences of violating the anti-bribery laws.[71] During the first term of Xi's presidency, from 2012 to 2017, 122 civil servants or military officials at the provincial-ministerial level or above were investigated for duty-related crimes (a term typically used to refer to bribery and corruption).[72] 2405 public officials at the departmental-bureau level and 15234 officials at the county-divisional level were brought down for similar charges.[73] The establishment of NSC in 2018 further boosted the sweeping anti-corruption campaign. In the year of 2022 alone, 88,000 persons were handed over by SCs to the Procuratorates for prosecution based on charges of corruption or dereliction of duty.[74] 104 former officials at the provincial-ministerial level or above were prosecuted in the same year.[75]

The large-scale anti-corruption campaign extends beyond the national border. A high number of loaded officials escaped from China to foreign countries or regions that were once perceived as "safe havens". According to a leaked document from the Anti-Money Laundering Bureau of the Central Bank of China, 16,000-18,000 corrupt officials or senior executives of SOEs went missing or fled overseas from mid-1990s to 2008. They took along corrupt proceeds of up to ¥800 billion (€102.6 billion), accounting for 2% of China's GDP in 2008.[76] The fleeing of corrupt officials not only results in heavy losses of state assets, but also corrodes the Party's anti-corruption efforts. In an attempt to seek international cooperation for the repatriation of corrupt officials fleeing abroad and the recovery of stolen assets, CCP and different government agencies launched the "Operation Foxhunt" in 2014 and the "Skynet Action" in 2015.[77] According to the

[69] For a more comprehensive list of the officials that are implicated in the anti-corruption campaign initiated in 2012, see the Wikipedia page: "Officials Implicated by the Anti-corruption Campaign in China (2012–2017)," https://en.wikipedia.org/wiki/Officials_implicated_by_the_anti-corruption_campaign_in_China_(2012%E2%80%932017) (accessed February 26, 2021).
[70] "周永康落马凸显中央从严治党决心 (Zhou Yongkang's Downfall Highlights the Central Committee's Determination to Run the Party Strictly)," *People's Daily,* July 29, 2014, http://opinion.people.com.cn/n/2014/0729/c1003-25365691.html (accessed February 26, 2021) (using Zhou Yongkang's downfall to rebuke the conjecture such as "PSC Immunity" and "Bureaucrats Protect Each Other").
[71] "Former China Huarong Chairman Executed After Bribery Conviction," *Reuters*, January 29, 2021, https://cn.reuters.com/article/us-china-huarong-lai/former-china-huarong-chairman-executed-after-bribery-conviction-idUSKBN29Y1P2 (accessed February 26, 2021).
[72] Jun Zhang, 2020 年最高人民检察院工作报告 (Work Report of the SPP of 2020), March 15 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed March 15, 2021).
[73] *Ibid.* For a more visualized image of the magnitude of Xi's anti-corruption campaign, see "Visualizing China's Anti-Corruption Campaign," August 15, 2018, https://www.chinafile.com/infographics/visualizing-chinas-anti-corruption-campaign (accessed March 8, 2021).
[74] Jun Zhang, 2022 年最高人民检察院工作报告 (Work Report of the SPP of 2020), March 17, 2023, https://www.gov.cn/xinwen/2023-03/17/content_5747234.htm (accessed March 20, 2023).
[75] *Ibid*.
[76] "我国腐败分子向境外转移资产的途径及监测方法研究 (A Study on the Ways of Transferring Assets Abroad by China's Corrupt Officials and Monitoring Methods)," June 2008, http://paper.usc.cuhk.edu.hk/webmanager/wkfiles/8152_1_paper.pdf, at 6-7 (accessed February, 2021). Though the document was subsequently proclaimed as unreliable by the authority, many researchers believe the actual number would be similarly, if not more, shocking, see "中国金融学会有关论文作者向公众致歉并发声明 (A Statement of Apology to the Public by the Author of a Specific Article of the Chinese Financial Society)," June 17, 2011, http://news.cntv.cn/china/20110617/109355.shtml (accessed Feb. 16, 2018).
[77] "公安部部署开展'猎狐 2014' 缉捕在逃境外经济犯罪嫌疑人专项行动(Ministry of Public Security Deployed to Carry Out 'Operation Foxhunt 2014' to Capture Economic Criminal Suspects Fleeing Abroad)," July 22, 2014, https://web.archive.org/web/20160304130907/http://www.mps.gov.cn/n16/n1237/n1342/n803715/4084632.html (accessed February 26, 2021); "中国启动反腐'天网'行动 将抓一批外逃贪官 (China Launched Anti-corruption 'Skynet' Action to Catch a Group of Corrupt Officials Fleeing Abroad)," March 26, 2015, http://news.sina.com.cn/c/2015-03-26/175731649218.shtml (accessed February 26, 2021).

work report of NSC, 7831 persons were brought back to China from 120 countries and regions from 2014 to June 2020, recovering criminal proceeds of ¥19.65 billion (€2.52 billion) in total.[78]

2.2.2.3 Increasing Focus on Active Bribery and Commercial Bribery

While corrupt officials remain to be the main focus of China's anti-corruption agencies, the supply side of bribery has been increasingly targeted in order to cut off the supply of bribes and reinforce the anti-corruption movement.[79] Bribe-givers are no longer perceived as vulnerable victims who have no choice but to bribe powerful officials.[80] A nation-wide campaign against commercial bribery was launched in late 2005 and early 2006, aiming at cracking down on bribe-giving activities and private-to-private bribery.[81] Between 2013 and 2017, 37,277 bribe-givers in total were sent to the Procuratorates for prosecution, accounting for 39.48% of all suspects in the bribery-related crimes.[82] By contrast, prosecution of bribe-givers only accounted for 26.3% in the previous five-year period.[83] In September 2021, CCDI, NSC, SPC and SPP jointly released the Opinions on Further Promoting the Joint Investigation of the Giving and Acceptance of Bribes.[84] The Opinions requires the enforcement agencies to enhance the focus on bribe-givers when dealing with anti-bribery and corruption cases. Furthermore, it demands the relevant authorities to explore the blacklist system and strengthen their coordination in the joint punishment of bribe givers.[85] As a result, 9083 persons were prosecuted for the acceptance of bribes and 2689 for the offering of bribes in 2021, a respective increase of 21.5% and 16.6% compared with the year before.[86]

The most imposing Chinese corporate enforcement action in the anti-bribery field should be undoubtedly attributed to the charge brought against GSKCI with regard to the "bribe to prescribe" scheme. In 2014, GSKCI was awarded a record penalty of ¥3 billion ($441 million) by the Changsha Intermediate People's Court for paying bribes to doctors in China's state-owned hospitals.[87] Mark Reilly, the former general manager of GSKCI, and four other senior executives of GSKCI were sentenced to suspended imprisonment of two to three years.[88] Another high-

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[78] Xiaodu Yang, "国家监察委员会关于开展反腐败国际追逃追赃工作情况的报告 (Report of the NSC on the International Anti-corruption Chasing of Fleeing Criminals and Recovery of Stolen Goods)," August 10, 2020, http://www.ccdi.gov.cn/toutiao/202008/t20200810_223555.html (accessed February 26, 2021).

[79] Shengping Xu, "行贿罪惩治如何走出困境 (How to Get Bribery Crack-down Out of Dilemma)," 51 (claiming that with the exception of the extortion of bribery, bribe-giving activities are the root and source of bribe-accepting activities).

[80] Shaoping Li, "行贿犯罪执法困局及其对策 (Anti-bribery Law Enforcement Dilemma and the Countermeasures)," 12-13 (noting the general sympathy for bribe-givers in the society, which leads to the weak enforcement against bribe-giving offenses).

[81] Wedeman, "The Challenge of Commercial Bribery and Organized Crime in China," 25-28 (describing the crack-down on commercial bribery in 2005 and 2006 in detail).

[82] Jianming Cao, 2017 年最高人民检察院工作报告 (Work Report of SPP of 2017)," March 9, 2018, http://www.spp.gov.cn/spp/gzbg/201803/t20180325_372171.shtml (accessed February 26, 2021).

[83] Jianming Cao, 2012 年最高人民检察院工作报告 (Work Report of the SPP of 2021), March 10, 2013, http://www.spp.gov.cn/spp/gzbg/201303/t20130316_57131.shtml (accessed February 26, 2021).

[84] CCDI, NSC, SPC and SPP, et al, "关于进一步推进受贿行贿一起查的意见 (Opinions on Promoting the Joint Investigation of the Giving and Acceptance of Bribes)," September 8, 2021, https://www.ccdi.gov.cn/toutiao/202109/t20210908_249687.html (accessed September 21, 2022).

[85] See also, Calvin Chan, et al, "Anti-Corruption Enforcement in China – Increased Penalties for Bribe-Givers," Reed Smith, May 23, 2022, https://www.reedsmith.com/en/perspectives/2022/05/anti-corruption-enforcement-in-china-increased-penalties-for-bribe-givers (accessed September 13, 2022).

[86] Jun Zhang, 2021 年最高人民检察院工作报告 (Work Report of the SPP of 2021), March 15, 2022, https://www.spp.gov.cn/spp/gzbg/202203/t20220315_549267.shtml (accessed September 13, 2022).

[87] Keith Bradsher, and Chris Buckley, "China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case," *New York Times*, September 19, 2014, https://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html?_ga=2.83385558.1911301585.1614365058-1569969157.1614365058 (accessed February 26, 2020).

[88] Grace Zhu, and Fanfan Wang, "Meet the Glaxo Executives Convicted in China," *Wall Street Journal,* September 19, 2014, https://blogs.wsj.com/chinarealtime/2014/09/19/meet-the-glaxo-executives-convicted-in-china/ (accessed August 11, 2018).

profile bribery-related accusation was filed against four senior executives of Rio Tinto, the Anglo-Australian iron ore giant, for infringing on commercial secrets and accepting bribes as non-state functionaries.[89] The four executives were sentenced to imprisonment ranging from 7 to 14 years, while no charge was filed against the corporation.[90]

The prosecution of GSKCI foreshadowed a stronger anti-corruption storm in the healthcare industry, which sees no sign of weakening even at this moment.[91] Rampant commercial bribery in the healthcare industry is blamed for the artificially high drug price, which has become prohibitively expensive for common people and might even undermine the social stability.[92] Statistics showed that 386 medical personnel, including 82 directors of hospitals and 25 deputy directors, were penalized in 2016 for accepting bribes.[93] As to the supply side of commercial bribery, 438 pharmaceutical enterprises or their staff were accused of offering bribes between 2016 and July 2017 according to the published criminal judgements.[94] A number of well-known companies were reported to have been implicated in unethical practices, such as Gan & Lee,[95] Cheng Da,[96] Pfizer, General Electric,[97] Novartis,[98] and AstraZeneca.[99] The intense enforcement actions put the whole healthcare industry on high alert. Medical representatives that once connected medical enterprises with doctors are now being viewed as a "sensitive group".[100]

2.3 Missing Corporate Enforcement in China's Anti-bribery Strategy: Reasons and Impacts

Despite the eye-catching investigations, prosecutions and severe sanctions, the durability and long-term effect of China's anti-bribery movement have been constantly questioned. The anti-bribery criminal enforcement actions focus more on wrongdoers in the individual context when compared with corporate offenders and responsible personnel associated with such corporations.

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[89] Kit Chellel, Fran Wild, and David Stringer, "When Rio Tinto Met China's Iron Hand," *Bloomberg*, July 13, 2018, https://www.bloomberg.com/news/features/2018-07-13/did-china-hack-rio-tinto-to-gain-a-billion-dollar-advantage (accessed February 26, 2021).

[90] Zhao Hejuan, "Rio Tinto Executives Sentenced to Jail," *Caixin Global*, Mar 29, 2010, https://www.caixinglobal.com/2010-03-29/rio-tinto-executives-sentenced-to-jail-101018451.html (accessed February 26, 2020).

[91] CCDI, "重点领域正风观察, 深挖彻查医疗腐败 (Observation on Anti-Bribery Practices in Key Areas, Thorough Investigation of Medical Corruption)," August 4, 2020, http://www.ccdi.gov.cn/toutiao/202008/t20200804_223204.html (accessed February 26, 2021).

[92] Yu Zhu, "高强表示商业贿赂是造成医药行业混乱的重要原因 (Gao Qiang Attributed Commercial Bribery to Chaos in Healthcare Industry)," *Xinhua News Agency*, March 28, 2006, http://www.gov.cn:8080/jrzg/2006-03/28/content_238809.htm (accessed February 26, 2021).

[93] DXY, "2016 年 386 位医务人员被查 (386 Medical Personnel Investigated in 2016)," *Medical Top Line*, https://www.sohu.com/a/122843218_374886 (accessed February 26, 2021).

[94] "医药商业贿赂套路多 18 个月牵涉 400 余药企 (Multiple Tricks in Pharmaceutical Commercial Bribery, 400 Pharmaceutical Enterprises Implicated in Medical Commercial Bribery within 18 Months)," *新京报 (Beijing News)*, July 18, 2017, http://epaper.bjnews.com.cn/html/2017-07/18/content_688603.htm (accessed February 26, 2021).

[95] See Adam Jourdan, "China Drugmaker Gan & Lee Investigating Allegations It Paid $130 million in Bribes," *Reuters,* September 11, 2013, https://www.reuters.com/article/china-ganlee-bribery/china-drugmaker-gan-lee-investigating-allegations-it-paid-130-mln-in-bribes-idUSL3N0H71LZ20130911 (accessed February 26, 2021).

[96] Sanban Yi, and Yingzhe Xu, "疫苗行业商业贿赂成风 成大生物卷入 5 起行贿案件 (Commercial Bribery in the Vaccine Industry Became a Common Practice, Chengda Biotechnology Implicated in 5 Bribery Cases)," July 26, 2018, http://www.wabei.cn/p/201807/2317010.html (accessed February 26, 2021).

[97] Xiuhui Dai, "300 余家医药企业卷入贿赂案 (Over 300 Pharmaceutical Enterprises Involved in Bribery Cases)," *法治周末报 (Legal Weekly)*, August 1, 2017, https://www.sohu.com/a/161960183_99923264 (accessed February 26, 2021) (noting that two criminal convictions of bribery indicated the involvement of Pfizer and General Electric).

[98] Qingqing Chen, "Swiss Drugmaker Novartis Faces Bribery Allegations in China," *Global Times*, April 5, 2018 https://www.globaltimes.cn/content/1096505.shtml (accessed February 26, 2021).

[99] Lucy Tobin, "AstraZeneca Executive Detained after Chinese Police Raid Shanghai HQ," *Independent,* July 23, 2013, https://www.independent.co.uk/news/business/news/astrazeneca-executive-detained-after-chinese-police-raid-shanghai-hq-8727173.html (accessed February 26, 2021).

[100] Andrew Jack, and Patti Waldmeir, "Bribery Claims Infect Drug Companies' Dealings in China," *Financial Times*, September 23, 2013, https://www.ft.com/content/93990558-2156-11e3-a92a-00144feab7de (accessed February 26, 2021).

The missing attention to corporate bribery can be mainly attributed to the practical difficulties and scruples of corporate investigations and prosecutions. The low enforcement risk confronting corporations largely explains the missing role of corporate actors in the compliance with anti-bribery laws and the fight against bribery. Without the cooperation from corporate actors, corporate enforcement turns out to be burdensome and demanding for the under-staffed and ill-equipped anti-bribery agencies and judicial authorities. This Section will identify the prominent features and difficulties associated with China's anti-bribery enforcement actions and attempt to account for these features in the broader legal and non-legal contexts.

2.3.1 Low Criminal Enforcement Risks for Corporations Involved in Bribery

A distinct pattern of China's enforcement of anti-bribery laws is that individuals are the main target of criminal enforcement actions, while corporations themselves are more likely to be subject to administrative sanctions. In a study that reviews duty-related criminal cases involving listed corporations and their affiliated entities, it is found that only 3% included charges against the corporations.[101] The other 97% targeted purely individuals, being distributed evenly among high-ranking executives, middle managers and rank-and-file employees.[102] About 90% of corporate personnel that were individually charged with bribery-related offenses received jail sentences.[103] The conviction of GSKCI is a rare exception for big international corporations to stand in the dock for bribery.[104] Even when corporations are actually accused of bribery charges, they are more likely to avoid a harsh criminal fine.[105] An empirical study examining 107 judicial judgements based on the charge of entity bribery found that the average fine is ¥269,000(€3,448), while the average sum of bribes is ¥1,256,168 (€161,047).[106]

Corporations engaged in overseas bribery are faced with even lower risks of investigation and prosecution launched by the Chinese authorities. The provision criminalizing bribery of foreign public officials was added in the PRC Criminal Law in 2011 to fulfil China's commitments under the UNCAC.[107] After a decade, however, this foreign bribery provision remains of only symbolic importance. There has been no publicly-known investigation nor any effort to operationalize this abstract provision.[108] Apart from the difficulties inherent in the enforcement of foreign bribery laws, China's lack of interest in prosecuting foreign bribery violations can be

[101] Junfeng Chang, "上市公司刑事犯罪研究——上市公司涉及的职务犯罪 (Research on Criminal Cases of Listed Corporations: Duty-related Crimes Involving Listed Corporations)," *King & Wood Mallesons*, https://www.lexology.com/library/detail.aspx?g=d21a4728-17cc-42de-a4d8-e533ddaa6580 (accessed March 1, 2021).
[102] *Ibid.*
[103] *Ibid.*
[104] David Barboza, "As China Battles Corruption, Glaxo Lands in the Cross Hairs," *New York Times*, November 2, 2016, https://cn.nytimes.com/china/20161102/china-rules-glaxo-bribes-sex-tape-whistleblower-cautionary-tale-1/en-us/ (accessed March 1, 2021) (noting that there had been the policy of going easy on foreign enterprises in China for a long time as the government didn't want to cause embarrassment or give outsiders the impression that China is plagued with corruption).
[105] Gintel, "Fighting Transnational Bribery," 15 ("[c]riminal fines, unspecified in the provision as to their amount, have not been staggeringly high when applied in the domestic context for official and non-official bribery, at least not high enough to garner the kind of media attention that recent FCPA penalties have received").
[106] Mingcan Yin, "单位行贿的立法完善 (On Legislative Improvement to Entity Bribery)," 95-96 (examining all the 107 court judgements based on the charge of entity bribery that were publicly available on the Lawyee, an extensive Chinese database on the finalized cases).
[107] Amendment VIII to the PRC Criminal Law, promulgated on February 25, 2011 and became effective as of May 1, 2011, Article 29.
[108] Enshu Li, "贿赂外国公职人员入罪欠缺实操性 (No Maneuverability of the Criminalization of Bribery of Foreign Public Officials)," *中新社* (*China News*), October 13, 2011, http://www.chinanews.com/fz/2011/10-13/3384852.shtml (accessed March 24, 2021); Gintel, "Fighting Transnational Bribery: China's Gradual Approach," 8-11 (noting that though China's foreign bribery provision lacks immediate legal effect, it is an important step showing the CCP's desire to combat bribery).

largely attributed to political concerns.[109] The prosecution of Chinese companies for foreign bribery violations could dampen the companies' incentives to invest in foreign regions that are prone to bribery, undermining the leadership's Going Out Policy and the Belt & Road Initiative aiming at encouraging foreign investment.[110] Most companies that follow the Belt & Road Initiative and invest in the infrastructure projects overseas are fully or majority owned or controlled by the government, which further reduces the authorities' motivation to actively investigate and prosecute overseas bribery.[111]

Moreover, foreign corporations are subject to particularly low criminal enforcement risks in China as well. In the recent decade, the Chinese subsidiaries of multinational corporations have been occasionally targeted in the anti-bribery campaign, as is the case with GSKCI and Rio Tinto. However, such high-profile corporate prosecutions are exceptional in reality. Most of the corporations accused of FCPA violations for bribery occurring in China are not subsequently pursued by the Chinese authority.[112] The policy of "going easy on foreign enterprises" is widely believed to be out of investment and tax concerns possessed by local authorities, who are keen to attract foreign investment and boost local employment.[113] In addition, prosecuting a multinational corporation for bribery originating in China might even draw Beijing in a diplomatic dispute with its home country, and force the Chinese leadership to wash its dirty laundry in front of the international audience.[114]

In contrast with the low criminal risks, corporations are more likely to be targeted in the administrative enforcement actions for violating AUCL's commercial bribery provision. According to the *China Compliance and Anti-Commercial Bribery Report* 2016-2017, 71.43% of the surveyed companies acknowledged that they had been investigated by the administrative

[109] Tina Søreide, "Regulating Corruption in International Markets: Why Governments Introduce Laws They Fail to Enforce," in *The Oxford Handbook on International Economic Governance and Market Regulation,* ed. Eric Brousseau, et al (Oxford University Press Online, 2019): 2 (out of 29) (identifying technical, organizational and political obstacles to efficient enforcement of foreign bribery laws); Gintel, "Fighting Transnational Bribery," 10 (acknowledging that it takes time to investigate and build a case, while noting that the authority has ample opportunities to test new law "given that the Chinese appear to be significant contributors to the global supply of the type of bribery that the provision supposedly prohibits").

[110] Bertram Lang, "Engaging China in the Fight against Transnational Bribery: 'Operation Skynet' as a New Opportunity for OECD Countries," *2017 Global Anti-Corruption and Integrity Forum*, 3 (noting that the growing presence of Chinese companies in the international market increases "corrupt competition", while these companies acting in line with the government's policy face no or little legal sanctions for overseas bribery at home).

[111] Gintel, "Fighting Transnational Bribery," 21 ("many of those Chinese businesses are likely to be partially and even completely state-owned, giving the CCP a strong incentive as an equity interest holder to refrain from hindering itself").

[112] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," *法学 (Law Science)*, no. 9, (2014): 103-115 (providing a long list of multinational enterprises receiving hefty penalties from foreign regulators for bribery in China but not pursued by the Chinese government).

[113] Chong Yu, "在华外国公司商业贿赂犯罪的实证研究与刑法规制 (Empirical Research and Criminal Law Regulation of Commercial Bribery Crime Committed by Foreign Companies Operating in China)," *犯罪研究 (Criminal Research)*, no. 1 (2013): 49-54 (criticizing the approach of neglecting or over-indulging foreign firms engaged in bribery in China, and attributing the frequent commercial bribery scandals involving foreign companies to the lax regulation based on investment and the tax concerns); Freddie Dawson, "What China's Anti-Corruption Investigation Means For International Business," *Forbes*, July 31, 2014, https://www.forbes.com/sites/freddiedawson/2014/07/31/what-china-security-zsar-anti-corruption-investigation-means-for-international-business/#43c9cf6ac2b4 (accessed March 25, 2021) (noting that China's eager to learn technical know-how and the economic system based on the export model once led to a certain "flexibility" for foreign firms when it came to compliance; but it is about to change as China has gained more knowledge in manufacturing and starts to move to the domestic consumption model).

[114] David Barboza, "As China Battles Corruption, Glaxo Lands in the Cross Hairs," *New York Times*, November 2, 2016, https://cn.nytimes.com/china/20161102/china-rules-glaxo-bribes-sex-tape-whistleblower-cautionary-tale-1/dual/ (accessed August 20, 2018) (noting that there had been the policy of going easy on foreign enterprises in China for a long time as the government didn't want to cause embarrassment or give outsiders the impression that China is plagued with corruption).

enforcement agencies, while 30% eventually received administrative sanctions.[115] By comparison, only 3.9% were implicated in criminal investigations, while 1.3% received criminal punishments in the end.[116]

The focus of criminal enforcement authorities on individuals can be explained by the restrictive corporate liability rule, low sanctions for the convicted corporations and responsible personnel, and the fear for the collateral consequences of corporate criminal enforcement. As introduced in Section 2.2.1.2, China's corporate criminal liability rule for the attribution of an employee's misconduct to a corporation is extremely restricted.[117] It is thus less burdensome for the prosecuting agency to seek only the individual criminal liability.[118] Besides, it was noted above that under the PRC Criminal Law, responsible personnel charged with corporate crimes are subject to much lower criminal sanctions or/and higher prosecutorial threshold when compared with pure individual defendants.[119] Given the clear leniency shown to responsible personnel associated with corporate bribery, and the petty corporate fine following corporate criminal conviction, the Procuratorates have understandably less passion for bringing corporate bribery charges.[120] Moreover, the strategy of targeting corporate executives rather than the corporations themselves helps the Party to demonstrate its zero tolerance against corruption, without sacrificing the local government's interests in tax revenue, economic development and employment.[121]

The choice of bringing administrative rather than criminal enforcement actions against corporate entities can be better understood in the broader context of anti-bribery legal framework. Firstly, administrative enforcement actions can result in monetary sanctions as high as or even higher than a criminal fine.[122] Business operators in violation of AUCL's commercial bribery provision may be given an administrative fine of between ¥100,000 (€12,821) and ¥3 million (€384,615), confiscation of illegal proceeds, and revocation of business license in the most serious cases.[123] Secondly, from a procedural perspective, administrative enforcement agencies are subject to less demanding procedural rules and evidential standards than criminal investigators for the purpose

[115] China Institute of Corporate Legal Affairs, Wolters Kluwer, and Fangda Partners, "2016-2017 中国合规与反商业贿赂调研报告 (2016-2017 China Compliance and Anti-commercial Bribery Report)," Chart 20, at 51.
[116] *Ibid.*
[117] See *supra* notes 49-51.
[118] Shaoping Li, "行贿犯罪执法困局及其对策 (Anti-bribery Law Enforcement Dilemma and the Countermeasures)," 10 (noting that though entity bribery cases are widespread, few entities are criminally investigated and sanctioned as a result of the difficulties in the identification of the nature of cases or the role of specific individuals, investigation and the enforcement of penalty).
[119] See *supra* note 47.
[120] Brandon L. Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014): 6 (noting that before the introduction of the sentencing guideline in the U.S., "given the modest sentences for companies, it was often not worth the effort to prosecute them"); Hong Li, "完善我国单位犯罪处罚制度的思考 (Reflections on Perfecting the Punishment System for Entity Crimes in China)," 82 (claiming that the alleged misconducts constitute entity crime instead of individual crimes is becoming an important defense strategy to help the criminal wrongdoers to escape the justice).
[121] Shaoping Li, "行贿犯罪执法困局及其对策 (Anti-bribery Law Enforcement Dilemma and the Countermeasures)," 15 (noting that the anti-bribery policy at the regional level often shows excessive leniency to influential entities or their directors engaged in bribery schemes based on the concerns of local economic development, tax revenues and employment).
[122] Ruihua Chen, "论企业合规的中国化问题 (On the Issues of the Sinicization of Corporate Compliance)," *法律科学 (Science of Law)*, no. 3 (2020): 45 (noting that owing to the inherent drawbacks of China's entity criminal liability system, the entities in violation of administrative law may receive even harsher sanctions than those in violation of criminal law).
[123] 中华人民共和国反不正当竞争法 (Anti-unfair Competition Law), Article 7 (outlawing commercial bribery and subjects the violator to both administrative (Article 19) and civil penalty (Article 17).

of conducting investigations and imposing sanctions.[124] Considering the exacting requirement as to the collection of evidence for criminal cases, regulatory agencies are often reluctant to hand over cases to the Procuratorates after the detection of corporate misconduct. Other self-serving motives, such as increasing the department budget and glorifying the case-resolving record, also play an important role in the regulatory agencies' decisions.[125] Based on the publicly-accessible information, in the year of 2013, only 20 commercial bribery cases were handed over to the criminal enforcement agencies by Administrations for Industry and Commerce (AICs) nationwide, the regulatory enforcement agency under the AUCL and later replaced by Administrations for Market Regulation (AMRs).[126] As a result, corporate bribery cases that constitute criminal offenses are likely to be processed as regulatory offenses and do not have the opportunity to enter into the criminal proceedings.[127]

2.3.2 Lack of Technology, Resources and Personnel to Adequately Enforce Anti-Bribery Laws

Regarding the investigation and prosecution of bribery violations, factors that seriously restrain corporate enforcement in other jurisdictions, such as the exacting due process restrictions,[128] the ubiquity of legal privileges[129] and the high costs and uncertainty of criminal trials,[130] do not play an equally important role in China due to its unique criminal procedural rules. Nevertheless, Chinese anti-corruption agencies generally lack the technology, expertise and staff needed to effectively enforce the anti-bribery laws.[131] The enforcement agencies rely heavily on the testimony of suspects, especially the testimony of putative bribe-givers, to build their cases.[132] Technical investigative measures, such as electronic interception, telephone monitoring, email inspection and covert investigation, are often unfamiliar to, and rarely employed by, the Chinese

[124] Garoupa, "The Economics of Business Crime," 10 ("[a] regulatory penalty is less costly and entails a higher probability of effective sanction for the offender, due to a lower burden of proof and disregard for mental states or other qualifications of the offender's misconduct").

[125] Songnian Ying, and Jian Feng, "行政罚款制度的困境及其破解——以证券行政处罚为例 (The Dilemma of Administrative Penalty System and Its Solution - Taking Securities Administrative Penalty as An Example)," *求索 (Seeker),* no. 1 (2021): 145 (noting that the department funding and performance evaluation standard are often based on the "income" of the department in the form of fines and confiscation).

[126] Yingbo Yu, "反不正当竞争法施行 20 年查案 54 万件 (540,000 Cases Investigated in the 20 Years of AUCL Enforcement)," *法制日报 (Legal Daily)*, November 28, 2013, https://www.chinacourt.org/article/detail/2013/11/id/1151958.shtml (accessed March 1, 2021).

[127] Søreide, "Regulating Corruption in International Markets: Why Governments Introduce Laws They Fail to Enforce," 11-14 (out of 29) (noting that corruption often has implications on other areas that are subject to the regulation of specific enforcement institutions; there is often inadequate coordination between regulatory institutions and anti-bribery agencies).

[128] Under the PRC Criminal Procedure Law, the defendants do not have the right to silence or the presence of lawyer during the police interrogation. In addition, a search warrant can be easily obtained by the investigative agency with the approval of its own head, without any involvement of the court. Moreover, the exclusionary evidential rule is interpreted narrowly to apply only to verbal evidence, while the request for the exclusion of illegal evidence is rarely granted by the judge, let alone impacting the result of the proceeding, see Weimin Zuo, and Rongjie Lan, "Exclusionary Rule of Illegal Evidence in China: Observation from Historical and Empirical Perspectives," in *Do Exclusionary Rules Ensure a Fair Trial*: *A Comparative Perspective on Evidentiary Rules,* ed. Sabine Gless, and Thomas Richter (Cham: Springer, Cham, 2019): 307-328 (noting that the application for the exclusionary rule is rare and unlikely to be approved by the judge, let alone influencing the outcome of the case).

[129] Xu Xi, "A Comparative Study of Lawyers' Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality," *Tsinghua China Law Review* 46, no. 1 (2009): 48-61 (noting the duty of confidentiality under the Chinese laws is different from attorney-client privilege as it does not entitle a party to refuse the demand from the authority regarding the communication between the attorney and the client); *Wultz v. Bank of China*, 11 Civ. 1266 (SAS), 2013 U.S. Dist. Lexis 154343 (S.D.N.Y., Oct. 24, 2013) ("the duty of confidentiality is an ethical obligation and not an evidentiary protection analogous to the attorney-client privilege").

[130] The rate of conviction in the Chinese criminal justice system is as high as 99.99%, see China Law Society, *Law Yearbook of China* (Press of Law Yearbook of China), 2003-2014 (the rate of acquittal ranges from 0.06% to 0.70% between the year of 2002 and 2013).

[131] Zengke He, "Corruption and Anti-corruption in Reform China," *Communist and Post-Communist Studies* 33, (2000): 252-53 (noting that "limited funds, obsolete technical means and equipment, and insufficient personnel training" all restrict the capability of anti-corruption agencies).

[132] Mingrong Li, "贪污贿赂犯罪案件口供依赖的破解 (The Solution to the Problem of High Dependency on Oral Confession in Corruption and Bribery Cases)," *国家检察官学院学报 (Journal of National Prosecutors College) 24*, no. 2 (2016): 129 (noting that according to the interview conducted among 150 judges, prosecutors, and lawyers, 95.7% of interviewees believe that oral confession is very important in bribery cases, while none think it is non-important).

criminal enforcement agencies.[133] The authorities' reliance on testimony is widely blamed for the excessive mercy shown to bribe-givers, which in turn leads to the limited success of the anti-bribery campaigns in controlling bribery.[134]

Enforcement agencies and judicial authorities are suffering from a chronic shortage of personnel in face of the booming caseload as a result of the large-scale anti-bribery campaigns.[135] In the time of campaigns, the entire Party and government agencies are often mobilized to combat bribery, which to a certain extent helps to complement the lax enforcement at normal times.[136] However, such great concentration of enforcement resources is often at the expense of other governance goals, casting doubts on the sustainability of the intensive anti-bribery campaigns.[137] Besides, with the introduction of multiple Amendments to the PRC Criminal Law, a large number of minor offenses have been criminalized and flowed into the criminal justice system.[138] In the year of 2016, a record number of 63,000 individuals faced criminal trials in the first-instance courts nationwide for embezzlement and bribery offenses.[139] The number represents a sharp rise of 251% compared with the year of 2000, when 17,931 individuals were tried based on the same offenses.[140] However, the number of court personnel has only slightly increased by about 18% between 1995 and 2014, from 168,571 to 198,800.[141] The average workload for each judge is even higher than what the data suggest considering the actual distribution of personnel in the judicial system. About 58% of court personnel are formal judges, meaning that a judge may have fewer than one judicial assistant on average.[142] Due to the scarcity of support staff,

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[133] *Ibid,* 136 (from the interview with over 40 anti-bribery investigators in the Procuratorates, finding that technical investigation measures are used to track the suspects only, but not for the collection of evidence); Shaoping Li, "行贿犯罪执法困局及其对策 (Anti-bribery Law Enforcement Dilemma and the Countermeasures)," 14 (attributing the infrequent use of technical investigation measures to the poor equipment conditions and technical inability in the enforcement agencies).

[134] Shengping Xu, "行贿罪惩治如何走出困境 (How to Get Bribery Crack-down Out of Dilemma)," 52 (noting that local Procuratorates often have no choices but to offer leniency to bribe-givers to encourage their cooperation, which actually leads to the uncontrolled bribery misconducts).

[135] "案多人少 广东反贪缺人手 (Huge Caseload versus Inadequate Personnel: A Shortage of Personnel in the Anti-corruption Agencies in Guangdong)," *一财网 (Yi Cai)*, July 29, 2014, https://www.yicai.com/news/4000242.html (accessed March 21, 2021).

[136] Minxin Pei, "How Not to Fight Corruption: Lessons from China," *Daedalus* 147, no. 3 (2018): 217 (noting that "periodic and intense anticorruption campaigns" present one of the pillars of the CCP's approach to combating corruption); Xianxing Tang, "中国治理困境下政策工具的选择——对'运动式执法'的一种解释 (The Choice of Policy Tools in China's Governance Dilemma: An Explanation for 'Campaign-Style Enforcement')," *探索与争鸣 (Exploration and Free Views)*, no. 2 (2009): 31-35 (attributing the Chinese government's reliance on campaign-style enforcement to the ability to include particular issues in the government agenda, concentrate governmental and social resources, and promote coordination between different departments).

[137] Pei, "How Not to Fight Corruption: Lessons from China," 217 ("[d]uring an anticorruption campaign, the entire CCP is mobilized to accomplish a political objective chosen by its top leader. Consequently, anticorruption campaigns consume an inordinate amount of time, energy, and attention of Chinese officials at all levels, at the expense of other important governance goals").

[138] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," *法学研究 (Chinese Journal of Law)*, no. 4 (2016): 79-80 (claiming that the Chinese government has been using the criminal laws to intervene in the social life more aggressively under the trend of activism and functionalism); Weidong Chen, "认罪认罚从宽制度研究 (On the Leniency System)," *中国法学 (China Legal Science)*, no. 3 (2016): 50-51 (noting the influx of large number of minor offenses in the criminal justice system following the Amendments VIII and IX to the PRC Criminal Law, and the abolishment of the labor camps).

[139] Qiang Zhou, 2017 年最高人民法院工作报告 (Work Report of the SPC of 2017), February 28, 2018, http://www.court.gov.cn/zixun-xiangqing-82602.html (accessed March 21, 2021).

[140] Yang Xiao, 2000 年最高人民法院工作报告 (Work Report of the SPC of 2000), March 10, 2001, http://www.china-judge.com/fybg/gzbg14.htm (accessed March 21, 2021).

[141] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," 80 (noting that from 1995 to 2015, the criminal caseload increased by 127.29%, while the number of judges rose only by 18%).

[142] Lin Na, *"*案多人少：法官的时间去哪儿了 (Large Caseload versus Inadequate Personnel: Where Did the Judge's Time Go)," *人民法院报 (People's Court Daily),* March 16, 2014, http://rmfyb.chinacourt.org/paper/html/2014-03/16/content_78542.htm?div=-1 (accessed March 21, 2021) (noting that the number of judges seems not too low by looking at the total number of judges or the number of judges per capita, yet judges are often pressured with high workload and have to work overtime due to the outdated work style, the heavy administrative work, the inadequate judicial assistants, etc.).

judges often have to devote a large amount of their valuable time to administrative work.[143] Moreover, some higher-level judges, such as the president of the tribunal or the president of the court, are often burdened with administrative or managing tasks, thus further increasing the pressure on front-line judges.[144]

Recent judicial reforms could further exacerbate the tension between the heavy caseload and limited judicial personnel. Firstly, the supreme judicial authorities have been actively rolling out the trial-centered judicial reform since 2016.[145] In the Chinese criminal justice system, PSB as the criminal investigative agency has traditionally enjoyed a powerful position, rendering the charging decisions made by the Procuratorate and court trials more of a formality to confirm and endorse the results of investigation.[146] The set-up of SCs as the investigating authority for bribery cases involving civil officials has further tipped the scales towards investigators. It is not uncommon that criminal trials in China last only for one or two hours without cross-examination of any witnesses or experts.[147] Unlike the traditional investigation-centered litigation mode, the trial-centered judicial reform calls for a more substantive role played by the court in the criminal justice system, such as promoting the confrontation between the prosecution and the defense, more cross-examination, and a higher percentage of timely announcement of judgements after the trial.[148] Aiming to strengthen the protection of the defendants' rights, the reform is likely to increase the problem of judicial staff shortage as judges would have to spend substantively more efforts and time coping with the same number of criminal cases.[149]

Another relevant development is the judicial personnel quota reform. According to the reform plan, formal prosecutors and judges should account for less than 39% of the headcount in the agency, judicial assistants 46%, while another 15% is reserved for administrative staff.[150] As a result, the number of formal prosecutors nationwide was reduced from 160,000 to 87,000, and judges from 210, 000 to 120,000 in the year of 2017.[151] The quota reform attempts to free prosecutors and judges from cumbersome administrative work, streamline the judicial authorities

[143] *Ibid.*
[144] *Ibid.*
[145] SPP, SPC, Ministry of Public Security, et al, 关于推进以审判为中心的刑事诉讼制度改革的意见 (Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System), No. 8 [2016] of the SPC, July 20, 2016.
[146] Jiahong He, *冤案讲述: 刑事司法十大误区 (Story on Unjust Cases: Ten Mistakes in Criminal Justice)* (Taipei: Yuanzhao Publishing, 2014), 134-135 (claiming that the criminal justice system in China resembles an "assembly line", where the investigation is the core process and the role of prosecution and judgment is marginalized).
[147] Xin Fu, "Public Prosecutors in the Chinese Criminal Trial – Courtroom Discourse from the Prosecution Perspective," *International Journal of Legal Discourse* 1, no. 2 (2016): 408-411 (noting that prosecutor rarely request their witnesses to appear in the courtroom, but mainly rely on their written evidence to prove the case); Weimin Zuo, "认罪认罚何以从宽: 误区与正解——反思效率优先的改革主张 (Why Leniency for the Admission of Guilt and Acceptance of Punishment: Reflections on the Efficiency First Reform Proposal)," *法学研究 (Chinese Journal of Law)* 39, no. 3 (2017): 167-68 (finding that criminal trials normally take ten minutes to two hours depending on the type of trial procedures).
[148] SPP, SPC, Ministry of Public Security, et al, 关于推进以审判为中心的刑事诉讼制度改革的意见 (Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System); Fu, "Public Prosecutors in the Chinese Criminal," 414 (finding that few judgements, accounting for 12.5%, were immediately announced after the trial).
[149] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," 80 (believing that the trial-centered judicial reform may actually worsen the problem of large caseload).
[150] Weidong Chen, "认罪认罚从宽制度研究 (On the Leniency System)," 51.
[151] Jun Zhang, 2017 年最高人民检察院工作报告 (Work Report of the SPP of 2017), March 9, 2018, https://www.spp.gov.cn/spp/gzbg/201803/t20180325_372171.shtml (accessed March 22, 2021); 徐家新就司法责任制等综合改革试点工作答问 (Xu Jiaxin Answered Questions on Judicial Responsibility System and other Comprehensive Reform Pilot Work), July 5, 2017, http://www.court.gov.cn/fabu-xiangqing-49802.html (accessed March 21, 2021) (acknowledging that the number of judges before the reform was over 210,000, while following the reform, only 120,000 people were authorized to handle cases independently).

and pave the way for better salary and higher status for formal prosecutors and judges.[152] However, whether the quota reform can achieve the desired effects is dubious. Many have voiced concerns over the fact that a large percentage of the quota has been secured by the higher-level judges in the court, who are often tasked with heavy bureaucratic affairs and have rarely enough time or energy to handle cases in reality.[153] In addition, the former prosecutors or judges demoted to judicial assistants are very likely to leave the judicial agencies, making it impossible to ensure the adequate number of judicial assistants in the short term.[154] In a word, the judicial reforms might unexpectedly aggravate the pressure on prosecutors and judges in face of the mounting caseload.

2.3.3 Undesired Economic Implications of Corporate Criminal Enforcement

Though criminal enforcement presents one of the most powerful ways to punish bribery, it carries many undesirable consequences as well, especially in the corporate context. China's criminal investigation is notorious for the high rate of pre-trial detention.[155] One empirical study on the criminal enforcement risks confronting listed companies and their executives found that out of the 286 responsible personnel implicated in the criminal cases, 261 were detained in the investigation stage and 179 were later arrested;[156] 60.84% of those appearing before the first-instance court for trial were still held in custody.[157] It also discovered that the criminal proceedings can be especially protracted, as most cases took 6 to 30 months from the start of investigation to the conclusion of the first-instance trial.[158] Responsible personnel are not only subject to a high rate of prolonged pre-trial detention, but may ultimately receive a long-term jail sentence for their role in the bribery schemes once convicted.[159] As for the corporate entities themselves, the criminal justice authorities are used to applying coercive measures, such as seizing, detaining or freezing of corporate property, during the investigation period.[160] The same

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[152] Xiaohong Yu, "The Meandering Path of Judicial Reform with Chinese Characteristics," in Björn Ahl (ed.), *Chinese Courts and Criminal Procedure: Post-2013 Reforms* (Cambridge: Cambridge University Press): 42-43 (noting that the reform aims to slim down the bench, increase the judicial efficiency and make way for pay raise).

[153] Ruihua Chen, "法官员额制改革的理论反思（Theoretical Reflection on the System Reform of the Specified Number of Judge)," *法学家 (The Jurist)*, no. 3 (2018): 4-6 (noting that the presidents of court or divisions at different levels have generally taken seats within the quota in addition to their administrative management work and become super-judges. Other judges often have to share part of their workload).

[154] Bin Liu, "从法官'离职'现象看法官员额制改革的制度逻辑 (On the Institutional Logic of the Judicial Quota Reform from the Perspective of the Phenomenon of Judges' Resignation), " *法学 (Law Science),* no. 10 (2015): 52-53 (noting that former judges are likely to have no passion for auxiliary work, and it is unrealistic to recruit sufficient number of experienced assistants from the job market in the short term).

[155] Jun Zhang, 2020 年最高人民检察院工作报告 (Work Report of the SPP of 2020), March 8, 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed March 22, 2021) (reporting that the pre-trial detention rate decreased from 96.8% in 2000 to 53% in 2020); Shu Shuo Si Fa, "这五年'审前羁押'状况改善了吗？303 万文书里有答案 (Has the Pretrial Custody Situation Improved During the Last Five Years: An Analysis of 3.03 Million First-instance Judgements)," December 4, 2018, https://www.thepaper.cn/newsDetail_forward_2704356 (accessed March 22, 2021) (noting that although the situation has been greatly improved following the amendment to the Criminal Procedure Law, the rate of pretrial custody is as high as 57.55%. 84.55% of defendants under pretrial custody are later awarded with imprisonment penalty, in which case the application of state compensation law is not appliable).

[156] Under the PRC Criminal Procedure Law, the criminal investigative agency may decide to detain the criminal suspects for 3 days and may extend the period to seven days and another 30 days in complicated cases before requesting the Procuratorate's approval of arrest; the Procuratorate has normally 7 days, which can be extended to 14 days, to decide whether to approve the arrest request. The period of arrest is normally two months in the investigative stage, an additional one month in the stage of the examination for prosecution, and another one month in the trial stage. But such time restraints can be extended multiple times for various reasons through relatively easy procedures.

[157] Hongliang Xu, "2016—2017 年度中国上市公司高管犯罪案例研究报告 (Research Report on the Criminal Cases involving Senior Executives in China's Listed Companies from 2016 to 2017)," Beijing DHH Law Firm, August 15, 2018, https://mp.weixin.qq.com/s/2cZCnHlutWQd7j1kFODzqQ (accessed March 22, 2021).

[158] *Ibid.*

[159] The PRC Criminal Law, Articles 163, 164, 390, 390-1, 391 and 393.

[160] Fenfei Li, "论企业合规检察建议 (On the Procuratorial Recommendation of Enterprises Compliance)," *中国刑事法杂志 (Criminal Science),* no. 1 (2021): 101-102 (noting that the authority frequently takes coercive investigative measures against corporate assets or puts the director of privately-owned enterprises in custody, leading to the result that "the case is solved, but the enterprise is destroyed").

study found that coercive investigative measures were used against corporate property in 131 out of the 180 sample cases, while in many other cases such measures were not applied just because there were no illegal gains.[161]

Moreover, criminal conviction of bribery offenses may bring destructive collateral consequences to both the company and the high-ranking management. China's Social Credit System, which has drawn much attention and controversy in the western world, exacerbates the legal and business risks for individuals and companies implicated in the bribery and corruption schemes.[162] The Social Credit System relies on new technologies to systematically monitor corporate behavior, allows the violations detected and sanctioned by one government agency to be shared with more than 30 other participating agencies or even the public, and uses algorithms to rate an individual or a company based on all relevant positive and negative information.[163] The aim is to build a society of trust and punish untrustworthy behavior. A bribery conviction can significantly reduce the social credit rating of a company, subjecting the company to a higher frequency of inspection and audits and more difficulties in obtaining permits or licenses or other governmental approvals under the "joint sanctions approach".[164] As the social credit score also serves as a reference by the securities regulators and banks, companies engaged in commercial bribery may find it impossible to go public or maintain their listing status, or receive financial support from domestic banks or multilateral development banks.[165] Those in the highly regulated industries, such as the pharmaceutical companies and construction companies, may be even blacklisted from bidding for projects funded by the government agencies or state-owned institutions in the same province or nationwide.[166]

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[161] See *supra* note 157.
[162] Nicole Kobie, "The Complicated Truth about China's Social Credit System," *Wired*, https://www.wired.co.uk/article/china-social-credit-system-explained (accessed August 14, 2022); Helen Hwang, and Eric Carlson, "China's Social Credit System Applies to Companies and Impacts Compliance," *FCPA Blog*, September 5, 2019, https://fcpablog.com/2019/09/05/chinas-social-credit-system-applies-to-companies-and-impacts/ (accessed August 14, 2022).
[163] The State Council, 国务院关于印发社会信用体系建设规划纲要（2014—2020 年）的通知 (Notice of the State Council on Printing and Distributing the Plan for Establishing a Social Credit System (2014–2020)), June 27, 2014, http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm (accessed August 14, 2022); European Chamber, and Sinolytics, *The Digital Hand: How China's Corporate Social Credit System Conditions Market Actors*, https://www.sinolytics.info/wp-content/uploads/2021/05/Sinolytics_The-Digital-Hand-How-Chinas-Corporate-Social-Credit-System-Conditons-Market-Actors.pdf (accessed August 14, 2022), at 10-19.
[164] Anti-Unfair Competition Law, Articles 7 and 26 (penalizing commercial bribery as unfair competition practice and requiring the administrative sanctions to be included in the credit record of the business operator); European Chamber, and Sinolytics, *The Digital Hand: How China's Corporate Social Credit System Conditions Market Actors*, at 15-16 ("[t]he principle of joint sanctions - meaning that all relevant government authorities levy sanctions based not only on the rating they are directly responsible for, but also in response to negative ratings in all rated fields—is one of the most important characteristics of the Corporate SCS [social credit system]").
[165] SPP, 最高人民检察院关于行贿犯罪档案查询工作的规定 (Provisions of the SPP on Inquiries about the Archives on the Crime of Offering Bribes), June 2, 2013, Article 17 (mandating local Procuratorates to provide bribery records to government authorities or other agencies responsible for qualification screening for bidding, procurement … and loan screening); For Chinese enterprises and individuals backlisted by the World Bank, see "Procurement - World Bank Listing of Ineligible Firms and Individuals," https://www.worldbank.org/en/projects-operations/procurement/debarred-firms (accessed March 22, 2022); see also Adam Jourdan, "China Drugmaker Gan & Lee Investigating Allegations It Paid $130 million in Bribes," September 11, 2013, *Reuters*, https://www.reuters.com/article/china-ganlee-bribery/china-drugmaker-gan-lee-investigating-allegations-it-paid-130-mln-in-bribes-idUSL3N0H71LZ20130911 (accessed March 22, 2021) (China's largest insulin maker Gan & Lee Pharmaceuticals was implicated in a commercial bribery scandal in 2013 during its application for IPO, the review of which was subsequently terminated by the Issuance Examination Committee of China Securities Regulatory Commission).
[166] National Health and Family Planning Commission, "关于建立医药购销领域商业贿赂不良记录的规定 (Regulations on the Establishment of Commercial Bribery Records in the Field of Pharmaceutical and Medical Purchase and Sale)," December 25, 2013, http://www.nhc.gov.cn/yaozs/zcwj/201312/ef92cb05dee341a18fff7b3e00eb1156.shtml (accessed March 23, 2021) (stating that pharmaceutical enterprises and their representatives that have been confirmed of violating anti-commercial bribery laws and regulations or Party policies may be put in the blacklist and barred from providing drugs and medical supplies to the state-owned or state-financed medical institutions in the same providence or nationwide for two years); National Healthcare Security Administration, " 医药价格和招采信用评价的操作规范（2020 版）(Operating Manual on the Drug Pricing and Procurement Credit Rating)," December 30, 2020, http://www.gov.cn/zhengce/zhengceku/2020-11/28/content_5565653.htm (accessed March 23, 2021) (mandating the implementation of a "credit rating system" for medical device and

In light of the collateral consequences of coercive investigative measures and corporate conviction, corporate criminal enforcement could paralyze business operation and even endanger corporate existence.[167] The corporations' ability to fully pay the financial penalties and compensate victims would also be undermined. Such potential consequences of corporate criminal enforcement clash with the authorities' goal to promote economic recovery and growth. The miraculous economic growth rate in the past decades is often touted by the CCP to demonstrate the superiority of China's "whole-nation system", which refers to the Party's ability to mobilize national resources and personnel to achieve specified goals.[168] The authorities are thus keen to protect firms, especially those with big balance sheets, from criminal prosecution.[169] Private enterprises that are crucial to economic growth have been suffering long-term discrimination in comparison with their SOE peers.[170] Amid the ever-escalating China-U.S. trade conflict and the Covid-19 pandemic, the necessity to protect enterprises, especially the private enterprises, becomes even more pressing.

2.3.4 Enforcement-Oriented and State-Centric Strategy Fails to Effectively Control Bribery

The anti-corruption campaign since 2012 is unprecedented in terms of the extent, the number of enforcement actions and the severity of punishment. Despite the investment of huge resources and the risks of negative economic implications, the high-profile campaign has not achieved the desired effect in controlling bribery and corruption. In 2022, China ranked 65th out of 180 countries on Transparency International's CPI regarding the perceived degree of corruption in the public sector.[171] China consistently scores around 40 out of 100 points (with 0 being highly corrupt and 100 being highly clean) between 2012 and 2022.[172] The sweeping and long-lasting anti-corruption movement has had little measurable effect in promoting China's ranking on the CPI.

pharmaceutical manufacturers, distributors, logistics companies and corporate agents); "湖南: 让行贿人一次违法处处受限 (Hunan: Let Bribers be Limited Everywhere for Breaking the Law Once)," March 25, 2022, https://www.ndrc.gov.cn/fggz/fgfg/dfxx/202203/t20220325_1320361.html?code=&state=123 (accessed September 19, 2022) (discussing the development of the blacklisting system in Hunan province for engineering companies engaged in bribery).

[167] Emily Feng, "How China's Massive Corruption Crackdown Snares Entrepreneurs Across The Country," NPR, March 4, 2021, https://www.npr.org/2021/03/04/947943087/how-chinas-massive-corruption-crackdown-snares-entrepreneurs-across-the-country?t=1639826318948 (accessed December 19, 2021).

[168] Wenting Xie, et al, "China Solemnly Declares Complete Victory in Eradicating Absolute Poverty," *Global Times*, February 25, 2021, https://www.globaltimes.cn/page/202102/1216520.shtml (accessed March 1, 2021) (claiming that "China's achievement in poverty alleviation shows the progress of the country's 'whole nation system' - China can concentrate its efforts and resources to do major things and realize development").

[169] Shaoping Li, "行贿犯罪执法困局及其对策 (Anti-bribery Law Enforcement Dilemma and the Countermeasures)," 15 (noting that local authorities often decide to offer leniency to directors of influential enterprises in the region for the fear of affecting economic growth, tax income or employment).

[170] National Bureau of Statistics, "国家统计局发布新中国成立 70 周年经济社会发展成就系列报告之二———经济结构不断升级 发展协调性显著增强 (National Bureau of Statistics Released a Serial Report on the Achievements of Economic and Social Development in the 70th Anniversary of the Founding of New PRC- Part II: the Economic Structure has been Continually Upgraded and Developed, and the Coordination has been Significantly Enhanced)," July 8, 2019, http://www.stats.gov.cn/tjsj/zxfb/201907/t20190708_1674587.html (accessed April 13, 2021) (reporting that there are more than 25 million private enterprises in China, contributing to more than 50% of the tax revenue, 60% of the GDP, fixed asset investment and foreign direct investment, 80% of urban employment, 90% of the rate of new employment); "Why China's Private Sector is So Anxious," *Caixin Magazine*, October 9, 2018, https://www.caixinglobal.com/2018-10-09/editorial-why-chinas-private-sector-is-so-anxious-101332971.html (accessed March 8, 2021) ("[p]rivately owned businesses still face many obstacles, including difficulty accessing markets and obtaining loans, simply because they are not state-owned").

[171] Transparency International, Corruption Perceptions Index, https://www.transparency.org/research/cpi (accessed February 5, 2023).

[172] *Ibid.*

Global enforcement actions against bribery of foreign public officials provide additional insight into the prevalence of bribery in China. With 69 concluded FCPA enforcement actions involving bribes paid to Chinese public officials and SOE executives, China has a larger share on the list of FCPA enforcement actions than any other jurisdictions.[173] The high number of FCPA enforcement actions involving bribery misconducts originating in China can be explained by various factors, including strong foreign investment in the country, as well as the significant presence of SOEs in the Chinese market that makes many business persons "foreign officials" for the purpose of FCPA.[174] Though neither the perception of corruption nor the number of global enforcement actions precisely shows the actual magnitude of bribery in the country, the figures at least highlight the severity of bribery in China and call for a reconsideration of China's anti-bribery approach.[175]

In order to explain the paradox between the intensive anti-bribery campaigns and the endemic bribery in reality, commentators have proposed two possible theories in general. Some critics question the genuine goal of the massive crackdown on corruption launched by the CCP. They hold the theory that the campaign has been mainly employed by the leadership to wipe out political rivals in the power struggle.[176] Another less cynical theory believes that the fight against corruption serves to justify the legitimacy of China's one-Party rule and to maintain the stability of the political system.[177] Purifying the Party of corrupt officials helps buttress the CCP's claim that it should remain as the sole ruling power in China more than seven decades after winning the civil war: CCP is not only competent to deliver economic success, but can also rule the nation in a self-restrained way based on the rule of law.[178] The rampant bribery is widely blamed for many of China's serious social problems, including the artificially high drug price, the lax regulation of food and product safety, and the widening gap between the wealthy and the poor.[179] Scholars have estimated that the direct costs of corruption could account for 3% of China's

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[173] Stanford Law School, Sullivan & Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse, Heat Maps of Related Enforcement Actions, http://fcpa.stanford.edu/geography.html (accessed November 16, 2022) (Brazil is on the second of the list with 32 FCPA enforcement actions).

[174] Daniel Chow, "The Interplay between China's anti-Bribery Laws and the Foreign Corrupt Practices Act," *Ohio State Law Journal* 73, no. 5 (2012): 1017 (noting that "China poses special risks for MNCs under the FCPA" and attributing it to the heavy state imprints in almost everywhere in the countries and the business culture that tolerates petty corruption); Mike Koehler, "The Unique FCPA Compliance Challenges of Doing Business in China," *Wisconsin International Law Journal* 25, no. 3 (2007): 416-25 (noting the unique FCPA risks in China "given the prevalence of SOEs in that country as well as certain cultural norms and expectations of doing business").

[175] Jakob Svensson, "Eight Questions about Corruption," *The Journal of Economic Perspectives* 19, no. 3 (2005): 21-24 (discussing the different indicators to rank corruption across countries, while acknowledging the difficulties in measuring corruption).

[176] Benjamin Kang Lim, David Lague, and Charlie Zhu, "Special Report: The Power Struggle Behind China's Corruption Crackdown," *Reuters*, May 23, 2014, https://www.reuters.com/article/us-china-corruption-special-report-idUSBREA4M00120140523 (accessed December 18, 2021); Echo Hui, "China's False War on Corruption," September 4, 2019, https://thewalrus.ca/corruption-chinas-false-war-on-corruption/ (accessed December 18, 2021).

[177] Lang, "Engaging China in the Fight against Transnational Bribery," 6 ("with the omnipresent abuse of power for personal gain eroding the legitimacy of one-party rule, concerns for legitimacy and system stability ‑ rather than human rights or economic efficiency – are now at the core of CCP anti-corruption efforts"); Konstantinos Tsimonis, "China and the UN Convention Against Corruption: A 10-year Appraisal," August 6, 2016, https://theasiadialogue.com/2016/08/06/china-and-the-united-nations-convention-against-corruption-a-10-year-appraisal/ (accessed February 28, 2021) ("[a]nticorruption policy is dominated politically and institutionally by the Party which strives to maintain its legitimacy by 'cleaning itself' mainly through the periodic intensification of normative and punitive measures targeting its personnel during the so-called anticorruption 'campaigns'").

[178] Gintel, "Fighting Transnational Bribery," 5-7 (noting that "China has continued to experience the astonishing growth that allows the CCP leadership to deliver the 'quid pro quo of rising living standards' to its people", yet being aware of the fact that "this level of economic progress is unsustainable in the long run… the CCP's efforts over the past decade have shifted toward 'rule of law' reform in order to soften the landing during an inevitable economic slowdown").

[179] "China to Tighten Drug Safety Checks," *China Daily*, February 27, 2007, http://www.chinadaily.com.cn/china/2007-02/27/content_815284.htm (accessed May 3, 2018); YanZhong Huang, "In China, Food Safety is Threatened by an Increasingly Opaque Political System," Jan 10, 2021, https://www.scmp.com/magazines/post-magazine/long-reads/article/3116884/china-food-safety-threatened-increasingly-opaque (accessed December 18, 2021).

annual GDP.[180] In any case, the control of bribery and corruption is crucial to the ruling status of CCP and the social stability.

The strategy adopted by the Chinese authorities in the combating of corruption is subject to no less criticisms than the goal of the anti-corruption campaign. In spite of the periodic intensification of enforcement actions, the authorities are less enthusiastic about promoting institutional and fundamental reforms aimed at preventing and controlling bribery, such as mandatory asset disclosure for public officials and judicial independence.[181] Researchers have long realized the fallacy of "fight[ing] corruption by fighting corruption", which is only valuable for the authorities as a strategic and expedient way to tackle the problem of corruption and solicit public support.[182] However, the enforcement-centered approach involving booming investigations, prosecutions and monetary sanctions call for huge investment of enforcement resources in a short period of time.[183] Meanwhile, enforcement campaigns are generally less effective than preventive measures in the sense that the damages already caused by corruption are difficult to erase and the fundamental factors underlying corruption are better addressed in advance.[184] Moreover, the periodic and temporary anti-corruption campaigns might also foster opportunistic business behavior, as corporations would reasonably choose to seek patronage through expensive gifts and extravagant meals at ordinary times and lie low in the time of enforcement campaigns.[185]

In addition, China's anti-bribery enforcement strategy features heavy reliance on the state actors with few inputs from the civil society or the business community.[186] The civil society involving non-governmental organizations (NGOs), community groups and news media is subject to strict scrutiny and censorship from the public authorities regarding the investigation and reporting of bribery and corruption, owing to their potential for disgracing the authorities and undermining

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[180] Minxin Pei, "Corruption Threatens China's Future," *Carnegie Endowment for International Peace Policy Brief* 55, (2007): 2 ("based on the conservative assumption that 10 percent of the land lease revenues, fixed investments, and government spending is stolen or misused, the direct costs of corruption in 2003 could be 3 percent of GDP").

[181] Sui-Lee Wee, "China Sentences Activists for Urging Asset Disclosure: Lawyer," *Reuters*, April 18, 2014, https://www.reuters.com/article/us-china-activists-idUSBREA3H04H20140418 (accessed March 25, 2021); Lucy Hornby, "China's Top Judge Denounces Judicial Independence," *Financial Times*, January 17, 2017, https://www.ft.com/content/60dddd46-dc74-11e6-9d7c-be108f1c1dce (accessed March 25, 2021) (judicial independence was denounced by Zhou Qiang, the former president of the SPC, as "false western ideals").

[182] U. Myint, "Corruption: Causes, Consequences and Cures," *Asia-Pacific Development Journal* 7, no. 2 (2000): 56 ("[e]mphasis must thus be placed on preventing corruption by tackling the root causes that give rise to it through undertaking economic, political and institutional reforms. Anti-corruption enforcement measures such as oversight bodies, a strengthened police force and more efficient law courts will not be effective in the absence of a serious effort to address the fundamental causes"); Pei, "How Not to Fight Corruption: Lessons from China," 217 (noting that the enforcement-only anti-corruption approach helps leaders in democratic countries to "tap into populist resentments against perceived privileges and corruption of elites", and those in autocratic countries to "build public support with anticorruption campaigns").

[183] Lirong Guo, "防疫常态化背景下刑事政策的反思与调整 (Reflection and Adjustment of Criminal Policy Under the Background of Normalization of Epidemic Prevention)," *山东警察学院学报 (Journal of Shandong Police College)*, no. 5 (2020): 47-49 (noting that the criminal enforcement policy tends to be stricter and severer in face of serious emergencies, which often leads to the excessive expansion of the enforcement, the pursuit of speed in the investigation and prosecution, reduced protection of the defendant's procedural rights and rights to legal counsel).

[184] Minxin Pei, "How Not to Fight Corruption: Lessons from China," *Daedalus* 147, no. 3 (2018): 218 (noting that the shot-lived anti-bribery campaigns "may temporarily suppress corruption while it is active, but the institutional sources of corruption remain essentially intact").

[185] Guochong Xu, et al, "中国式政府监管：特征、困局与走向 (Chinese-style Government Supervision: Characteristics, Dilemmas and Trends)," *行政管理改革 (Administration Reform)*, no. 1 (2019): 77 (describing the regulation policy adopted by Chinese authority as fire-fighter style regulation, which fails to prevent misconducts and may even promote opportunistic behaviors from the business).

[186] Zengke He, "Corruption and Anti-corruption in Reform China," *Communist and Post-Communist Studies* 33, (2000): 253-54 (noting that with the weak role of civil society, "the success of anti-corruption efforts depends largely on the political will and determination of the top leadership").

the Party's ruling status.[187] As discussed above, corporations engaged in bribery are faced with low enforcement risks, and can easily satisfy the low standard for the self-reporting of bribery.[188] In view of the reputational costs following the exposure of corporate misconduct, firms typically have no incentives to implement effective compliance program to monitor and detect bribery, or to timely self-report the corporate bribery schemes to the authorities in competition with other potential sources.[189] In addition, the corporations' ability to conduct internal investigations into potential wrongdoings is heavily restrained under China's strict data privacy and state secret laws.[190] The 30-month jail awarded to Peter Humphrey and Yu Yingzeng, two private investigators hired by GSKCI to uncover the identity of the whistleblower, for data violation clearly demonstrates the risks of conducting private investigations in China.[191] Without the reform of the enforcement-oriented and public-actors-only anti-bribery strategy, the above-identified problems concerning the efficacy and costs of anti-bribery campaigns are set to remain.

2.4 A Chinese Version of Deferred Prosecution Agreement: Solution to Corporate Enforcement Challenges?

As will be discussed in the following Chapters in detail, corporate enforcement actions against foreign bribery have been increasingly active in a handful of jurisdictions with the popularity of non-trial resolution mechanisms.[192] All U.S. FCPA corporate enforcement actions since 2002 have been resolved through non-trial agreements, including plea agreements, and most noticeably, DPAs and NPAs.[193] In the face of mounting international pressure on combating corporate bribery, more jurisdictions, including not only common law countries such as the UK, Canada and Singapore, but also traditional civil law countries such as France and Brazil, began

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[187] According to Report Without Borders (RSB)'s annual World Press Freedom Index, China scored 78.48 on a scale from 0 (free) to 100 (not free) in 2020, ranking 177 out of 180 countries surveyed, see RSB, World Press Freedom Index, https://rsf.org/en/china (accessed March 25, 2021); Echo Hui, "China's False War on Corruption," September 4, 2019, https://thewalrus.ca/corruption-chinas-false-war-on-corruption/ (accessed December 18, 2021); Pei, "How Not to Fight Corruption: Lessons from China," 218 (claiming that "a vibrant civil society and free press, essential components of a prevention-oriented anticorruption strategy, threaten the political monopoly of autocratic regimes").

[188] See *supra*-Sections 2.2.1.3 and 2.3.1.

[189] Kyle Wombolt, Robert Hunt and Anita Phillips, "Anti-Corruption and Bribery in China," Herbert Smith Freehills LLP, December 13, 2018, https://www.lexology.com/library/detail.aspx?g=760a5dc1-33db-4d92-91de-c475eb4110da (accessed March 21, 2021) (noting that self-reporting to the Chinese government is highly unusual, while self-reporting first to foreign authorities with follow-on report to China is more common).

[190] Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (NY: Oxford University Press, 2019), 155 (noting that "laws that promote private regulation are most likely to be cost-effective when they are complemented by laws that place few restrictions on private actors' ability to engage in investigation", and citing China's state security and data privacy laws as examples of restrictions on private investigation); Bradley A. Klein, and Steve Kwok, "Compliance Investigations in China Take On New Urgency," *Skadden's 2019 Insights*, January 17, 2019, https://www.skadden.com/insights/publications/2019/01/2019-insights/compliance-investigations-in-china (accessed December 23, 2021) (warning that clients shall conduct investigations into potential misconducts with caution, given the strict limits imposed by China on the investigation conducted by non-governmental and unlicensed actors, to avoid infringement on the state sovereignty and individual's privacy).

[191] "British Investigator Peter Humphrey Jailed for 2.5 Years for Buying Private Data," August 8, 2014, https://www.scmp.com/news/china/article/1569614/investigator-peter-humphrey-and-wife-jailed-buying-private-information (accessed December 18, 2021).

[192] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm (accessed June 15, 2019), 22-24 (noting that non-trial resolution mechanisms have become a driver of enforcement by avoiding the time-consuming and expensive court trials, increasing the efficiency of criminal enforcement and limiting the statute of limitations).

[193] Brandon L. Garrett, and Jon Ashley, *Corporate Prosecution Registry*, Duke University and University of Virginia School of Law, at https://corporate-prosecution-registry.com/browse/ (accessed January 6, 2023) (documenting that out of the 200 corporate foreign bribery cases registered on Corporate Prosecution Registry from 2002 to October 2022, 53 cases were resolved through plea agreements, 76 through DPAs, 44 through NPAs and the other 27 through declinations); Gibson Dunn, *2016 Year-End Update on Corporate NPAs and DPAs,* https://www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ (accessed July 6, 2021) (the percentage of corporate FCPA resolutions involving at least one NPA or DPA (whether at parent- or subsidiary-level, DOJ- or SEC-driven) has averaged approximately 54% per year since 2004).

to embrace DPA or DPA-like mechanisms in the hope of boosting corporate enforcement.[194] DPA has been hailed for holding corporate and individual wrongdoers accountable and reforming the troubled corporations, as well as incentivizing corporate voluntary self-disclosure and cooperation, without triggering the undesired collateral consequences of corporate indictment to the innocent third-parties.[195] The international trend in corporate settlements could also find its impact in China. This Section outlines CNP, a DPA-like mechanism emerging in China, while raising questions regarding the effectiveness of CNP in addressing the current challenges confronting the Chinese authorities in the enforcement of anti-bribery laws against corporations.

2.4.1 A General Introduction of China's Compliance Non-Prosecution Program

In light of the prevalence of DPAs in the U.S. and other foreign jurisdictions, the mechanism of conditioning non-prosecution on corporate compliance development is perceived by many Chinese scholars as a viable way to limit the adverse impacts of corporate prosecution and to promote corporate compliance.[196] Under the aegis of the SPP, since March 2021, over 100 local Procuratorates in ten provinces tested the Compliance Inspection Pilot Program for enterprises involved in criminal cases, which is colloquially referred to as compliance non-prosecution program (CNP).[197] In April 2022, the SPP announced that the pilot CNP would be expanded nationwide.[198] Neither the SPP nor the legislature has released specific guidelines detailing the elements of CNP, but delegated the task to Procuratorates at the provincial/county level.[199] Nonetheless, Third-Party Compliance Supervision Guidelines jointly issued by the SPP and other ministerial departments in June 2021 regarding the third-party supervision in the context of CNP

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[194] Gibson Dunn, *2018 Mid-Year Update on Corporate NPAs and DPAs*, July 10, 2018, https://www.gibsondunn.com/2018-mid-year-npa-dpa-update/ (accessed June 17, 2021), 15-21 (tracking the international development of DPA and surveys countries that have adopted, or are considering adopting, similar regimes).

[195] Colin King, and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Cham: Palgrave Pivot, 2018), 73-82 (delineating the advantages of DPA regimes in the U.S. and UK); Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, 246-266 (listing the factors in favor of the introduction of DPAs in Ireland); Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1884-89 (discussing the advantages for firms to negotiate a DPA).

[196] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," *中国法学 (China Legal Science),* no. 6 (2020): 229 (noting that unlike the procuratorial suggestion model that is based on the inherent power of the Procuratorial organ, the CNP model draws lessons from the deferred prosecution agreements popular in the western countries in response to the limitations of the procuratorial suggestions for the purpose of encouraging enterprises to build compliance program); Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 57-59 (justifying the introduction of corporate CNP in China from its capability to improve corporate compliance, limit the damages of corporate criminal enforcement, and further the legal reforms and pilot programs in China).

[197] "企业合规不起诉改革试点拟扩至 10 个省份，约上百家检察院 (Pilot Reform of Enterprise Compliance Non-Prosecution Planned to Be Expanded to about 100 Procuratorates in Ten Provinces)," March 14, 2021, https://www.sohu.com/a/455616516_114988 (accessed April 15, 2021); "最高检下发工作方案 依法有序推进企业合规改革试点纵深发展 (SPP Issued the Work Plan to Orderly Promote the In-depth Development of Enterprise Compliance Reform Pilot in Accordance with the Law)," April 8, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202104/t20210408_515148.shtml#1 (accessed April 15, 2021).

[198] Ridan Xu, "涉案企业合规改革试点全面推开！这次部署会释放哪些重要信号？(The Pilot Program for Compliance Reform of Enterprises Involved in the Criminal Cases Fully Launched, What Important Signals did this Deployment Release?)," SPP Online, April 2, 2022, https://www.spp.gov.cn/zdgz/202204/t20220402_553256.shtml (accessed April 3, 2022).

[199] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," *法治日报 (Legal Daily)*, September 23, 2020, https://www.spp.gov.cn/spp/zdgz/202009/t20200923_480702.shtml (accessed April 15, 2021); 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), December 16, 2020, http://www.148hb.com/newsview/8572.html (accessed April 15, 2021); Daishan County Procuratorate, 《涉企案件刑事合规办理规程（试行）》 (Regulations on the Handling of Enterprise-related Criminal Cases Based on Compliance (For Trial))," September 27, 2020, https://www.shangyexinzhi.com/article/2955767.html (accessed April 15, 2021).

offers considerable insight into the expectations of central authorities about the designing of CNP.[200] This Section will introduce the design and application of CNP based on the local CNP plans and the Third-Party Compliance Supervision Guidelines.

Closely resembling the design of DPAs, local CNP regimes generally allow the Procuratorates to inspect corporate compliance progress for a certain period and to make arrest[201] and charging decisions accordingly, taking into consideration the circumstances of the alleged crimes.[202] The enterprise accused of criminal wrongdoings are expected to (i) accept the alleged facts and charges, (ii) agree with the Procuratorate's inspection for a certain period and (iii) manage to improve its compliance program as agreed at the end of the inspection period. Under such conditions, the Procuratorate will generally decide (i) not to hold the relevant individuals in pre-trial custody, (ii) not to impose restrictive measures on the corporate assets, and (iii) not to charge either the enterprise or relevant individuals.[203] The enterprise may still be handed over to the regulatory authorities for imposing administrative sanctions.[204] If criminal prosecution is still necessary, the Procuratorate will recommend to the court to impose lighter or mitigated sentences on the enterprise and responsible personnel.[205]

The Third-Party Compliance Supervision Guidelines formally establish a third-party monitoring mechanism at the national level.[206] According to the Guidelines, Board of Management for Third-party Mechanism will be set up at both national level and regional level and is responsible for establishing and updating a directory of compliance inspection professionals, including lawyers, accountants and tax agents.[207] Upon the request of the Procuratorates, the Board of Management will, based on the circumstances of the case and the type of enterprises, randomly select professionals from the directory to form a third-party organization.[208] The third-party organization is tasked with reviewing the compliance plan submitted by the enterprise, inspecting and assessing the corporate compliance progress, and submitting a final report to the

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[200] SPP, Ministry of Justice, Ministry of Finance, Ministry of Ecological Environment, SASAC, State Administration of Taxation, SAMR, All-China Federation of Industry and Commerce, China Council for the Promotion of International Trade, 关于建立涉案企业合规第三方监督评估机制的指导意见（试行）[Guidelines on the Implementation of Third-party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved in the Criminal Cases (Trial Implementation) (hereafter referred to as "Third-Party Compliance Supervision Guidelines")], June 3, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603_520224.shtml (accessed June 20, 2021).

[201] Under Chinese law, the Procuratorate is authorized to ratify the investigative agency' request for arresting the suspect, see The PRC Criminal Procedure Law, Articles 85-88; see also Guodong Du, and MengYu, "Don't Forget the People's Procuratorate When Resorting to China's Judicial System," China Justice Observer, April 10, 2019, https://www.chinajusticeobserver.com/a/dont-forget-the-peoples-procuratorate-when-resorting-to-chinas-judicial-system (accessed June 20, 2021).

[202] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (defining the compliance inspection system adopted by the Ningbo Procuratorate); Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 229-230 (interpreting the CNP as the experimentation of the conditional non-prosecution model).

[203] 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), Article 4; Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," *比较法研究 (Journal of Comparative Law),* no. 1 (2020): 21-29 (discussing the compliance incentives created by the reduced use of coercive investigative measures and the diversion from criminal trial).

[204] 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), Article 6, para. 2.

[205] *Ibid*, Article 27, para. 2 (allowing the Procuratorate to recommend a lighter or mitigated punishment against the enterprise and the responsible personnel if criminal prosecution is really necessary).

[206] "最高检：推动建立国家层面的企业合规第三方监管机制 (SPP: Promoting the Establishment of Third-party Monitoring Mechanism for Enterprise Compliance at the National Level)," *21世纪经济报道 (The 21st Century Business Herald)*, https://m.21jingji.com/article/20210225/herald/bb6190f1809697023c337794c1437e90_zaker.html (accessed April 17, 2021).

[207] Third-Party Compliance Supervision Guidelines, Articles 6 & 8.

[208] Third-Party Compliance Supervision Guidelines, Article 10.

Board of Management and the Procuratorate at the end of the inspection period.[209] The compliance plan and compliance report will form an important basis for the Procuratorate's decisions as to the approval of coercive investigative measures, the prosecution of the enterprise and responsible personnel, as well as the proposition of sentencing suggestions to the court or reduced administrative sanctions to regulatory agencies.[210]

The SPP disclosed that as of April 2022, 766 corporate cases had been resolved via the CNP within the ten pilot provinces, including 503 cases where the third-party supervision mechanism was applied.[211] Moreover, several local Procuratorates in other non-pilot provinces also used the CNP to resolve 223 corporate cases, including 98 cases to which the third-party supervision mechanism was applied.[212] Up to August 2022, the Procuratorates across the country had employed CNP to settle 3218 corporate cases, including 2217 cases to which the third-party supervision mechanism was deployed.[213] As a result, 830 enterprises and 1382 individuals were awarded with a non-prosecution decision.[214]

2.4.2 Background: Increased Emphasis on Economic Recovery and Corporate Compliance

CNP was conceived and rolled out across the country against the background of the economic downturn, escalating trade conflict with the U.S. and growing emphasis on economic recovery following the start of the Covid-19 pandemic. It has become the top priority for the leadership to promote economic recovery and to support domestic enterprises.[215] Privately-owned enterprises, which are crucial to tax revenue, economic growth and employment yet suffer long-term systemic discrimination in comparison with SOEs, are now more valued.[216] In 2019, the CCP and State Council proposed to improve the legal environment for private enterprises, promote the equality between privately-owned and state-owned enterprises, and safeguard the rights and lawful properties of private enterprises and entrepreneurs.[217] Against this background, judicial authorities have become even more reluctant to put firms and responsible personnel in the dock

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[209] Third-Party Compliance Supervision Guidelines, Articles 11, 12 &13.
[210] Third-Party Compliance Supervision Guidelines, Article 14.
[211] Ridan Xu, "涉案企业合规改革试点全面推开！这次部署会释放哪些重要信号？(The Pilot Program for Compliance Reform of Enterprises Involved in the Criminal Cases Fully Launched, What Important Signals did this Deployment Release)," *SPP Online*, April 2, 2022, https://www.spp.gov.cn/zdgz/202204/t20220402_553256.shtml (accessed April 3, 2022).
[212] *Ibid.*
[213] Ridan Xu, "检察机关共办理涉案企业合规案件 3218 件 (The Procuratorial Organs Handled 3218 Compliance Cases involving Enterprises)," *检察日报 (Procuratorial Daily)*, October 13, 2022, http://newspaper.jcrb.com/2022/20221013/20221013_002/20221013_002_1.htm (accessed October 20, 2022).
[214] *Ibid.*
[215] "三次地方考察，习近平推动复工复产提速扩面 (Xi Jinping Promotes the Acceleration and Expansion of the Recovery of Work and Production during Three Local Inspections)," *Xinhua News Agency*, April 23, 2020, http://www.xinhuanet.com/politics/xxjxs/2020-04/23/c_1125893244.htm (accessed March 30, 2021).
[216] National Bureau of Statistics, "国家统计局发布新中国成立 70 周年经济社会发展成就系列报告之二 —— 经济结构不断升级 发展协调性显著增强 (National Bureau of Statistics Released a Serial Report on the Achievements of Economic and Social Development in the 70th Anniversary of the Founding of New China- Part II: the Economic Structure has been Continually Upgraded, and the Coordination of Development has been Significantly Enhanced)," July 8, 2019, http://www.stats.gov.cn/tjsj/zxfb/201907/t20190708_1674587.html (accessed April 13, 2021) (reporting that there are more than 25 million private enterprises in China, contributing to more than 50% of the tax revenue, 60% of the GDP, fixed asset investment and foreign direct investment, 80% of urban employment, 90% of the rate of new employment); Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 236 and 240 (noting that most enterprises implicated in criminal offenses in China are private enterprises).
[217] 中共中央国务院关于营造更好发展环境支持民营企业改革发展的意见 (Opinions of the CCP Central Committee and the State Council on Creating a Better Development Environment to Support the Reform and Development of Private Enterprises), *Xinhua News Agency*, December 12, 2019, http://www.gov.cn/zhengce/2019-12/22/content_5463137.htm (accessed April 6, 2021).

for the fear of triggering adverse economic consequences.[218] Procuratorates are directed by SPP to refrain from holding the directors of private enterprises in custody, filing criminal charges or recommending jail sentences if possible, and instead focus on the development of corporate compliance and internal control system.[219]

The Procuratorial agencies' motives for jumping in the deep water of corporate compliance can be better understood from the institutional perspective.[220] The newly established NSC in 2018 took away the Procuratorates' authority of investigating corruption and other duty-related crimes involving public officials, which was once perceived by the Procuratorial authority as an important safeguard of its status and power.[221] The rising focus on corporate compliance enables the Procuratorial agencies to expand their traditional function and intervene in the world of corporate compliance and social governance.[222]

Beyond the domestic context, the international corporate enforcement practices have played an equally, if not more, important role in setting off the trend of corporate compliance in China. ZTE, the second largest Chinese telecom equipment provider, was sanctioned by the U.S. Department of Commerce in 2017 and 2018 twice for the violations of the U.S. export restrictions and breach of plea agreements.[223] The company was ordered to pay a jaw-dropping amount of about $2.6 billion in fine and escrow payment in total, retain a team of special compliance coordinators to monitor the company's compliance with the U.S. export control laws for a period of 10 years, and overhaul the entire board and senior leadership under the threat of export ban.[224] The ZTE incident serves as a warning bell for Chinese authorities and overseas Chinese corporations about the dire consequences of violating the U.S. laws, as well as the

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[218] Jianming Tong, "充分履行检察职责 努力为企业发展营造良好法治环境 (Fulfill the Procuratorial Duties and Strive to Create a Good Legal Environment for the Development of Enterprises)," *检察日报 (Procuratorial Daily)*, September 22, 2020 , https://www.spp.gov.cn/spp/llyj/202009/t20200922_480611.shtml (accessed March 30, 2021) (directing local Procuratorates to consider the pragmatic necessity of protecting business operators and promoting development when approving the arrest request and making charging decisions).

[219] Jun Zhang, 2020 年最高人民检察院工作报告 (Work Report of the SPP of 2020), March 15, 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed March 15, 2021) (re-emphasizing the policy in the economic criminal cases involving directors of private enterprises: don't take them into custody if possible, don't file criminal charges if possible and recommend suspended sentence if non-substantial sentences are applicable, while stressing the importance of exploring mechanisms to ensure corporate compliance in order to institutionalize the "strict regulation" and prevent the manipulation of leniency).

[220] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 232-36 (noting three types of procuratorial motives for pushing forward CNP: taking special protective measures for privately-owned enterprises; reforming the privately-owned enterprises and their management model; exploring new social governance approaches through the compliance incentive mechanism).

[221] Fenfei Li, "检察再造论——以职务犯罪侦查权的转隶为基点 (On the Reconstruction of Procuratorial Power: Analysis of the Transference of the Investigation Power of Duty Crime)," *政法论坛 (Tribune of Political Science and Law)* 36, no. 1 (2018): 29-30 (noting that the Procuratorial organ has long perceived the authority of investigating duty-related crime as an important safeguard of its status and power, thus the establishment of SCs increases the urgency for the Procuratorial organ to redefine its function and have a greater say in the litigation).

[222] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (Ye Weizhong, Party Secretary and chief procurator of People's Procuratorate in Ningbo, claimed that the procuratorial efforts to promote compliance helps the Procuratorial organ to play a leading role in the criminal justice, expand the procuratorial function from *ex-post* and passive punishment to *ex-ante* and active prevention, and expand the depth of the Procuratorial involvement in social governance).

[223] Press Release, "Secretary of Commerce Wilbur L. Ross, Jr. Announces $1.19 Billion Penalty for Chinese Company's Export Violations to Iran and North Korea," March 7, 2017, 2017, https://www.commerce.gov/news/press-releases/2017/03/secretary-commerce-wilbur-l-ross-jr-announces-119-billion-penalty (accessed December 2, 2020); Press Release, "Secretary Ross Announces $1.4 Billion ZTE Settlement; ZTE Board, Management Changes and Strictest BIS Compliance Requirements Ever", June 7, 2018, https://www.commerce.gov/news/press-releases/2018/06/secretary-ross-announces-14-billion-zte-settlement-zte-board-management (accessed December 28, 2019).

[224] *Ibid.*

strategic value of implementing an effective corporate compliance program.[225] Compliance has since then become a hot topic in China and increasingly emphasized and studied by regulatory authorities, corporate executives, legal practitioners and scholars.[226] Beyond the traditionally heavily regulated financial industry, more and more regulatory agencies began to issue compliance guidelines for enterprises of particular types, such as national-level SOEs and overseas Chinese enterprises, or compliance in specific areas, such as anti-trust compliance.[227] Apart from issuing non-binding guidelines to promote compliance in particular enterprises or areas, the judicial authorities, especially the Procuratorates, are also actively attempting to incentivize the development of corporate compliance through corporate liability and enforcement mechanism.[228] CNP represents the latest result of the Procuratorates' efforts in this area.

2.4.3 **Unresolved Issues Concerning Compliance Non-Prosecution Program**

CNP was introduced in a period when the anti-bribery rules and institutions were undergoing a sea change, protecting privately-owned enterprises and promoting corporate compliance development have been given top priority by the authorities. Currently, CNP is still in the pilot stage. Many issues concerning the designing and application of CNP remain highly debated among scholars, legal practitioners, regulatory and prosecuting agencies. This Section attempts to identify some of the most important unresolved issues. With those issues in mind and in order to contribute to the development of CNP in China, Chapters 3-6 will discuss and analyze the foreign corporate enforcement policies and practices involving the use of DPAs, which are perceived as the prototype of CNP.

2.4.3.1 What is the Desired Scope of Application for CNP?

Regarding the type of cases to which CNP can be applied, most local Pilot programs allow the use of CNP to settle not only corporate charges (both the corporation and responsible personnel are prosecuted), but also individual charges involving actual controllers, managers and key

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[225] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," 19 (claiming that the ZTE incident gives Chinese people a close sense of what is corporate compliance, the significance of corporate compliance to the country and specific corporations, and the importance of developing compliance program for Chinese enterprises that are operating overseas).

[226] Xue Zhao, 中央企业及其他国有企业合规管理体系建设实务 (Practical Points for Building Compliance Management System in the Central Enterprises and Other State-Owned Enterprises), July 25, 2020, http://www.bjqiyelaw.com/s/120964.html (accessed December 3, 2020) (noting that as a result of the ZTE incident and other foreign-imposed sanctions, compliance has become a hot topic in the whole society, especially in the business and legal community, rather than a nascent subject attracting only a small group).

[227] SASAC, 中央企业合规管理指引（试行）[Guidelines for Centrally Administered Enterprises on Compliance Management (for Trial Implementation)], Guo Zi Fa Fa Gui [2018] No. 106, November 2, 2018, http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAwMTEzNDY5Njg%3D&showType=1 (accessed December 3, 2020); National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, People's Bank of China, SASAC, State Administration of Foreign Exchange, All-China Federation of Industry and Commerce, 企业境外经营合规管理指引 (*Guidelines for Enterprises on the Compliance Management of Overseas Operations*), Fa Gai Wai Zi [2018] No. 1916, December 26, 2018, unofficial translation at http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAwMTE0MjQxODU%3D&showType=1 (accessed December 3, 2020); Anti-monopoly Commission of the State Council, 经营者反垄断合规指南(Anti-Monopoly Compliance Guidelines for Business Operators), Guo Fan Long Fa [2010] No. 1, September 11, 2020, unofficial translation at http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAxMDAxMzkyNTU%3D&showType=1 (accessed December 3, 2020).

[228] For example, the Procuratorate of Pudong District in Shanghai made a bold move and initiated a pilot Corporate Leniency Program in order to apply the Leniency System to the corporate context in March 2018, but only one case has been reportedly resolved through this Program. Dongming Yu, "上海浦东新区: 探索单位犯罪认罪认罚从宽试点工作 (Shanghai Pudong New Area: Exploring the Pilot Program of the Leniency System for Entity Crimes)," March 7, 2018, https://www.spp.gov.cn/spp/dfjcdt/201803/t20180307_369317.shtml (accessed April 12, 2021); Pudong Procuratorate, "浦东新区检察院依法对一起单位犯罪案件适用认罪认罚从宽处理 (Pudong Procuratorate Granted Leniency for Admission of Guilt and Acceptance of Penalty to Resolve an Entity Crime Case in Accordance with the Law)," July 17, 2018, https://xw.qq.com/cmsid/20180717A1D0ZF00 (accessed April 12, 2021).

personnel of the corporations (only individuals are prosecuted).[229] Regarding the type of offenses, CNP can be used to resolve a wide range of criminal offenses, including but not limited to financial, fraud and tax crimes, product quality and safety violations, bribery and corruption crimes, environmental crimes, and crimes against intellectual property rights.[230] In terms of the severity of crimes, local Procuratorates generally reserve CNP for first-time offenders charged with minor offenses, for which the responsible personnel are subject to no more than a 3-year jail sentence.[231]

The desired scope of application of CNP remains highly debated among scholars and authorities. Those in support of the application of CNP to individual charges claim that individual prosecution may trigger similar adverse consequences as corporate prosecution.[232] Given that most firms implicated in the criminal enforcement actions in China are small and medium-sized enterprises, the responsible personnel are frequently the founder and soul of such enterprises. The pre-trial detention, criminal conviction or imprisonment of responsible personnel could paralyze business operation and even destroy the enterprises.[233] In addition, it also presents a pragmatic response to the common prosecuting practices that target only individuals for corporate crimes, as discussed in Section 2.3.1. On the other hand, some scholars heavily criticize the arrangement of releasing recalcitrant executives in return for corporate compliance efforts, claiming that "enterprise compliance does not equate to entrepreneur compliance".[234] Regarding the local practices of restricting CNP to minor offenses, the reason might be that local Procuratorates are reluctant to take a bigger step in the pilot stage of CNP, in light of potential criticism that serious corporate crimes and criminals are exempt from criminal prosecution and conviction.[235] However, some have expressed concerns that the exclusion of enterprises involved

[229] Third-Party Compliance Supervision Guidelines, Article 3; 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), Article 4.

[230] Zhicheng Zhao, "企业合规第三方监督评估机制及其启示 (Third-party Supervision and Evaluation Mechanism of Enterprise Compliance and its Enlightenment)," Zhong Lun, June 7, 2021, http://www.zhonglun.com/Content/2021/06-07/1654483661.html (accessed June 22, 2021) (noting that given the pilot work of local Procuratorates, the cases that may be resolved via the CNP include production safety crimes, commercial bribery and corruption crimes, environmental crimes, crimes against intellectual property rights, financial, fraud and tax crimes).

[231] 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), Article 6, para. 1& 3 (limiting the Compliance Inspection System to first-time offenders, where the responsible personnel is subject to punishment of no more than three-year imprisonment, with an exemption for those subject to 3-10 year imprisonment in the case of self-reporting, meritorious service or accessory offenders); Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (noting that the application of compliance inspection system is limited to minor enterprise cases in which the responsible personnel are subject to no more than three-year imprisonment).

[232] Fenfei Li, "论企业合规检察建议 (On the Procuratorial Recommendation of Enterprises Compliance)," 101-02 (noting that the authority frequently takes coercive investigative measures against corporate assets or holds the director of privately-owned enterprise in custody. As a consequence, "the case is solved, but the enterprise is destroyed").

[233] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2020): 62 (justifying the seemingly excessive leniency of the CNP, compared with the U.S. DPA system, through its rationale of restorative justice instead of deterrence and the fact that most enterprises implicated in criminal cases are small and medium-sized private enterprises); Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 87 (noting that the responsible personnel are typically the life and soul of the medium, small or micro enterprises; insulating such enterprises from prosecution while seeking conviction of responsible personnel might similarly destroy the enterprises).

[234] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 85 (acknowledging that the application of the CNP to individual crimes is understandable as both the Criminal Law and its enforcement demonstrate strong individualistic features, while criticizing such choice since enterprise compliance does not equate to entrepreneur compliance).

[235] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (explaining the choice of applying CNP to minor crimes as in consistence with the judicial policy of offering leniency to minor crimes, which would prevent excessive leniency to major crimes).

in the relatively serious crimes from the application of CNP might undermine their incentives to reform the corporate governance and compliance program.[236]

2.4.3.2 How to Define the Pre-conditions and Obligations of the CNP?

According to the Third-Party Compliance Supervision Guidelines, the Procuratorate may decide to apply third-party supervision in the context of CNP if (i) the persons involved in the criminal cases admit guilt and accept punishment; (ii) the entity is functioning normally and promises to establish or improve its compliance system; and (iii) the entity voluntarily accepts compliance supervision by the designated third-party organization.[237] In addition to the mandatory preconditions, the SPP has not yet provided a list of factors that would influence local Procuratorates' decisions in the application of CNP, nor clarified the degree of leniency that corporations could obtain by taking the expected measures.[238] In practice, when determining whether CNP should be applied to save an enterprise from compulsory investigative measures and criminal conviction, the authorities often consider the enterprise's value to the society in terms of the economic development prospect, market share and charity activities, as well as its history of misconduct.[239]

Under CNP, the enterprise in question is required to establish or improve its compliance program and accept the supervision and assessment from the Procuratorate or/and the third-party organization for a certain period. If the compliance progress in the enterprise turns out to be satisfactory, the Procuratorate would generally decide not to prosecute either the enterprise or the responsible personnel.[240] The Procuratorate, which is by nature a legal supervision organ rather than a law enforcement agency under the PRC Constitution, has no authority to impose substantive sanctions in addition to a non-prosecution decision.[241] In order to make sure the enterprise does not benefit from the misconduct, the Procuratorate often interprets the enterprise's acceptance of punishment, a mandatory pre-condition for the application of CNP, as including the willingness to disgorge the ill-gotten profits and compensate the victims.[242] Following a non-prosecution decision, the Procuratorate could decide to hand the case over to the regulatory agencies for imposing an administrative penalty with written procuratorial

[236] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 85-86.
[237] Third-Party Compliance Supervision Guidelines, Article 4.
[238] Yong Li, "检察视角下中国刑事合规之构建 (The Construction of Criminal Compliance in China from the Perspective of the Procuratorate)," *国家检察官学院学报 (Journal of National Prosecutors College)*, no. 4 (2020): 107 (recognizing that there are few supporting systems for the application of the Leniency System to promote corporate compliance, such as sentencing guidelines for the enterprise crimes or the use of non-prosecution conditioned on compliance development).
[239] SPP, 关于印发《企业合规典型案例（第二批）》的通知 [Notice on Distributing Typical Cases of Enterprise Compliance (Second Batch)], December 15, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202112/t20211215_538815.shtml#2 (accessed December 23, 2021).
[240] See *supra* note 203.
[241] In China, the Procuratorate acts as more than a prosecuting agency responsible for making charging decisions and proposing sentencing suggestions to the court. What is unique to the Chinese judicial system is that the procuratorial authority is designed by the Constitution as a legal supervision organ. Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 58 (noting that the legal supervision authority exercised by the procuratorial organ does not include the imposition of substantial and final sanctions).
[242] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 87 (noting that though the Procuratorates are not authorized to impose substantive actions, they may precondition CNP on the enterprises' willingness to disgorge the illegal benefits, pay the fine and compensate the victims).

suggestions (jiancha jianyi).[243] The procuratorial suggestions generally attest to the compliance progress in the enterprise at issue and suggest reduced administrative sanctions.

However, the pre-conditions and obligations of CNP have been called into question regarding their effectiveness in addressing the corporate enforcement challenges and promoting corporate compliance. Corporate voluntary self-disclosure and cooperation in the form of internal investigations are not actively encouraged by the authorities through either the preconditions for, or obligations under, CNP. Given the already stretched personnel and resources, it is questionable whether the Procuratorates are willing to spend extra time and resources assessing corporate compliance deficiencies and monitoring corporate compliance progress to the extent of fostering meaningful corporate compliance reforms.[244] The lack of effective incentives and mechanism for corporations to join in the public enforcement actions, and the increasing workload associated with the corporate compliance obligations could exacerbate the already acute shortage of judicial resources.

In terms of the obligations imposed under CNP, the Procuratorate has no authority to impose substantive sanctions. Instead, it has to rely on corporate voluntary actions, the regulatory agencies or the court to seek punishment and remediation. Without the imposition of substantial sanctions in the context of CNP, it seems that the authorities have abandoned the punishment element in the corporate settlement deals and relied purely on the rehabilitation theory to prevent the recurrence of corporate crimes.[245] Considering that both the enterprise and the responsible personnel will be exempt from prosecution once CNP is successfully concluded, does CNP present an inadequate substitute for criminal prosecution and conviction?[246] In that case, how to make sure that corporate and individual wrongdoers are prevented from committing crimes in the future?

2.4.3.3 How Effective is the Third-Party Compliance Supervision

Given that a major goal of CNP is to promote corporate compliance, continuing monitoring and assessment of corporate compliance progress is crucial to the success of CNP. Under the local CNP initiatives, the inspection period varies across regions but is generally very short. The Procuratorate of Bao'an District in Shenzhen sets an inspection period of 1- 6 months, while a period ranging from 6 months to 2 years is allowed by the Procuratorate of Daishan City in

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[243] Procuratorial Suggestion is a tool leveraged by the Procuratorate for the purpose of supervising legal proceedings and the execution of judgements. For an entity involved in the criminal enforcement actions, the Procuratorate may suggest the entity to improve its governance if it believes that the crime prevention system in the entity is inadequate or unworkable or suffers poor management. See Regulations on Work of Procuratorial Suggestions of People's Procuratorates, Articles 8-12.

[244] Fenfei Li, "论企业合规检察建议 (Procuratorial Suggestions on Enterprise Compliance)," 101 (noting that given the dilemma between the large caseload and the insufficient personnel in the local Procuratorates, they may have insufficient motivation and willingness to promote corporate compliance beyond the routinary prosecuting function); Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 81 (noting that the leniency system aims to dispose relevant cases as quickly as possible and is thus in compatible with the requirements for the development of compliance program, which generally calls for a long time period).

[245] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 62 (justifying the seemingly excessive leniency of the CNP, compared with the DPA system in the U.S., through its rationale of restorative justice instead of deterrence); Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 241-242 (claiming that the procuratorial organ abandons the rationales of retribution and deterrence in the promotion of the CNP system. Instead, the prevention of crime is emphasized as the primary goal).

[246] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 237 (arguing that the lack of criminal fine in the CNP triggers the concern of indulging corporate crimes and failing to achieve either retribution or specific deterrence, ultimately undermining the adequacy of the CNP as a substitute for criminal sanctions).

Zhejiang.[247] In practice, the inspection period normally lasts for 1-3 months.[248] The short compliance inspection period is mainly due to the legal barrier faced by the Procuratorate. Under the PRC Criminal Procedure Law, there is no explicit legal basis for the Procuratorate to suspend the criminal proceeding for the enterprise at issue to undertake its compliance commitments.[249] As a short-term expediency, the inspection period is set within the period currently available to the Procuratorate for making a charging decision. The Procuratorate is required to make a charging decision within six months based on the severity and complexity of the cases if the suspects are in pre-trial custody or house detention, or up to one year if the suspect is on bail.[250] Given the short inspection period, there is hardly enough time to identify the corporate compliance risks, implement an effective corporate compliance program and test the efficacy of the new compliance program.[251] It is thus questionable whether the authorities could make sure that the corporate compliance efforts are effective to the extent of reforming employees' conduct and nurturing an ethical corporate culture.[252]

The third-party organization model, which resembles the external monitorships employed by the U.S. and UK authorities in the application of DPAs, is believed to present the most important and eye-catching innovation in the context of CNP.[253] In order to avoid any conflict of interests in the selection of monitors, the Board of Management is created to be responsible for selecting members for the third party organization. In practice, the third party organization includes mainly individuals working for intermediary organizations, such as lawyers, certified public accountants, and tax agents.[254] Some pilot programs also delegate the task of compliance inspection to relevant regulatory agencies or include representatives of public authorities in the third-party organization.[255] Such approach aims to help reduce potential resistance from other

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[247] *Ibid*, 230 (citing the rule of non-prosecution conditioned on compliance issued by Bao'an Procuratorate, which remains an internal document and provides an inspection period of 1-6 months; while the Procuratorate of Nan'shan district allows an inspection period of 6-12 months); Dai'shan County Procuratorate, 《涉企案件刑事合规办理规程（试行）》 (Regulations on the Handling of Enterprise-related Criminal Cases Based on Compliance (For Trial)), Article 6 (providing that the period for the compliance rectification shall be 6 months to 2 years in principle and may be extended in appropriate situations).

[248] Xiaozheng Li, "企业合规不起诉的中国实践（二） (The Chinese Practice of Enterprise Compliance Non-prosecution)", King & Wood Mallesons, January 11, 2022, https://www.kwm.com/cn/zh/insights/latest-thinking/china-s-practice-of-non-prosecution-by-enterprise-compliance-with-2.html (accessed May 19, 2022) (noting that most of cases to which the CNP applies includes an inspection period of 1-3 months with few exceptions, and no cases includes an inspection period of over 1 year).

[249] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 83 (acknowledging that there is no explicit legal basis for the Procuratorial organ to set up long-term compliance period in the prosecution stage).

[250] Fenfei Li, "论企业合规检察建议 (Procuratorial Suggestions on Enterprise Compliance)," 106 (noting that there is no legal barrier to the provision of inspection period of six months to one year in cases where suspects are not detained; even when suspects have been detained, the Procuratorates can set an inspection period after altering the coercive measure of detention); "取保候审案件，审查起诉办案期限从 1 个月调整为 12 个月 (Case-handing Period of Examination and Prosecution Extended from 1 Month to 12 Months for Bail Cases)," April 20, 2021, https://www.163.com/dy/article/G81B73NK0514A1ND.html (accessed April 23, 2021).

[251] David Hess, and Cristie L. Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem," *Cornell International Law Journal* 41, no. 2 (2008): 310-11 (noting that "the interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies" are largescale and ongoing).

[252] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 237 (arguing that the insufficient compliance inspection period has become a major bottleneck in the CNP reform endeavors).

[253] Jason J Kang, et al, Kobre & Kim, "Monitorships in East Asia," in *The Guide to Monitorships – Second Edition,* by Global Investigation Interview, May 7, 2020, https://globalinvestigationsreview.com/guide/the-guide-monitorships/second-edition/article/9-monitorships-in-east-asia (accessed December 2, 2021) (noting that "the legal regime in most East Asian jurisdictions does not provide for the appointment of a monitor. Often, there is no procedure for the regulator or enforcer to settle a case; the government can simply decide to exercise its powers, bring a prosecution before a court or drop the investigation").

[254] Xiaozheng Li, "企业合规不起诉的中国实践（二） (The Chinese Practice of Enterprise Compliance Non-prosecution)", King & Wood Mallesons, January 11, 2022, https://www.kwm.com/cn/zh/insights/latest-thinking/china-s-practice-of-non-prosecution-by-enterprise-compliance-with-2.html (accessed May 19, 2022).

[255] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (relying on the relevant administrative agencies to inspect the

departments as CNP is a pilot program mainly promoted by the procuratorial authority.[256] Moreover, it also helps prevent potential criticisms over the privatization of criminal justice, an area that is traditionally believed to be occupied exclusively by the public agencies in China.[257]

However, the compliance monitoring mechanism is still in its infancy and most specific issues remain only crudely addressed or totally undefined.[258] For example, how to effectively incentivize regulatory and other public entities to send their personnel for compliance monitoring?[259] What is the benchmark for assessing the adequacy of corporate compliance program?[260] What is the relationship between the Procuratorate, the enterprise, and the third-party organization?[261] With these essential questions undefined, delegating third party organizations to monitor and assess corporate compliance is unlikely to promote meaningful compliance changes in the enterprises at issue.[262]

2.4.3.4 How to Ensure the Accountable Exercise of Procuratorial Authority under the CNP?

The broad prosecutorial discretion is fundamental for the decision of applying CNP to conclude a corporate criminal investigation instead of the traditional prosecution and trial procedure. As identified in the previous Sections, the SPP has not yet provided clear guidance on the application of CNP or the offering of leniency under CNP.[263] No benchmark has been provided for assessing the effectiveness of a corporate compliance program, based on which a CNP is

compliance development progress in the enterprise at issue); Daishan County Procuratorate, 《涉企案件刑事合规办理规程（试行）》 (Regulations on the Handling of Enterprise-related Criminal Cases Based on Compliance (For Trial)),” (dividing the compliance inspectors into two categories, including professional compliance inspectors such as laywers, certified public accountants, and tax agents, and common compliance inspector such as representatives of other public authorities).

[256] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 61 (noting that the negative action or inaction from administrative regulators in CNP, which is more than merely a suspicion given the past legal practices, is likely to render the compliance development in the entity suspects superficial).

[257] *Ibid,* 59 (believing that given China's legal system and culture, delegating private agencies to exercise the authority of monitoring and supervision is yet difficult for the public and the target enterprise to accept). This "cultural reluctance to entrust a traditional government oversight role to a private party" is also observed in other East Asian jurisdictions as well. See Jason J Kang, et al, Kobre & Kim, "Monitorships in East Asia".

[258] Mingliang Ma, "论企业合规监管制度——以独立监管人为视角 (On Enterprise Compliance Monitoring System: From the Perspective of Independent Monitor)," *中国刑事法杂志 (Criminal Science)*, no. 1 (2021):138 (acknowledging a series of common and unique difficulties in China's compliance monitoring framework).

[259] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91 (noting that the regulatory authorities are not responsible for sanctioning enterprises involved in criminal activities, and they are not subordinate to the Prosecutorial authority. It is thus difficult to ensure that the regulatory agencies have the motives to effectively monitor corporate compliance efforts); Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 61 (noting that the negative action or inaction from administrative regulators in CNP, which is more than merely a suspicion given the past legal practices, is likely to render the compliance development in the entity suspects superficial).

[260] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91-94 (calling for the issuance of special compliance guidelines for enterprises in different industries, against which the assessment of corporate compliance development is possible).

[261] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (claiming that CNP shall not be interpretated as a reconciliation or agreement between the Procuratorial organ and the enterprise suspect, as corporate compliance efforts are only one consideration underlying the Procuratorate's charging decision); Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," *法学研究 (Chinese Journal of Law)*, no. 4 (2016): 83 (criticizing the Leniency System for being "a mercy shown to the defendant in a condescending manner rather than equal negotiation").

[262] Mingliang Ma, "论企业合规监管制度——以独立监管人为视角 (On Enterprise Compliance Monitoring System: From the Perspective of Independent Monitor)," 142-43 (claiming that if these questions are not addressed in the judicial theory and system, the use of compliance monitors is not likely to promote the CNP system owing to the high monitoring cost, the ambiguous role of compliance monitors, as well as the lack of assessment standard, effective supervision and remedy procedure).

[263] See Chapter 2, Section 2.4.3.2.

initiated and a non-prosecution decision is made.[264] What's more, the exercise of prosecutorial authority in the application of CNP is not subject to any oversight from the court. In China's criminal justice system, the court's review and approval are not required for the making of arresting or prosecution decisions.[265] Similarly, in the context of CNP, the Procuratorates could initiate CNP, impose corporate obligations, monitor and assess the corporations' implementation of the compliance program, and conclude the corporate criminal investigations without resorting to the court at all. In the absence of sufficient internal control or court oversight, the local Procuratorate has great leeway in choosing whether and how to settle under CNP.

The unrestrained exercise of procuratorial authority under CNP may cause inconsistencies and unfairness in the application of law, dampen the corporations' motives to cooperate with the enforcement authorities, and threaten the goals of CNP.[266] Moreover, the abuse of prosecutorial discretion could even breed judicial corruption and conflicts of interests, undermining the legitimacy of CNP.[267] In order to mitigate the potential criticisms, some local Procuratorates have opted to hold public hearings to examine the desirability of a non-prosecution decision made under the CNP in the corporate criminal case resolved through CNP.[268] All relevant parties, including the police representatives, the people's supervisor,[269] the victim, the firm's legal representative and responsible personnel, will be invited and their opinions will be heard. The public hearing process introduces certain transparency and external oversight of the Procuratorates' implementation of CNP and may force the Procuratorates to exercise its authority in a more responsible way.[270] However, the public hearing is not an integral process of CNP. Relying on the public hearing alone is unlikely to ensure the accountable exercise of Procuratorial authority in the application of CNP without adequate internal guidance and court

[264] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91-94 (calling for the issuance of special compliance guidelines for enterprises in different industries, against which the assessment of corporate compliance development is possible).

[265] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," *法制与社会发展 (Law and Social Development)*, no. 1 (2022): 54 (noting that China does not have the judge judicial review system).

[266] Fred C. Zacharias, "Justice in Plea Bargaining," *William & Mary Law Review* 39, no. 4 (1998): 1184-85 (calling for specific guidelines which enable prosecutorial agency to control its agents and to equalize treatment among defendants); Yunxia Yin, Yanjun Zhuang, and Xiaoxia Li, "企业能动性与反腐败'辐射型执法效应'——美国 FCPA 合作机制的启示 (Enterprise Initiative and 'Radiative Effect of Anti-corruption Law Enforcement': Lessons from the Cooperative Regime under the U.S. FCPA)," *交大法学 (SJTU Law Review)*, no. 2 (2016): 38-39 (claiming that the lack of detailed and uniform sentencing calculation standard discourages corporate self-reporting and cooperation as corporations cannot reasonably predict the leniency to such policing measures).

[267] Anthony Ogus, "Corruption and Regulatory Structures," *Law & Policy* 26, no. 3-4 (2004): 341 (noting that greater discretion to regulatory rule-makers creates more opportunities for corruption in a developing country where instruments of accountability may be weak).

[268] 最高人民检察院第二十二批指导性案例 (22nd Batch of Guiding Cases of the SPP), December 8, 2020, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202012/t20201208_488360.shtml#2 (accessed April 23, 2021) (in the case against Wuxi F Police Equipment New Technology Co., Ltd for tax violations, a public hearing was held by the Procuratorate to hear the opinions of police representatives, people's supervisor, the company's legal representative and responsible managers as well as their defenders to ensure the credibility and fairness of the proposed non-prosecution decision); Jia Sun, "检察建议助力跨境电商 保障新型小微企业复工复产 (Using the Procuratorial Suggestions to Help Cross Board E-commerce, Safeguarding the Recovery of Work and Production in the Small and Macro Enterprises)," Qingdao People's Procuratorate, June 15, 2020, https://mp.weixin.qq.com/s?__biz=MzAwMTE0NjAwMA==&mid=2649912788&idx=1&sn=64b6dedf5ef796aabce38c33efffac99&chksm (accessed April 23, 2021) (Jiangning, Deputy Director of policy planning department of Qingdao Private Economic Development Bureau, was invited as a people's supervisor and third-party representative in the case).

[269] People's supervisors refer to common citizens appointed by the Procuratorates to supervise their work in the handling of relevant cases, see 最高人民检察院关于实行人民监督员制度的规定 (Provisions of the SPP on the implementation of the people's supervisor system), Gao Jian Fa [2010] No. 21, November 17, 2010, https://web.archive.org/web/20110526041227/http://llzw.spp.gov.cn/zcfg/201011/t20101117_467641.shtml (accessed December 3, 2021).

[270] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," 54 (believing that enhanced transparency, including the public hearing process, helps mitigate the political and societal risks of the CNP).

review in place.[271] How to establish meaningful guidance and oversight of the Procuratorates' use of CNP merits serious discussion.

2.5 Conclusion

China's anti-bribery policy, which features frequent legislative reforms, periodic enforcement campaigns, sole reliance on public enforcement resources and *ex-post* enforcement actions, fails to effectively control bribery or foster compliance. The authorities prefer high-profile enforcement campaigns that involve booming investigations, prosecutions and punishment against bribery to political or institutional reforms that are crucial to the prevention of bribery. The anti-bribery enforcement actions are heavily reliant on the public enforcement agencies, with little input from the business community in the form of developing a corporate compliance program to prevent and detect wrongdoings or cooperating with the public investigators. Under the enforcement-centered and public actors-only approach to the fight against bribery, the huge caseload following the high-profile anti-bribery campaigns turns out to be burdensome and demanding for the under-staffed and ill-equipped anti-bribery agencies and judicial authorities. The intensive yet often temporary anti-bribery campaigns fail to control bribery and could instead foster opportunistic corporate behavior. Moreover, in view of the frequent use of coercive measures in the investigation stage and the potentially disastrous collateral consequences of corporate prosecution and conviction, corporate criminal enforcement may distort business operation and even endanger the corporate viability.

For the Chinese leadership and judicial authorities, the undesired economic implications of corporate criminal enforcement and the promotion of corporate compliance are becoming more pressing in the background of the Covid-19 pandemic and the escalating Sino-U.S. trade war. In order to promote the development of private economy and corporate compliance, the procuratorial agencies around the country are experimenting with CNP, a DPA-like program that allows the Procuratorates to inspect corporate compliance efforts with the assistance of third-party organizations for a certain period and make arrest approvals and prosecuting decisions accordingly. It is expected that the fostering of corporate compliance under CNP will make it an adequate substitute for criminal prosecution with the advantages of preventing the recurrence of corporate crimes through corporate rehabilitation and limiting the collateral consequences of corporate conviction.

However, the approach of promoting corporate compliance by making it a precondition for non-prosecution is still at a nascent stage. Many issues concerning the designing and application of CNP remain debated, and the adequacy of CNP as a substitute for criminal prosecution is questionable. For example, in terms of the scope of application, should CNP be applied to only corporations or to individual wrongdoers as well? Should CNP be used to resolve all corporate crimes, or only corporate crimes of certain types and severity? Regarding the pre-conditions and obligations of CNP, are the corporation's acceptance of punishment and promise to improve its compliance system under inspection sufficient for a non-prosecution decision? If the corporation

[271] *Ibid*, 55-58 (calling for the clarification of the scope of application for CNP, and the effective compliance program standard and enhanced transparency in the CNP procedure).

successfully fulfills its compliance commitments at the end of the inspection period, should a non-prosecution decision be granted to only the corporation or to individual wrongdoers as well? Given the already enormous tension between the huge caseload and the shortage of judicial resources, how to make sure that the Procuratorates have sufficient incentives to undertake the time-consuming work of compliance monitoring and assessment? With regard to the compliance inspection by third-party organizations, how to ensure other public entities are willing to cooperate with the procuratorial agencies and undertake the work of compliance monitoring? Given the short inspection period under CNP and the lack of any guidelines for the evaluation of corporate compliance program, how can the effectiveness of corporate compliance efforts be ensured?

With all the unresolved issues in mind, the following Chapters will introduce and analyze the corporate enforcement practices involving the use of DPAs in the U.S., UK and France, in the hope of contributing to the development of CNP in China. The ultimate goal is to develop an enforcement mechanism that empowers the Chinese authorities to utilize the existing enforcement resources to combat bribery effectively and promote long-term corporate compliance, without inflicting unbearable pains on the enforcement resources and the innocent third parties.

Chapter 3 Deferred Prosecution Agreement as a Promising Solution to Corporate Enforcement Challenges

3.1 Introduction

Though slight differences remain across jurisdictions, a DPA generally refers to an agreement between a prosecuting authority and a putative corporate defendant for the resolution of the alleged misconduct. Corporations aiming for DPAs are expected to conduct timely internal investigation into the potential wrongdoings, self-report and cooperate with the government's investigations, including the investigation into relevant individual wrongdoers, and take remedial measures.[1] They are typically required under DPAs to accept responsibility for the alleged violations, pay monetary sanctions, and improve their compliance program under the supervision of the prosecutor or independent compliance monitor.[2] In reward, the prosecutor agrees to defer the charge filed against the corporation, with the court's approval, for a set period (typically several years) in order to give the corporation an opportunity to demonstrate its good conduct.[3] The charge will be dismissed if the prosecutor believes that the corporation has met all the obligations at the end of the deferral period.[4] Otherwise, the government reserves the right to proceed to trial.

DPA presents a pragmatic way to resolve criminal matters for both the corporation and the prosecutor. From the perspective of the corporation, the pre-trial resolution mechanism offers a valuable opportunity to avoid the protracted trial proceeding, criminal conviction and the ensuing reputational damages, de-licensing and debarment from governmental contracts, which can be deadly to the corporation.[5] From the perspective of the prosecutor, DPA presents a speedy and less costly way of concluding corporate investigations without the lengthy and uncertain trial proceeding, nor the risks of inflicting the spill-over effect of corporate conviction on the innocent third-parties.[6] DPA also enables prosecutors to impose huge monetary sanctions on the corporations and elicit extensive corporate cooperation and compliance obligations.[7] Even if the

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[1] U.S. Government Accountability Office, "Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness," GAO-10-110, 2009, https://www.gao.gov/assets/300/299781.pdf, 10 (enumerating the considerations for the prosecutorial decisions to decline, enter into a D/NPA, or prosecute).

[2] *Ibid*, 11 (listing a set of obligations that are often imposed on corporations under D/NPAs).

[3] *United States v. Fokker Services B.V.,* 15-3016 (D.C. Cir. Apr. 5, 2016), 19 ("the entire object of a DPA is to enable the defendant to avoid criminal conviction and sentence by demonstrating good conduct and compliance with the law"); *SFO v. Standard Bank Plc*, Southwark Crown Court, Case No: U20150854, November 30, 2015, para. 1 (the purpose of DPA "is to provide a mechanism whereby an organisation can avoid prosecution for certain economic or financial offences by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act").

[4] Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1892 ("[o]ffenders seeking deferral at any price are thus forced in advance to submit to adjudicatory processes outside the reach of any judicial review, where prosecutors alone determine the deferee's compliance").

[5] *Ibid*, 1884-89 (discussing the incentives for firms to negotiate a DPA, including most importantly the elimination of collateral consequences, the management of negative publicity, and the avoidance of corporate conviction).

[6] U.S. Government Accountability Office, "Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness," 29 ("DPAs and NPAs are appropriate tools and offer a number of benefits, such as the avoidance of negative collateral consequences of prosecution and conviction to companies and innocent third parties").

[7] David M. Uhlmann, "Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability," *Maryland Law Review* 72, no. 4 (2013): 1301 ("[t]he terms of the agreements are attractive to the government, because they often provide large penalties, far-reaching corporate compliance programs with outside monitors approved by the Department, and promises of cooperation by the companies involved").

corporation breaks its promises under the DPA, the prosecutor is able to leverage the corporate-proffered evidence and acceptance of responsibility to bring a hard prosecution.[8]

Owing to its pragmatic value in empowering corporate bribery enforcement, DPA is expanding from the U.S., its country of origin, to other jurisdictions. In the U.S., DPA is now a primary way of resolving the FCPA investigations.[9] Benefiting from the pre-trial resolution vehicles, the U.S. is leading the global anti-bribery enforcement with a large number of FCPA enforcement actions against both domestic and foreign firms, as well as jaw-dropping monetary sanctions.[10] It accounts for 155 of all the 264 corporations that were sanctioned between 1999 and 2021 for foreign bribery in the 44 member states to the OECD Anti-bribery Convention.[11] In the face of mounting international pressure on combating corporate bribery, more jurisdictions, including not only common law countries such as the UK, Canada and Singapore, but also traditional civil law countries such as France and Brazil, began to embrace the DPA or DPA-like mechanisms in the hope of boosting enforcement actions against bribery.[12] Being conscious about the criticisms of the unfettered prosecutorial discretion in the U.S. model of DPAs, the newcomers show a clear preference for the DPA model that allows a more substantial role played by the judiciary and more transparency for the sake of protecting the justice and public interests.[13] Similarly, the 2021 OECD Recommendations for further combating foreign bribery also called for an expanded use of DPAs and other non-trial resolution mechanisms in the anti-bribery enforcement area with the emphasis on appropriate oversight.[14]

This Chapter introduces and compares the origins, design and application of DPAs in the U.S., UK and France. It serves the whole research by paving the way for the normative analysis and assessment of the DPA mechanism in terms of its efficacy in facilitating corporate enforcement actions and promoting the criminal law goals of deterrence and rehabilitation. It is hoped that the discussion and analysis of DPA programs in the three selected jurisdictions would offer valuable lessons for China in designing its own version of DPAs.

[8] Christopher A. Wray, and Robert K. Hur, "Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice," *American Criminal Law Review* 43, no. 3 (2006): 1105 ("the government would proceed to trial, armed with the company's admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion").

[9] Gibson Dunn, *2016 Year-End Update on Corporate NPAs and DPAs,* https://www.gibsondunn.com/2016-year-end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ (accessed July 6, 2019) (the percentage of corporate FCPA resolutions involving at least one NPA or DPA (whether parent- or subsidiary-level, DOJ- or SEC-driven) has averaged approximately 54% per year since 2004).

[10] John Ashcroft, and John Ratcliffe, "The Recent and Unusual Evolution of an Expanding FCPA," *Notre Dame Journal of Law Ethics & Public Policy* 26, (2012): 27 (claiming that the increased international cooperation after 9/11, the promulgation of Sarbanes-Oxley Act, and the use of DPAs after the dismantling of Arthur Andersen jointly contribute to the boom of FCPA enforcement actions).

[11] OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions*, December 20, 2022, https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf (accessed January 10, 2023).

[12] Gibson Dunn, 2018 Mid-Year Update on Corporate NPAs and DPAs, July 10, 2018, https://www.gibsondunn.com/2018-mid-year-npa-dpa-update/ (accessed June 16, 2021), 15-21 (tracking the international development of DPA and surveying countries that have adopted, or are considering adopting, similar regimes).

[13] Richard A. Epstein, "The Deferred Prosecution Racket," *Wall Street Journal*, November 28, 2006, http://www.wsj.com/articles/SB116468395737834160 (accessed June 15, 2019) (claiming that the use of DPAs and NPAs undermines the principle of the separation of powers by turning prosecutor into both judge and jury); Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements," *Journal of Legal Analysis* 8, no. 1 (2016): 191-234 (noting that prosecutors are quasi-regulators to the extent of using the mandate to create and impose new duties, and criticizing the lack of effective ex-ante constraints and ex-post oversight for being inconsistent with the rule of law); Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, para. 5.168 (noting that the concerns over the abuse of prosecutorial discretion "can be remedied by a more transparent, codified and supervised DPA").

[14] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, adopted on November 26, 2009 and amended on November 26, 2021, at 9-10.

This Chapter proceeds as follows. Following the Introduction, Section 3.2 provides an overview of the U.S. DPA mechanism, including the historical development, the conditions for an access to DPA, the typical terms of DPA and the application of DPA in practice. Section 3.3 looks at how the UK and French authorities have designed and applied their DPA regimes in order to copy the success story of the U.S. in the corporate enforcement area while avoiding the criticisms plaguing the U.S. DPA model. Comparative observations of the DPA programs in the three jurisdictions are provided in Section 3.4. It is noted that compared with the U.S. model of DPA, the UK and French DPA programs place more emphasis on the statutory basis, judicial oversight and transparency. In terms of the goal to incentivize corporate self-reporting and cooperation, strengthen individual accountability and corporate compliance, the policies in the three jurisdictions show wide variations in the threshold for an access to DPAs, the level and predictability of incentives, as well as the extent of obligations imposed under DPAs. In light of the potentials of DPAs for the enforcement authorities and the challenges confronting the Chinese anti-bribery authorities as identified in Chapter 2, Section 3.5 envisions that introducing DPA in China could help the Chinese authorities to address those challenges they face in the enforcement of anti-bribery laws. However, considering the lessons learned from the DPA systems in the U.S., UK and France, many crucial questions are left unanswered for the designing and implementation of China's own version of DPAs to achieve the desired goal. Section 3.6 concludes.

3.2 Origin, Evolution and Application of DPAs in the U.S.

U.S. prosecutors enjoy extremely broad discretion in choosing whether to file or drop charges, and whether to negotiate a plea or other types of resolution.[15] Based on the broad prosecutorial discretion, prosecutors have at their disposal various vehicles to settle corporate bribery matters, ranging from the classic plea agreements to DPAs, NPAs and, a relatively recent innovation, declinations with disgorgement. In addition to DPA that was defined in the beginning of this chapter, an NPA involves similar arrangement as a DPA. The only difference is that NPA is not filed with the court, thus eliminating the possibility for judicial involvement.[16] Declination with disgorgement is often issued in the form of a letter, which announces the prosecutor's decision to decline to prosecute conditional upon the corporation's timely self-disclosure, full cooperation, remediation and commitments to disgorgement of illegal proceeds.[17] As these means of resolution are based on similar structural arrangement, this Section will use DPA as a typical example to introduce the U.S. settlement mechanisms, unless otherwise specified.

[15] *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (ruling that refusal to prosecute is not subject to judicial review); *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991) (claiming that the court is generally required to grant a prosecutor's motion to dismiss the charges under Rule 48 (a) of Federal Rule of Criminal Procedure unless dismissal is "clearly contrary to manifest public interest").

[16] DPAs and NPAs are not distinguished in this paper unless otherwise stated. U.S. Government Accountability Office, "Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements," June 5, 2009, https://www.gao.gov/assets/130/122853.pdf (accessed June 15, 2019), 10-11 (noting that a commonly accepted distinction between DPA and NPA is whether charges are filed with the court).

[17] US Justice Manual, 9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (clarifying that declination with disgorgement, in contrast to traditional declinations, is applied to "a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy").

3.2.1 The Historical Development of DPAs and Arthur Andersen Effect

In the U.S., DPAs were originally available for individual defendants only, such as juveniles and first-time offenders charged with minor crimes. The concept was first conceived by the Chicago Boy's Court in 1914 to reduce the congestion of dockets in the court and to facilitate the rehabilitation of juveniles and first-time offenders by avoiding the stigma of criminal conviction.[18] During the 1970s, deferred prosecution played an important role in the war on drugs after the Supreme Court's historical judgment in *Robinson v. California* that criminal penalty against drug addiction was cruel and unusual.[19] Today, deferred prosecution of individuals is very rare. Less than 1% of federal suspects were offered a pre-trial diversion agreement in 2018.[20] The recent deal reached between the DOJ and Meng Wanzhou, the CFO of China's Huawei Technologies, with regard to the allegation of misleading a financial institution is an unusually high-profile DPA in the individual context.[21]

Faced with a potential corporate crime, the US prosecutors had practically two choices, namely, indicting the corporation or declining to prosecute. This situation began to change in the 1990s. In the charge of security fraud violations against Salomon Brothers in 1992, the DOJ decided not to prosecute the company considering its exceptionally comprehensive cooperation. Although no formal agreement was reached, this non-prosecution decision promoted the idea that genuine cooperation could win favorable terms for the firm.[22] In another case against Prudential Securities in 1994, a security fraud charge was filed by the U.S. Attorney for the Southern District of New York but was then deferred for three years under the condition of substantial corporate internal reforms.[23] It became the first DPA involving a major company, formally introducing the DPA mechanism into the corporate sphere.[24] However, prosecutors at that time tended to believe that their expertise lay in the retrospective evaluation of criminal liability. The intimidating image of intervening in the prospective corporate governance area through DPAs is not an attractive option, especially considering the lack of formal guidance from the DOJ regarding organizational prosecutions.[25] DPA was only sporadically used during the 1990s for

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[18] Greenblum, "What Happens to a Prosecution Deferred?" 1866 (tracing the deferred prosecution of individuals to 1914 regarding the attempts to process juvenile offenders without branding them as criminals).

[19] *Robinson v. California*, 370 U.S. 660, 667 (1962).

[20] Public Citizen, *Soft on Corporate Crime: Justice Department Refuses to Prosecute Corporate Lawbreakers, Fail to Deter Repeat Offenders,* September 26, 2019, https://www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/(accessed 16 October 2019) (the data is based on the analysis of D-4 and H-1 of the 2019 Federal Judicial Caseload Statistics, which reports 455 pre-trial diversions out of 75,358 convictions and guilty pleas between April 2018 and March 2019, while NPAs not filed with the court are not included); Bureau of Justice Statistics, "Federal Justice Statistics, 2013 - Statistical Tables (March 2017), Table 2.3, 12, https://www.bjs.gov/content/pub/pdf/fjs13st.pdf (accessed June 18, 2019) (0.7% of federal suspects received pre-trial diversional agreements).

[21] Press Release, "Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution," September 24, 2021, https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution (accessed October 16, 2021).

[22] Press Release, "DOJ and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case," May 20, 1992, https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm (accessed June 18, 2019); Peter Spivack, and Sujit Raman, "Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements," *American Criminal Law Review* 45, no. 2 (2008): 163-164 ("[t]hough the Salomon case did not involve a formal non-prosecution agreement, it provided a clear message to companies that full cooperation, and the sincere willingness to clean house, could lead to favorable results").

[23] Deferred Prosecution, Prudential Securities Inc. (S.D.N.Y 1994) (Mag. No. 94), October 27, 1994, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/prudential.pdf (accessed June 18, 2019).

[24] "Davis Polk's Scott Muller on the Rise of Corporate Deferred Prosecutions," *Corporate Crime Reporter* 24, (2010) https://www.corporatecrimereporter.com/scottmuller092710_000.htm (accessed June 18, 2019) (noting that the Prudential Securities DPA was the "first ever" DPA in the corporate context).

[25] "Interview with Mary Jo White," *Corporate Crime Reporter* 19, no. 11 (2005), www.corporatecrimereporter.com/maryjowhiteinterview010806.htm (accessed June 18, 2019) ("prosecutors are at their best when they decide to charge or not and not get into managing corporate America").

the resolution of corporate crimes, and only about a dozen cases were resolved through pre-trial diversional agreements.[26]

In 1999, Eric Holder, then-Deputy Attorney General of DOJ, delineated nine factors that should be considered by prosecutors when charging organizations in a memorandum titled *Bringing Criminal Charges against Corporations*.[27] The memo provided long-waited guidance and clarification for the federal investigations and prosecutions of corporate misconduct and laid foundations for the all-round development of DPAs in the U.S. The Enron and WorldCom financial scandals in the early 2000s shocked the global market, leading people to question the competence of the regulators and the internal control of the listed companies. In response, the Congress quickly passed the Sarbanes-Oxley Act and set up a Corporate Fraud Task Force headed by President Bush under the DOJ, setting off a wave against corporate crimes.[28] Against this backdrop, Arthur Andersen, the auditing firm of Enron and one of the former Big Five, was convicted of obstruction of justice in 2002 for intentionally shredding accounting documents related to Enron.[29] As the SEC rules prohibit the accounting firm convicted of a felony from auditing listed entities, Arthur Andersen was soon put out of business, costing the jobs of 28,000 employees in the U.S. alone.[30] Although the Supreme Court revoked the criminal conviction later in 2005 citing flaws in the instructions to the jury, it was too late to prevent the collapse of the company worldwide.[31]

The Arthur-Andersen event fully demonstrated the destructive spill-over effect of criminal conviction on the company itself, the shareholders, the employees and even the whole market, illustrating the necessity of promoting pretrial diversion mechanism in the post-Enron era.[32] Larry D. Thompson, the successor to Eric Holder, revised the original Holder Memo in 2003 to emphasize the authenticity of corporate cooperation in affecting the prosecutors' charging decisions. More importantly, the Thompson Memo explicitly authorized prosecutors to use NPA as a third way to resolve corporate criminal matters in addition to seeking conviction or granting exemption.[33] Since then, the DOJ has supported and guided the prosecutors' use of DPAs and NPAs to deal with criminal cases involving organizations through a series of memoranda,

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[26] Brandon L. Garrett, and Jon Ashley, *Corporate Prosecution Registry*, Duke University and University of Virginia School of Law, at https://corporate-prosecution-registry.com/browse/ (accessed January 6, 2023) (documenting 5 DPAs and 7 NPAs in the 1990s); Leonard Orland, "The Transformation of Corporate Criminal Law," *Brooklyn Journal of Corporate, Financial & Commercial Law* 1, no. 1 (2006): 57 (estimating that only ten corporate DPAs and NPAs were executed in the 1990s).

[27] Memorandum from Deputy Attorney General Eric Holder, *Bringing Criminal Charges against Corporations* (Holder Memorandum), June 16, 1999.

[28] Executive Order No. 13271, *Establishment of the Corporate Fraud Task Force*, July 9, 2002, https://www.justice.gov/archive/dag/cftf/execorder.htm (accessed October 10, 2019).

[29] *United States v. Arthur Andersen*, No. 02-121 (S.D. Tex. June 15, 2002).

[30] SEC, *Rules of Practice*, 17 CFR Article 201.102(e), 2003; Elizabeth K. Ainslie, "Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution," *American Criminal Law Review* 43, (2009): 107-09 (noting that the 85,000 people employed by Arthur Andersen in 2001, in approximately 390 offices in 85 countries, were reduced to only 3000 by the end of 2002).

[31] *Arthur Andersen LLP v United States*, 544 US 696 (2005); Linda Greenhouse, "Justices Reject Auditor Verdict in Enron Scandal," *New York Times*, June 1, 2005, https://www.nytimes.com/2005/06/01/business/justices-reject-auditor-verdict-in-enron-scandal.html (accessed June 18, 2019) (reporting that despite its overturned conviction, Andersen "has no chance of returning as a viable enterprise").

[32] John C. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 447-48 (referring to the tendency for fines imposed on the corporation to fall on those that are not culpable as the "overspill problem"); Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-first Century," *University of Pennsylvania Journal of Business Law* 15, (2013): 797-842 (however, showing that the "corporate death penalty" is no more than a bogeyman and plea agreements can also be used to obtain structural reforms).

[33] Memorandum from Deputy Attorney General Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* ("Thompson Memorandum"), January 20, 2003 (emphasizing particularly the authenticity of a corporation's cooperation).

including, most notably, the Yates Memo, the Benczkowski Memo and the latest Monaco Memo.[34] The SEC, the enforcer of the civil liability of the FCPA accounting violations, and Commodity Futures Trading Commission, the enforcer of foreign corrupt practices constituting the violations of the Commodity Exchange Act, respectively embraced their own versions of DPA in 2010 and 2019 to incentivize corporate cooperation and remediation.[35]

3.2.2 The U.S. DPA Regime in General

When corporate offenses are brought to their attention, the prosecutors enjoy sole discretion to determine whether to charge the corporation or not, whether to negotiate with the corporation for the conclusion of investigation or to proceed to the court without any agreement.[36] Since the release of the Filip Memo in 2008, the principles and factors set forth by the memoranda for prosecutors to consider in corporate investigations and prosecutions have been incorporated in the U.S. Attorneys' Manual, the DOJ's non-binding internal document that was later updated to the USJM in 2018.[37] The USJM enumerates a non-exhaustive list of eleven factors for prosecutors to take into consideration when making charging decisions involving business organizations, determining the means of resolution and negotiating the terms of agreement.[38] Though the content and interpretation of factors have evolved over time with the release of different DOJ memoranda, the factors generally include the gravity of crime, the corporation's history of similar misconduct, the adequacy of non-criminal remedies and individual prosecution, corporate compliance program, self-disclosure, cooperative and remedial measures, the potential collateral consequences of prosecution, and the interests of any victims.[39] Out of all these factors, the prosecutors' decision to offer a DPA to a particular firm is largely influenced by the firm's willingness to cooperate and remediate, as well as the potential collateral damages to the innocent third parties, such as the employees, shareholders and customers.[40]

After determining that a DPA is the proper means to resolve corporate charges, the prosecutors would invite the corporation to negotiate the terms of the agreement. There is no general rule or

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[34] Memorandum from Deputy Attorney General Paul McNulty, *Principles of Federal Prosecution of Business Organizations* ("McNulty Memorandum"), December 12, 2006; Memorandum from Deputy Attorney General Mark R. Filip, *Principles of Federal Prosecution of Business Organizations* ("Filip Memorandum"), August 28, 2008; Memorandum from Deputy Attorney General Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing* ("Yates Memorandum"), September 9, 2015; Memorandum from Deputy Attorney General Brian A. Benczkowski, *Selection of Monitors in Criminal Division Matters* ("Benczkowski Memorandum"), October 11, 2018; Memorandum from Deputy Attorney General Lisa O. Monaco, *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* ("Monaco Memorandum-I"), October 28, 2021; Memorandum from Lisa O. Monaco, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* ("Monaco Memorandum-II"), September 15, 2022.

[35] Press Release, "SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations," January 13, 2010, https://www.sec.gov/news/press/2010/2010-6.htm (accessed June 21, 2019); Commodity Futures Trading Commission Division of Enforcement, Commodity Futures Trading Commission Enforcement Manual, Articles 7.2.2 and 7.2.3, May 20, 2020, https://www.cftc.gov/media/1966/download (accessed January 13, 2023) (authorizing DPAs and NPAs as the tools at the disposal of the Division for facilitating self-reporting, cooperation, and remediation).

[36] *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (ruling that refusal to prosecute is not subject to judicial review); *United States v. Pimentel*, 932 F.2d 1029, 1033 n.5 (2d Cir. 1991) (claiming that the court is generally required to grant a prosecutor's motion to dismiss the charges under Rule 48 (a) of Federal Rule of Criminal Procedure unless dismissal is "clearly contrary to manifest public interest").

[37] Filip Memorandum, at 1 (claiming that the revised principles will be set forth for the first time in the United States Attorneys' Manual); "Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual," September 25, 2018, https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual (accessed June 22, 2019).

[38] USJM, 9-28.300, Factors to be Considered.

[39] *Ibid.*

[40] Government Accountability Office, "Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements," June 5, 2009, at 9 (noting that prosecutors "most frequently cited the company's cooperation with the investigation, the collateral consequences of a criminal prosecution, and any remedial measures the company had taken or planned to take as most important in their decision on entering into a DPA or NPA").

guideline on the terms of DPAs, thus the agreements drafted by different attorney's offices may differ in specific provisions.[41] Generally speaking, corporations are required under DPAs to admit and accept responsibility for the alleged criminal facts (not an admission of guilt), and promise to comply with the agreements and relevant laws underlying the alleged misconduct.[42] Monetary obligations in the form of criminal or civil fine, restitutions to the victims and disgorgement of criminal proceeds, and non-monetary obligations such as discipline of individual wrongdoers, and corporate governance and compliance reforms may be imposed on the corporations.[43] Corporations are also routinely demanded to provide continual cooperation with the U.S. and foreign prosecutors and regulators in various ways, such as collecting and disclosing relevant documents, making witnesses available for interview, as well as cooperating in the relevant individual proceedings.[44] As a reward, the prosecutors agree to hold the charges in abeyance for a set period, ranging from 12 to 48 months, and drop the charges at the end of the deferral period if no breach of the DPA or relevant laws occurs.[45] Otherwise, the prosecutors reserve the right to extend the deferral period or even revoke the DPA to continue with the prosecution procedure based on the company's admission of guilt and the evidence submitted by the company for obtaining cooperation credits.

DPAs agreed between the government and the corporation need to be sent to the court for approval. According to the Speedy Trial Act, a trial shall commence within seventy days from the filing of charges. Meanwhile, the trial can be suspended for "any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct".[46] The Speedy Trial Act is perceived as authorizing the judge to exercise the judicial oversight over DPAs. However, the court's role in reviewing DPAs is rather narrow and deferential in nature. According to the ruling of the U.S. Court of Appeals for the D.C. Circuit in *U.S. versus Fokker Service,* the court's authority of approving DPAs under the Speedy Trial Act is limited to determining whether the DPA is used to enable the defendant to demonstrate good conduct or to circumvent the speedy trial clock.[47] In deference to the executive's exclusive power and greater competence in making charging decisions, the court has few means to conduct a meaningful review of the substantive provisions of a DPA for assessing

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[41] Lawrence D. Finder, and Ryan D. McConnell, "Devolution of Authority: The Department of Justice's Corporate Charging Policies," *St. Louis University Law Journal* 51, no. 1 (2006): 2-3 (noting that the terms of a pretrial agreement depend on which particular prosecutor's office is drafting the resolution).

[42] Brandon L. Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (2011): 1845 (noting that such provision has served a moral purpose and also a practical purpose to bind the firm should it breach the agreement or deny having engaged in the prohibited conducts); Deferred Prosecution Agreement, United States Attorney's Office of the Middle District of Pennsylvania and Breakthru Beverage Pennsylvania, July 19, 2017, https://www.justice.gov/file/984896/download (accessed November 3, 2019), 3 (the company admits that the statement of facts is true but denies any criminal liability for the fact, which presents a stark exception to the majority of DPAs).

[43] U.S. Government Accountability Office, "Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness," 11 (listing a set of obligations that are often imposed on corporations under D/NPAs).

[44] Karolos Seeger, and Bruce E. Yannett, "UK vs US: An Analysis of Key DPA Terms and Their Impact on Corporate Parties," *in The International Comparative Legal Guide to: Business Crime 2019* (London: Global Legal Group Ltd., 2018), 6 ("US DPAs contain a general obligation to 'cooperate fully' in any matter related to the conduct described in the DPA both with DOJ and other 'other domestic or foreign law enforcement and regulatory authorities and agencies'").

[45] Gibson Dunn, *2018 Year-end Update on Corporate NPAs and DPAs*, 8 ("duration of the agreement typically ranges from 12 to 48 months").

[46] 18 U.S.C. Article 3161(h) (2).

[47] *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 751 (D.C. Cir. 2016) (reversing the district court's decision of rejecting the DPA which it considers too lenient on the defendant based on Speedy Trial Act. Meanwhile, implying that the unethical and illegal provisions may become justifications for rejecting DPAs, but choosing not to elaborate it in the current case).

its fairness and consistence with the public interest.[48] Furthermore, when a NPA instead of a DPA is concluded between the prosecutor and the corporation, there is practically no room for judicial review as NPA is not filed with the court at all.[49]

In order to ensure that the company is genuinely complying with the terms of DPAs, the DOJ has employed several oversight mechanisms, including corporate self-reporting obligations and the use of independent compliance monitors. Companies are usually required under DPAs to report on their remedial and compliance progress to the prosecutor at specified internals during the deferral period.[50] Such post-resolution self-reporting requirements may demand the disclosure of newly discovered evidence about the misconduct, or mere allegations about potential violations of laws, even the allegations that are unrelated to the misconduct underpinning the agreement.[51] Some prosecutors may go even further and require the company to retain at its own expense an independent compliance monitor. The primary responsibility of an independent monitor is to assess and monitor the company's compliance with the terms of DPA with the ultimate goal of addressing and reducing the risk of the recurrence of misconducts.[52] According to the Morford Memo and the Benczkowski Memo governing the use and selection of monitors in the context of DPAs, monitors are generally expected to prepare the initial and follow-up reports (i) setting forth the assessment of, and the recommendations to promote, the effectiveness of corporate policies, procedures and internal controls; (ii) reviewing the company's remedial efforts; and (iii) evaluating whether the corporate compliance program is reasonably designed and implemented

[48] *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) ("[j]udicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts"); *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (acknowledging that the Attorney General and United States Attorneys retain "broad discretion" to enforce the nation's criminal laws, and that the Executive is more equipped and experienced than the judiciary to assess the strength of the case against the defendant).

[49] See Wray, and Hur, "Corporate Criminal Prosecution in a Post-Enron World," 1105 ("[n]on-prosecution agreements... can encompass most of the attributes of a deferred prosecution, but they do not involve the formal filing of charges"); *United States v. HSBC Bank USA, N.A. and HSBC Holdings PLC*, 2013 WL 3306161 (E.D.N.Y., 2013), 9-10 (noting that an NPA confers a public relations benefit to the companies, while DPA confers such benefit for the government in terms of the effectiveness of prosecutorial authorities in the public eye).

[50] Jennifer Arlen, and Marcel Kahan, "Corporate Governance Regulation through Non-prosecution," *University of Chicago Law Review* 84, no. 1 (2017): 337 ("[m]ost PDAs with mandates also require firms to regularly report to prosecutors and other federal authorities on the firm's compliance activities"); For a typical DPA that imposes self-reporting obligation, see *United States v. Herbalife Nutrition Ltd.*, Deferred Prosecution Agreement, 20 Cr-00443-GHW, (S.D.N.Y Aug. 24, 2020), https://www.justice.gov/criminal-fraud/file/1312361/download (accessed January 13, 2023), at 11 ("[t]he Company agrees that it will report to the United States annually during the Term regarding remediation and implementation of the compliance measures described in Attachment C. These reports will be prepared in accordance with Attachment D").

[51] Gibson Dunn, "2020 Mid-Year Update on Corporate NPAs and DPAs," July 15, 2020, https://www.gibsondunn.com/wp-content/uploads/2020/07/2020-mid-year-npa-dpa-update.pdf, at 22-23 (discussing the tendency in the expansion of self-disclosure obligations under DPAs or NPAs); Gibson Dunn, "2021 Year-end Update on Corporate NPAs and DPAs," February 3, 2022, https://www.gibsondunn.com/wp-content/uploads/2022/02/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf, at 7-8 (discussing the formalization of the certification requirements under DPAs, which require the corporate executives to certify that (1) they are aware of the company's self-disclosure obligations under DPA; and (2) the company has disclosed "any and all evidence," including all allegations about potential violations of law).

[52] Memorandum from Acting Deputy Attorney General Craig S. Morford, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, March 7, 2008, https://www.justice.gov/archives/jm/criminal-resource-manual-163-selection-and-use-monitors (accessed October 26, 2020) ("[a] monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct"); Benczkowski Memorandum, October 11, 2018 ("[m]onitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution").

to prevent and detect violations of pertinent laws.[53] The monitors' reports will form an important basis for the prosecutor's assessment of the company's fulfillment of the DPA obligations.[54]

DPAs usually contain provisions that grant prosecutors the sole discretion to determine whether the putative defendant has breached the agreement, and in case of breach, to decide what measures should be taken.[55] The court plays a rather limited role in monitoring or determining the company's compliance with the agreement or applicable laws.[56] According to the presumption of regularity rule, the court is not allowed to directly monitor the implementation of DPAs in lieu of prosecutors based on a theoretical concern over any potential prosecutorial misconduct.[57]

3.2.3 Corporate Enforcement Policy

The unique challenges in detecting and prosecuting foreign bribery schemes render corporate self-reporting and cooperation even more valuable for the corporate enforcement actions in the foreign bribery field.[58] Having realized the significance of corporate self-reporting and cooperation, the FCPA Corporate Enforcement Policy (hereinafter "CEP") was codified in the USJM in 2017 following a 12-month pilot program.[59] It aims to provide greater and more certain incentives for corporations facing the foreign bribery charges to self-report, cooperate and remediate.[60] CEP has since then been revised three times respectively in March and November 2019 and January 2023, and is now expanded to all types of corporate criminal cases resolved by DOJ's Criminal Division as a non-binding guidance.[61]

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[53] Jessica Nwokocha, and Adria Perez, Kilpatrick Townsend & Stockton LLP, "Ending the Decade on a High: U.S. Government's 2019 FCPA Enforcement Highlights," April 10, 2020, https://www.jdsupra.com/legalnews/ending-the-decade-on-a-high-u-s-54997/ (accessed October 17, 2020) (noting that in the four 2019 monitorship agreements involving MTS, Fresenius, and Ericsson, "the majority of the terms are substantially the same and reflect the standard language used for such agreements", while the Walmart agreement pertains to key risky areas and specific countries).

[54] *United States v. Bilfinger SE*, Deferred Prosecution Agreement, 4:13-er-00745 (T.X.S.D, Sep. 23, 2019), https://www.justice.gov/criminal-fraud/file/971416/download (accessed October 28, 2020), at 3-4 (citing "the monitor's inability to certify compliance with the compliance obligations in the 2013 Agreement after 18 months of monitorship" as a consideration for the extension of DPA).

[55] See Stolt-Nielsen, 442 F.3d 177 (3rd Cir. 2006) (ruling that federal courts do not have the authority to enjoin a prosecutor from indicting a firm which the prosecutor concludes violated a DPA); *U.S. v. Goldfarb*, No. C 11–00099 WHA, 2012 WL 3860756 (N.D. Cal. Sept. 5, 2012) (denying motion to dismiss indictment because of claimed substantial performance with DPA).

[56] Greenblum, "What Happens to a Prosecution Deferred?" 1904 (claiming that enhanced juridical oversight is even more urgent for "the implementation of the agreement, where dissolution of the agreement can result in prosecution and the stakes are highest").

[57] *United States v. HSBC Bank USA*, NA, 863 F.3d 125, 129 (2d Cir. 2017) ("[i]n the absence of evidence to the contrary, the DOJ is entitled to a presumption of regularity — that is, a presumption that it is lawfully discharging its duties"); *Rinaldi v. United States*, 434 U.S. 22, 29 n. 15, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (ruling that the "leave of court" requirement for dismissing charges authorizes the court only the right to protect defendant from prosecutorial harassment).

[58] OECD, *The Detection of Foreign Bribery*, 2017, at 9 (discussing the unique challenges of detecting foreign bribery, including no incentives for either party to disclose, no identified direct victims, and insufficient knowledge of witnesses about the misconduct); Government Accountability Office, "Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements," June 5, 2009, at 9 (noting that corporate cooperation is an important factor in offering DPAs in the FCPA cases, as obtaining evidence from foreign countries and tracing bribe payments through multiple overseas accounts are burdensome for the authority).

[59] Tom Schoenberg, "Companies Get Extra Incentive to Disclose Bribes: No Charges," *Bloomberg*, November 29, 2017, https://www.bloomberg.com/news/articles/2017-11-29/new-u-s-incentive-for-self-reporting-bribes-no-penalty-at-all (accessed December 12, 2019) (reporting that the DOJ would make the Pilot Program a permanent guideline to encourage companies to self-report possible violations of the FCPA); US Justice Manual, 9-47.120, FCPA Corporate Enforcement Policy (revised in March 2019 and last updated on November 20, 2019), https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 (accessed December 2, 2019).

[60] *Ibid*.

[61] Jody Godoy, "DOJ Expands Leniency Beyond FCPA, Lets Barclays Off," Law360, March 1, 2018, https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off (accessed December 2, 2019); USJM. 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, updated in January 2023, https://www.justice.gov/opa/speech/file/1562851/download (accessed February 4, 2023).

Under the CEP, a declination will be presumptively awarded to the corporations that have met all the requirements of voluntary self-disclosure, full cooperation, timely and appropriate remediation and disgorgement, in absence of aggravating circumstances relating to the seriousness, frequency or pervasiveness of the violation.[62] Corporations with aggravating circumstances are not qualified for the presumption of declinations, but may still be offered a declination based on the prosecutors' discretion.[63] Even if a DPA is concluded instead of declinations as a result of the aggravating factors, the firms can still receive 50% to 75% reduction off the low end of the range of fine based on the U.S. Organizational Sentencing Guidelines, and will generally avoid the imposition of external compliance monitorship.[64] As an attempt to encourage voluntary self-disclosure, the CEP places a cap of 50% reduction to corporations that failed to self-report in the first place but engaged in full cooperation and remediation in a later stage.[65]

It is worth noting that voluntary disclosure, full cooperation and remediation are strictly defined and interpreted by the DOJ. According to the CEP, voluntary disclosure will only be credited if it is made by the company to the Criminal Division "prior to an imminent threat of disclosure or government investigation", and "within a reasonably prompt time after becoming aware of the misconduct".[66] Therefore, corporations opting to self-report to the DOJ with the knowledge that the misconduct will soon be exposed in the media are not likely to receive voluntary disclosure credits, even though the misconduct was not known to the DOJ at the time of self-reporting. In order to receive full cooperation credits, firms are expected to (i) conduct comprehensive internal investigation, disclose all relevant facts, *including* all facts related to the involvement in the criminal activity by all relevant individuals, and attribute the facts to specific sources; (ii) cooperate in a proactive way even without the specific request from the DOJ; (iii) in a timely and voluntary manner, preserve, collect, and disclose relevant documents and make relevant individuals available for the DOJ's interview.[67] Firms are further expected to demonstrate their recognition of the severity of the misconduct and reduce the risk of recurrence through remedial measures. Corporate remedial measures include (i) measures to address the root cause of the underlying misconduct; (ii) implementation of an effective compliance and ethics program; (iii) appropriate discipline of employees responsible for, or related to, the misconduct; and (iv) appropriate retention of business records.[68]

3.2.4 The Application of Corporate DPAs in Practice

There is no general rule in the U.S. that requires the prosecutors to publicize every DPA they have negotiated.[69] It is thus difficult to compile all corporate DPAs entered into by the U.S. prosecutors. However, the efforts of private actors or entities, Gibson Dunn for example, to track

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[62] Andrew Spalding, "Restoring Pre-existing Compliance Through the FCPA Pilot Program," *University of Toledo Law Review* 48 (2017): 538-45 (noting a four-element requirement in the FCPA Piot Program, the precursor of the CEP, and the absence of pre-existing compliance).
[63] USJM, 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] U.S. Government Accountability Office, "Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness," 5 (noting that "DOJ did not begin to centrally track all DPAs and NPAs until 2009").

DPAs over the years offer us a valuable insight into the application of DPAs in practice.[70] In the 1990s, prosecutors around the U.S. only concluded a dozen corporate DPAs.[71] Encouraged by the Thompson Memo issued in the wake of Arthur Andersen's collapse, the use of DPAs for corporate enforcement actions has increased exponentially since the year of 2003. By the end of 2021, the litigating units of the DOJ and the SEC, as well as different Attorney's Offices around the country had signed at least 608 DPAs, based on the publicly available information.[72] The annual number of corporations that have entered into DPAs with U.S. DOJ and SEC since 2003 is listed in the Figure below.[73]

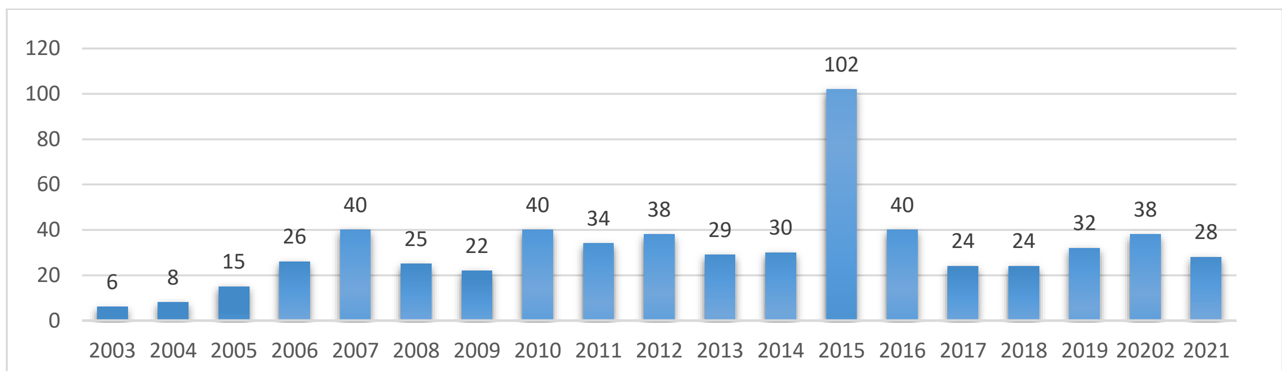

Figure 4 Corporate DPAs and NPAs in the U.S.: 2003 to 2021

A wide range of corporate offenses have been resolved via DPAs or NPAs, including domestic and foreign bribery, money laundering, fraud, antitrust violations, tax offenses, export control and immigration violations, environment and safety violations, healthcare and Food and Drug Administration violations.[74] In particular, foreign (36%) and domestic bribery (9%) make up the largest category of corporate crimes resolved through pretrial agreements, as discovered by Alexander and Cohen in their empirical study documenting D/NPAs involving public companies from 1997 to 2011.[75] According to the Corporate Prosecution Registry that provides a rather comprehensive list of the U.S. federal organizational prosecutions, all 200 FCPA corporate enforcement actions from 2002 have been resolved using settlement vehicles of different kinds, including plea agreements (26.5%), DPAs (38%), NPAs (22%) and declinations (13.5%).[76]

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[70] See Gibson Dunn, (Bi)Annual Year-end Update on Corporate NPAs and DPAs.

[71] See *supra* note 26.

[72] Gibson Dunn, *2020 Year-end Update on Corporate NPAs and DPAs*, 2; Brandon L. Garrett, and Jon Ashley, *Corporate Prosecution Registry*, Duke University and University of Virginia School of Law, at https://corporate-prosecution-registry.com/browse/ (accessed January 5, 2023) (documenting 326 NPAs and 301 DPAs secured by the DOJ from 2000 to October 2022).

[73] Gibson Dunn, *2021 Year-end Update on Corporate NPAs and DPAs*, 2 (noting that the SEC has entered into 10 agreements so far, including 1 in 2010, 2012, 2013, 2014 and 2015 respectively; 3 in 2011 and 2 in 2016; 2015 is an outlier because of the Swiss Bank Program initiated by the Tax Division of the DOJ that resulted in 80 NPAs).

[74] Cindy R. Alexander, and Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea-agreements," *American Criminal Law Review* 52, no. 3 (2017): 563-65 (listing eight categories of offenses that have been settled by public companies and DOJ or federal prosecutors using N/DPAs as well as plea agreements).

[75] *Ibid*, 571-73 (documenting 14 domestic bribery cases and 56 FCPA cases involving the use of DPAs and NPAs out of 157 agreements from 1997 to 2011); See Gibson Dunn, *2019 Year-End Update on Corporate NPAs and DPAs*, at 3 (categorizing the variety of offenses to which DPAs and NPAs are used, while FCPA violations accounted for 22.6% of the total agreements in 2019, compared with 29.2% in 2018 and 22.7% in 2017).

[76] *Corporate Prosecution Registry*, Duke University and University of Virginia School of Law, at https://corporate-prosecution-registry.com/browse/ (accessed January 13, 2023) (documenting that out of the 200 corporate foreign bribery cases registered on Corporate Prosecution Registry from 2002 to October 2022, 53 cases were resolved through plea agreements, 76 through DPAs, 44 through NPAs and the other 27 through declinations); Gibson Dunn, *2016 Year-End Update on Corporate NPAs and DPAs,* https://www.gibsondunn.com/2016-year-

Ever since the introduction of the FCPA Pilot program in 2016, which later evolved into the CEP, 17 declinations with disgorgement have so far been issued.[77] All the declination letters cite the corporation's prompt voluntary self-disclosure, full cooperation and remediation as important considerations. Notably, in the two declinations involving Cognizant Technology Solutions Corporation and Insurance Corporation of Barbados Limited, the DOJ declined to prosecute the corporations despite the involvement of high-level executives in the wrongdoings, which is viewed as one aggravating element that disqualifies the corporation from the presumption of declination according to the CEP.[78] It is explained by the DOJ officials that the involvement of high-level executives does not necessarily rule out declination if other requirements relating to voluntary disclosure, cooperation, remediation and disgorgement are fulfilled.[79]

3.3 The Expansion of DPA Regime to Other Jurisdictions: the UK and France

The success of the U.S. foreign bribery enforcement has inspired law enforcement agencies in a handful of other jurisdictions to adopt similar regimes. DPA has been expanding from the U.S. and warmly welcomed by other jurisdictions as a pragmatic way to resolve organizational crimes. In the UK, France, Canada[80] and Singapore,[81] a DPA or DPA-like mechanism is now available for prosecutors to resolve corporate crimes. However, only 2 remediation agreements, the Canadian version of DPA, have been approved by the Canadian courts, while no agreement has so far been concluded by prosecutors in Singapore since the inception of the DPA mechanism in 2018.[82] Furthermore, countries such as Ireland,[83] Australia[84] and Poland[85] are also contemplating the adoption of similar mechanisms. When designing their own DPA programs, these countries generally adapt the U.S. model of DPAs to their legal system based on their understanding of justice and public interests. This Section uses the DPA program in the UK and the CJIP program in France, the global forerunners in this area next to the U.S., as examples to introduce the alternative models of DPAs. The designing and implementation of the pre-trial resolution

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end-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ (accessed July 6, 2019) (the percentage of corporate FCPA resolutions involving at least one NPA or DPA (whether parent- or subsidiary-level, DOJ- or SEC-driven) has averaged approximately 54% per year since 2004).

[77] For all the delineations made in accordance with the CEP till March 10, 2023, see Declinations, https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations (accessed March 15, 2023).

[78] In Re: Cognizant Technology Solutions Corporation, https://www.justice.gov/criminal-fraud/file/1132666/download (accessed December 11, 2022); In Re: Insurance Corporation of Barbados Limited, August 23, 2018, https://www.justice.gov/criminal-fraud/page/file/1089626/download (accessed December 11, 2022).

[79] "Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference," March 8, 2019, https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national (accessed July 2, 2019) (claiming that aggravating factors like high-level executive involvement in the misconduct will not necessarily preclude a declination if other requirements are fulfilled).

[80] See Parliament of Canada, Criminal Code, R.S.C. 185, c. C-46, XXII-1, Remediation Agreements, https://laws-lois.justice.gc.ca/eng/acts/c-46/page-186.html#h-130598 (accessed June 6, 2021); Public Prosecution Service of Canada, 3.21—Remediation Agreements, https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html (accessed June 4, 2021).

[81] Republic of Singapore Government Gazette, Criminal Justice Reform Act 2018, No. 9 of 2018, April 20, 2018, https://sso.agc.gov.sg/Acts-Supp/19-2018 (accessed June 6, 2021).

[82] Mark Morrison, et al, "Canada Sees Its Second-Ever Remediation Agreement," June 12, 2023, https://www.blakes.com/insights/bulletins/2023/canada-sees-its-second-ever-remediation-agreement (accessed June 23, 2023); Gibson Dunn, *2021 Year-end Update on Corporate NPAs and DPAs*, at 15 (noting that "prosecutors … Singapore have yet to enter into such an agreement since both countries passed legislation authorizing the practice in 2018").

[83] Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, at 219-281.

[84] Australian Government: Attorney-General's Department, Deferred Prosecution Agreement Scheme Code of Practice-Consultation, June 8, 2018, https://www.ag.gov.au/integrity/consultations/deferred-prosecution-agreement-scheme-code-practice (accessed June 6, 2021).

[85] Poland Government Legislative Process, Draft Act on the Liability of Collective Entities for Offenses, https://legislacja.rcl.gov.pl/projekt/12312062 (accessed June 6, 2021).

regimes in these two jurisdictions are expected to provide valuable lessons for the Chinese policymakers in designing a Chinese-style DPA mechanism.

3.3.1 The Introduction and Application of DPAs in the UK

DPA was introduced in the UK against the background of strong criticisms questioning the authorities' capacity and willingness to prosecute corporate crimes.[86] The prosecutors in the UK are confronted with similar challenges as their peers in the U.S.: criminal prosecution of corporate organizations is an understandably costly and risky task involving burdensome investigation and protracted trial proceedings.[87] The negative collateral consequences following criminal indictment and conviction played an important role in discouraging the prosecution of major companies, as was exemplified in the SFO's controversial decision to discontinue the investigation into BAE Systems for bribery of Saudi Arabian officials due to national security concerns.[88] Moreover, prosecutors face extra difficulties in holding big companies accountable as a result of the restrictive corporate liability rule based on the identification doctrine, which attributes the fault of only the company's "directing mind and will" to the company itself.[89]

Beyond the challenges in the domestic landscape, the prosecuting agency's options in tackling overseas corporate crimes are further restricted by the double jeopardy rule and the judiciary's strong resistance to plea-bargaining practices in the UK. The foreseeable costs following indictment had driven several big corporations away to settle with the U.S. agencies, considering the absence of a DPA equivalent regime in the UK.[90] The international double jeopardy rule is well recognized in the UK, while a DPA negotiated with a foreign prosecuting agency was interpreted by the SFO as having the same legal status as a conviction for the purpose of double jeopardy rule in the case of DePuy International Limited.[91] Therefore, a DPA reached in another country could preclude the UK authorities from imposing further criminal sanctions for the same

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[86] Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, at 228-231 (discussing the origins of DPAs in the UK).

[87] UK Ministry of Justice, *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements,* CP9/2012, May 2012 ("DPA Consultation"), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236065/8348.pdf (accessed June 15, 2021), para. 41 ("investigating and then prosecuting a case which results in a late guilty plea costs the SFO around £1.6 million and takes around eight years to conclude").

[88] BAE Systems: Al Yamamah Contract – in the House of Lords, December 14, 2006, https://www.theyworkforyou.com/lords/?id=2006-12-14d.1711.2 (accessed October 7, 2019) (the investigation into the affairs of BAE Systems plc was discontinued as far as they related to the Al Yamamah defense contract in order to safeguard national security and public interests). The decision to drop charges against BAE for national security reasons sparked intense international outrage, see "OECD to conduct a further examination of UK efforts against bribery," March 14, 2007, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdtoconductafurtherexaminationofukeffortsagainstbribery.htm (accessed June 15, 2021).

[89] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001), 84-106 (the corporate liability rule based on the identification theory that applies to non-regulatory fault-based offenses attributes to the corporation only the *actus reus* and *mens rea* of the top echelon senior officers of the company); The Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper,* CP/195 (discussing the weakness of the identification doctrine, including the ambiguity of "directing mind and will", as well as its impropriety and ineffectiveness in establishing the criminal liability of modern enterprises in different sizes). The recent offenses of failure to prevent bribery and failure to prevent the facilitation of tax evasion present two exceptions to the prevailing identification doctrine.

[90] OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention Phrase 3 Report, United Kingdom*, para. 101 ("the SFO views that the principal objection to obtaining a criminal conviction for foreign bribery in two cases, including DePuy and BAE-AI Yamamah Contract, was the doctrine of double jeopardy"); OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention Phrase 4 Report*, para. 124 ("the UK cites double jeopardy as the reason for not opening an investigation in the Finmeccanica case").

[91] *Treacy v DPP*, [1971] A.C. 537 (15 December 1970) (ruling that double jeopardy "has always applied whether the previous conviction of acquittal based on the same facts was by an English court or by a foreign court"); Judith Seddon, etc.,"Global Investigations Around the World: Introduction," *Global Investigations Review*, January 2, 2020, https://www.lexology.com/library/detail.aspx?g=fbd90adf-a2e0-4dce-80e1-2548806dded4 (July 27, 2022) (in the case of DePuy International Limited, the SFO believed that the DPA agreed by DePuy's parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct underlying SFO's investigation and decided to bring only civil actions against the company).

misconduct.[92] In addition, the prosecutors' attempts to employ plea agreements as the "third way" of settling corporate crimes and coordinating global settlements was met with strong opposition from the judiciary, which believed that the terms of sentences encroached on the court's sentencing power.[93]

Against the backdrop, the UK authorities believed that "a swifter alternative to prosecution which can deal with wrongdoing effectively, proportionately and with a greater degree of certainty" is needed.[94] Following a three-month consultation, DPA was formally introduced in England and Wales (hereinafter "the UK" for simplicity) under the Crime and Courts Act 2013.[95]

3.3.1.1 The UK DPA Regime in General

DPA was introduced in the UK to deal with complex economic crimes involving commercial organizations. As opposed to the U.S. DPA model that allows all federal prosecutors to enter into a DPA with both organizations and individuals, DPAs in the UK can only be signed by *designated prosecutors*, namely, the Director of the SFO or the Director of the Crown Prosecution Service (CPS) with *an organization*.[96] Individuals are not allowed to apply for DPAs in connection with either individual crimes or actions undertaken on behalf of an organization. Currently, DPAs in the UK can only be employed to resolve certain specified offenses, including bribery and corruption, fraud, false accounting, money laundering, tax and customs violations, and other financial or economic crimes.[97]

A. When will a DPA be Offered: Prosecutorial Considerations

In order to provide detailed guidance for prosecutors on the implementation of the DPA program, the DPA Code of Practice jointly promulgated by the SFO and CPS sets a two-stage test.[98] Prosecutors are directed to decide if the existing evidence or further obtainable evidence will sustain a realistic prospect of conviction (evidential stage), and whether a DPA will serve the public interests (public interests stage).[99] Regarding the public interests test, prosecutors should balance several factors for or against prosecution, including previous misconduct, the severity, pervasiveness and harms of the alleged misconduct, the presence of a corporate compliance program and its effectiveness, the existence and quality of corporate self-reporting, cooperation

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[92] Transparency International UK, *Deterring and Punishing Corporate Bribery: Policy Paper Series Number One: An Evaluation of UK Plea Agreements and Civil Recovery in Overseas Bribery Cases*, May 2012, at 69 (appealing for the reform of the concept of double jeopardy to allow cases where there is a strong public interest to argue for primacy of the UK courts to be tried in the UK).

[93] *R v Innospec Ltd,* [2010] EW Misc 7 (EWCC) (the judge nearly rejected the plea agreement, which was entered by the company with the DOJ and SFO for its foreign bribery conducts in Indonesia with $12.7 million of fines allocated to the UK, believing that division of the global sum between the UK and the US was not fair, and warned that "no such arrangement should be made again"); Press Release, "Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations, Admits to Violating the U.S. Embargo Against Cuba: Coordinated Global Enforcement Action by DOJ, SEC, OFAC and United Kingdom's Serious Fraud Office," March 18, 2010, https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us (accessed October 7, 2019).

[94] Ministry of Justice, *DPA Consultation*, para. 43.

[95] Crime and Courts Act 2013, c. 22, Section 45 and Schedule 17.

[96] Crime and Courts Act 2013, Schedule 17, Article 4.

[97] Crime and Courts Act 2013, Schedule 17, Part 2-Offences in relation to which a DPA may be entered into; Criminal Finances Act 2017, c. 22, Article 51 (3) (adding two offenses of failure to prevent the facilitation of tax evasion); Policing and Crime Act 2017, c. 3, Article 150 (adding offenses related to financial sanction regimes and terrorism).

[98] SFO and CPS, *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* (DPA Code of Practice), https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (accessed October 8, 2019).

[99] SFO and CPS, DPA Code of Practice, Article 1.

and the collateral consequences of corporate conviction.[100] Prosecution should generally take place unless the public interest factors against prosecution clearly outweigh those in favor of prosecution.[101]

In reality, the offering of DPAs is restricted to cases where companies have provided material information, which is legally admissible in establishing the wrongdoing and previously unknown to the authorities, through self-reporting or cooperation.[102] In order to obtain cooperation credits, the identification of the individuals that are responsible for the potential wrongdoing is necessary, regardless of their seniority or position in the organization. Corporations should not withhold materials that would jeopardize an effective investigation into individual wrongdoers, which is otherwise a strong factor for prosecution.[103] Besides, corporations' voluntary waiver of legal privileges may also be perceived by the prosecuting authorities and the court as a willingness to cooperate, though it is claimed by the SFO that an assertion of legal privileges is not penalizable.[104]

B. Terms of DPAs: Corporate Monetary and Non-monetary Obligations

Crime and Courts Act 2013 and the DPA Code of Practice include a non-exhaustive list of terms that may be included in DPAs.[105] In practice, the terms of a standard UK DPA are similar to those of the U.S. DPAs. Companies agreeing to DPAs are required to admit the statement of facts, which is not necessarily an admission of guilt, and to cooperate in relevant investigations.[106] Another common term of DPAs relates to the monetary obligations, including the payment of financial penalty, disgorgement of illegal profits, victim compensation, and reimbursement of the prosecutors' reasonable costs incurred in connection with the alleged offense or DPA.[107] Pursuant to the Crime and Courts Act 2013, the financial penalty agreed under DPAs must be broadly comparable to the fine a court would have imposed for the alleged offense following a guilty plea, which leads to a maximum of one-third deduction.[108] Following the wide outcry over the insufficient incentives for corporate self-reporting and cooperation, the UK authorities are now regularly granting a 50% discount in practice to corporations that have

[100] SFO and CPS, DPA Code of Practice, Article 2.

[101] SFO and CPS, DPA Code of Practice, Article 2.5.

[102] Lisa Osofsky, Director of the SFO, "Keynote Address at the FCPA Conference," December 4, 2018, https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/ (accessed December 15, 2019) (interpreting full cooperation as "tell us something we don't know", requiring the provision of hot documents rather than overloaded information and making evidence available in a way that is compliant with the law).

[103] SFO and CPS, DPA Code of Practice, Article 2.9.1.

[104] SFO, *Corporate Co-operation Guidance,* Witness Accounts and Waiving Privilege ("[a]n organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code but will not be penalised by the SFO"); *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, para. 121 (viewing Rolls-Royce's voluntary disclosure of internal investigations, with limited waiver of privilege over internal investigation memoranda and certain defense aerospace and civil aerospace materials, as a cooperating factor).

[105] Crime and Courts Act 2013, Schedule 17, Article 5(3) (providing a non-exhaustive list of terms that may be included in the DPA); SFO and CPS, DPA Code of Practice, Section 7 (specifying the range and standard of the terms included in DPA).

[106] Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet and Maxwell, 2015), 333 ("the statement of facts is not necessarily an admission of guilt of the offence, but rather acceptance of the existence of facts the prosecutor alleges"); Crime and Courts Act 2013, Schedule 17, Article 5 (3) (f).

[107] Crime and Courts Act 2013, Schedule 17, Article 5 (3).

[108] Crime and Courts Act 2013, c. 22, Schedule 17, para. 5(3) (providing that the amount of any financial penalty agreed under DPA must be broadly comparable to the fine that a court would have imposed for the alleged offense following a guilty plea); Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline*, became effective as of October 1, 2014 and updated in May 2016 (allowing a one-third reduction for early guilty plea as the final step after any discounts for co-operation, self-reporting and assistance to the prosecution).

self-reported and fully cooperated.[109] Most DPAs also stipulate non-monetary obligations, particularly the implementation of a compliance program or improvement of the existing compliance program to prevent and detect similar misconduct.[110] Compliance monitorships may be imposed at the company's expense if it is necessary "to positively and genuinely assist in changing corporate behaviour", in view of the facts and circumstances of each case and any proactive remedial measures.[111] DPAs typically last for several years (3-5 years) in practice.[112] On expiry of the agreement, the prosecution will be discontinued if no material breach has occurred.

C. Judicial Oversight and Transparency

The most prominent feature of the UK model of DPA is that judicial oversight is incorporated into its very core. Prosecutors are required to seek the court's approval at every stage of the DPA process. A preliminary hearing process will be held after the commencement of the DPA negotiation and before the conclusion of the DPA terms, followed by a final hearing process for the approval of the negotiation and the content of DPA.[113] In the hearing processes, the court will assess and declare whether (a) entering into the DPA is in the interests of justice; and (b) the proposed terms of DPA are fair, reasonable and proportionate, and further give its reasons for the declaration.[114] A DPA will only become effective and binding on both parties, i.e., the prosecutor and the corporation, if it is approved by the court. If the court rejects the proposed DPA, the prosecutor is generally prohibited from using the information obtained during the negotiation stage against the corporation in any subsequent criminal proceedings.[115] In addition to the approval of DPA, the court's involvement is also required for approving any variations to the original DPA, determining whether a material breach occurs "on the balance of probabilities", and deciding on the appropriate remedies in case of breach.[116] After the successful completion of DPA, the prosecutor is expected to discontinue the prosecution and to notify the court of the decision.[117]

Transparency is particularly emphasized in the UK DPA regime. If the court decides to approve the proposed DPA in the final hearing, it should make its declaration in the open court and give its reasons. Meanwhile, the prosecutor is required to publish the DPA, along with the court's

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[109] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, March 14, 2019, https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf (accessed November 5, 2019), paras. 291-294 (questioning the inconsistent use of penalty discount to reward self-report or/and cooperation), and paras. 81-87 (calling for larger penalty discount offered to company who has voluntarily disclosed than those who has not in order to encourage self-reporting).

[110] Crime and Courts Act 2013, Schedule 17, Article 5 (3) (e).

[111] SFO and CPS, DPA Code of Practice, Article 7.11; Camilla de Silva, Joint Head of Bribery and Corruption, speaking at the Herbert Smith Freehills Corporate Crime Conference 2018, "Corporate Criminal Liability, AI and DPAs," June 21, 2018, https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/ (accessed December 19, 2021).

[112] An exception is the DPA awarded to Airlines Service Limited in October 2020, the duration of which is only 1 year. See *SFO v. Airline Services Limited*, Southwark Crown Court, Case No: U20201913, October 30, 2020, paras. 59-61 (believing that "[a]s a non-trading entity ASL would not benefit from a long period of instalment payments").

[113] Crime and Courts Act 2013, Schedule 17, 7 (1) (for the continuance of DPA negotiation), 8(1) (for the approval of the terms of DPA); SFO and CPS, DPA Code of Practice, Article 7.17 (for the selection of monitor).

[114] Crime and Courts Act 2013, Schedule 17, Article 7 (1), 8 (1), and 10 (2).

[115] Crime and Courts Act 2013, Schedule 17, Article 13 (4) (providing two exceptions to this general rule: "(i) on a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information, or (ii) on a prosecution for some other offence where in giving evidence P makes a statement inconsistent with the material").

[116] Crime and Courts Act 2013, Schedule 17, Article 10 (2) (for an approval of the variation of DPA); Crime and Courts Act 2013, Schedule 17, Article 9(1) (for determining if a serious breach occurs and the remedies).

[117] Crime and Courts Act 2013, Schedule 17, Article 11(1) (giving court notice regarding the discontinuance of proceeding after the completion of DPA).

declaration and reasons in both the preliminary and final hearings.[118] Following the successful completion of DPA, the prosecutor is required to publish the decision to discontinue the prosecution proceeding and to set out details of the company's compliance with the agreement.[119] On the other hand, certain procedures and information are not made in public or will only be disclosed at a later date for the purpose of "avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings".[120] For example, the preliminary hearing and the court's declarations and reasons therein should be made in private to ensure the corporation's willingness to negotiate by eliminating its concern that a failed negotiation would jeopardize its defense in the later prosecutions.[121] In reviewing the DPA offered to Airline Services Ltd, the court specified that certain names had been anonymized in the Statement of Facts and the judgment to ensure the fairness of any future prosecutions and to protect the relevant parties that were not represented in the DPA negotiation.[122]

3.3.1.2 The Application of DPAs in Practice

As instructed by the Crime and Courts Act 2013, all DPAs that have been entered into by the UK prosecutors and approved by the court, including the text of DPAs, the court's judgment and the Statement of Facts, are accessible on the government's website.[123] Since the inception of DPAs in 2014, the SFO that is responsible for investigating and prosecuting serious and complex fraud, bribery and corruption had secured 12 DPAs by the end of 2022.[124] CPS, the other agency that is authorized to negotiate DPAs, has not declared any DPA yet. Out of the twelve DPAs negotiated by the SFO, three DPAs are used to settle fraud charges. All the other 9 DPAs are related to the bribery and corruption allegations, particularly the offense of failure to prevent bribery under Article 7 of the UKBA.[125] The majority of corporations that have been awarded DPAs by the SFO are large organizations, the prosecution of which is admittedly challenging and likely to have disproportionately damaging repercussions to the corporation and the innocent third parties.[126] Meanwhile, three DPAs have been signed with small or medium companies, including one company remaining dormant in the course of the investigation.[127]

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[118] Crime and Courts Act 2013, Schedule 17, Article 8 (6), (7).
[119] Crime and Courts Act 2013, Schedule 17, Article 11 (8).
[120] Crime and Courts Act 2013, Schedule 17, Article 12.
[121] Justice of Department, *DPA consultation*, para. 82 ("[t]he prosecutor and the commercial organisation should be able to have free and frank discussions without the fear of potential adverse consequences which might arise were it to become known that a DPA was being considered"); Peter Reilly, "Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts," *Arizona State Law Journal* 50 (2019): 1164 (finding that the division of the DPA formation process into a private stage and an open stage cleverly balances transparency and the entity's willingness to negotiate).
[122] *SFO v. Airline Services Limited*, Crown Court at Southwark, Case No: U20201913, October 30, 2020, para. 13.
[123] For the links to the existing DPAs and relevant documents, see Deferred Prosecution Agreements, Current SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed January 14, 2023).
[124] *Ibid*.
[125] Bribery Act 2010, c. 23, Section 7, Failure of Commercial Organisations to Prevent Bribery.
[126] UK Ministry of Justice, *DPA Consultation*, para. 41 ("investigating and then prosecuting a case which results in a late guilty plea costs the SFO around £1.6 million and takes around eight years to conclude"); *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, paras. 52-57 (citing the potential negative impacts of prosecution for the offering of DPAs, including conviction-triggered debarment that may account for 30% of the company's order, the loss of shareholder confidence and even viability of the company, repercussions to the interests of third parties such as the UK defense industry, employees, pensioners and those in its supply chain).
[127] Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, 79-81 (believing that "it is too early in the life of the DPA regime to tell whether there is in fact a bias in favor of large companies being offered DPAs"); SFO enters into Deferred Prosecution Agreement with Airline Services Limited, October 30, 2020, https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/ (accessed June 4, 2021) ("[t]he company is no longer trading and will be kept open as a non-trading entity to fulfil the terms of the DPA").

The introduction of DPAs enables the UK prosecutors to bring a number of enforcement actions that would have been either too costly or socially undesirable, to collect breathtaking monetary sanctions and to reform corporate compliance programs. Firstly, DPA serves as a principal vehicle for the resolution of bribery offenses. Since the introduction of the offense of failure to prevent bribery in 2010, which employs a new "failure to prevent" model of corporate liability against the prevailing corporate liability rule based on the "identification theory",[128] only a handful of corporate bribery cases have been concluded without a DPA but ended with convictions based on a plea or court trial.[129]

Secondly, the SFO has so far collected about €1.7 billion in monetary sanctions through DPAs, including fines, disgorgement, victim compensation and the SFO's costs incurred in connection with the DPAs.[130] The DPA involving the largest monetary sanctions was concluded with Airbus, which agreed to pay €991 million to the UK authority out of a global resolution involving €3.6 billion based on mainly bribery charges.[131]

Thirdly, the SFO is actively using DPAs to enhance the compliance program in the negotiating corporation and beyond. For instance, in the DPA concluded with Serco Geografix Ltd, the SFO requires its parent company to provide a self-binding undertaking, committing to a group-wide reinforcement of the compliance program, annual reporting and substantial cooperation.[132] In practice, the UK authority is relatively more circumspect than its U.S. counterpart in resorting to independent monitorships. The recruitment of an external monitor is often not required in cases where the circumstances are minor, or less intrusive alternatives are available.[133] For example, under the DPAs with Scarlad and Güralp, the company's compliance officer, rather than an external monitor, is required to review and report to the SFO on the company's anti-bribery and corruption system, considering possibly the small size of the companies.[134]

Lastly, the SFO has suffered many defeats in terms of holding individuals liable for the misconduct underlying the DPAs. The DPA Code of Practice recognizes that corporations are

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[128] *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153 (1971) (interpreting the "directing mind" of a company, only whose conducts will be attributed to the company); Wells, *Corporations and Criminal Responsibility*, 84-106 (introducing the development of corporate criminal liability rules in England and Wales).

[129] Press Release, "Sweett Group PLC Sentenced and Ordered to Pay £2.25 million after Bribery Act Conviction," February 19, 2016, https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/ (accessed November 4, 2019) (the company pleaded guilty to the charge of failing to prevent an act of bribery in December 2015 and was ordered to pay £2.25 million in fine and confiscation); *R v Skansen Interiors Ltd*, Southwark Crown Ct, March 7, 2018 (the company was charged with failure to prevent bribery and raised the defense of adequate procedures, but was rejected by the jury); Press Release, "Serious Fraud Office Secures Third Set of Petrofac Bribery Convictions," October 4, 2021, https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/ (accessed November 26, 2022); News Release, "Glencore to Pay £280 million for 'Highly Corrosive' and 'Endemic' Corruption," November 3, 2022, https://www.sfo.gov.uk/2022/11/03/glencore-energy-uk-ltd-will-pay-280965092-95-million-over-400-million-usd-after-an-sfo-investigation-revealed-it-paid-us-29-million-in-bribes-to-gain-preferential-access-to-oil-in-africa/ (accessed November 26, 2022).

[130] For the financial information on the SFO's existing DPAs, see https://www.sfo.gov.uk/about-us/#dpa (accessed January 14, 2023).

[131] "SFO Enters into €991 m Deferred Prosecution Agreement with Airbus as Part of a €3.6 bn Global Resolution," January 31, 2020, https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/ (accessed June 4, 2021).

[132] Undertaking by Serco Group plc, Attachment A to Differed Prosecution Agreement– Serco Geografix Ltd & SFO, July 2, 2019; *SFO v. Serco Geografix Limited,* U20190413, Crown Court at Southwark, July 4, 2019, 10 (referring the third party's obligation pre-conditioning DPAs as an important development in the use of DPAs); Notably, in the Scarlad DPA, Scarlad's parent company also voluntarily offered to provide necessary financial support should the DPA be agreed, see *SFO v. Scarlad Plc*, Southwark Crown Court, Case No: U20150856, July 8, 2016, para. 20.

[133] See Judith Seddon, Chris Stott and Andris Ivanovs, "Monitorships in the United Kingdom," Ropes & Gray, April 25, 2022, in *The Guide to Monitorships - Third Edition,* by GIR, https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/united-kingdom-ordered-monitorships (accessed August 9, 2022) (compared to the scope of the US monitorship, "the monitorship components of settlements agreed to date" in the UK "could more accurately be described as quasi-monitorships").

[134] *SFO v. Scarlad Plc*, Deferred Prosecution Agreement, para. 20.

incriminated by the actions of individuals and deems that it will be ordinarily appropriate to investigate, and prosecute if appropriate, those individual wrongdoers.[135] While 12 corporate DPAs have been concluded involving hefty monetary sanctions and extensive compliance reforms, only one individual has been successfully prosecuted (with a guilty plea) in connection with the DPAs.[136] In some cases, such as those implicating Rolls-Royce[137] and Airline Services,[138] the SFO decided not to pursue any prosecutions against relevant individuals. In other cases, for example those implicating Tesco,[139] Sarclad[140] and Güralp Systems,[141] the SFO suffered major defeats in its attempts at individual prosecutions, which all resulted in acquittals following the court trials.

3.3.2 The Introduction and Application of CJIPs in France

In France, the judicial agreement of public interest (*convention judiciaire d'intérêt public* or CJIP), a DPA-like mechanism, was introduced in 2016 under the new anti-corruption law against the background of heated domestic debate and mounting international pressure. The fact that a number of leading French companies, including Alcatel-Lucent, Alstom, Technip and Total, were imposed with heavy sanctions by the U.S. agencies for FCPA violations and some were later acquired by American companies triggered angry allegations of "legal imperialism" and "economic warfare and espionage" by the French critics.[142] On the other hand, the French corporations' engagement in the large-scale corruption schemes and the French authorities' failure to prosecute either the corporations or the individual wrongdoers revealed serious defects in the country's anti-corruption regime.[143] France's poor record in the enforcement of foreign bribery laws was subject to harsh international criticisms for violating its legal obligations under the OECD Anti-bribery Convention.[144] Against this backdrop, the Law on Transparency, Fight against Corruption and Modernization of Economic Life was introduced, being referred to as the "*Sapin* II" law after Michael Sapin, the former Minister of Finance that also championed the

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[135] SFO and CPS, DPA Code of Practice, § 2.9.1.

[136] Ruby Hamid, et al, "The DPA challenge – the SFO's First DPA-related Conviction of an Individual Bucks the Trend," March 10, 2023, https://www.ashurst.com/en/news-and-insights/legal-updates/the-dpa-challenge---the-sfos-first-dpa-related-conviction/ (accessed April 22, 2023).

[137] "SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals," February 22, 2019, https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ (accessed May 27, 2021).

[138] "SFO Enters into Deferred Prosecution Agreement with Airline Services Limited," October 30, 2020, https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/ (accessed May 27, 2021).

[139] "Tesco Trial Failure is Another Setback for SFO," *Financial Times*, December 9, 2018, https://www.ft.com/content/9b39865c-fba8-11e8-ac00-57a2a826423e (accessed October 8, 2019) (noting the danger of the Tesco precedent, which may discourage other companies from reaching DPAs if no real possibility of convictions exists).

[140] "SFO Suffers Further Blow as Sarclad Ltd DPA Revealed," Fulcrum, July 30, 2019, https://fulcrumchambers.com/sfo-suffers-further-blow-as-sarclad-ltd-dpa-revealed/ (accessed May 27, 2021).

[141] "Three Individuals Acquitted as SFO Confirms DPA with Güralp Systems Ltd," December 20, 2019, https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/ (accessed May 27, 2021).

[142] Fred Einbinder, "Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice," *International Comparative, Policy & Ethics Law Review* 3, no. 3 (2020): 731-50 (discussing the four cases and their implications in detail and claiming that the substantial fine imposed in these cases provided the primary impetus for the enactment of the anti-corruption provisions of *Sapin* II law).

[143] *Ibid,* 739-40 (noting that compared with the American authority's successful enforcement action against Alstom and responsible individuals, the French investigations were protracted and did not lead to any plea agreements or conviction against the corporation or successful prosecution of individuals).

[144] "Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention," Oct. 23, 2014, https://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm (accessed June 8, 2021) ("the Working Group expresses serious concerns for France's limited efforts to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and strongly encourages France to pursue the reforms which were previously announced and remain necessary").

promulgation of the "*Sapin* I" law.[145] One of the most eye-catching and controversial parts of the anti-corruption law is the creation of CJIP.[146] The DPA-like mechanism was introduced with the hope of creating a pragmatic tool for the French prosecutors to ramp up the enforcement actions against foreign bribery and corruption, and promote corporate anti-corruption compliance program.[147]

3.3.2.1 The French CJIP Regime in General

CJIP was introduced in France in 2016 via the "*Sapin* II" law. The public prosecutor may enter into a CJIP with legal persons, but not with individuals, with respect to the charges of corruption, influence peddling, and the laundering of the proceeds of tax fraud.[148] Since October 2018, tax fraud cases can also be resolved via CJIP thanks to the promulgation of the Law on the Fight against Tax Fraud (Loi relative à la lutte contre la fraude fiscal).[149] A new law released in December 2020 further expanded the application of CJIP to environmental offenses to strengthen environmental protection.[150]

A. When is CJIP Offered: Prosecutorial Considerations

In order to provide detailed guidance for the public prosecutors regarding the application of CJIPs, the Parquet National Financier (French National Financial Prosecutor's Office or "PNF") and the Agence Française Anticorruption (French Anti-Corruption Agency or "AFA") jointly released the non-binding Guidelines on the implementation of CJIP (the "CJIP Guidelines") in June 2019, which was later updated on January 16, 2023.[151] In June 2020, the French Ministry of Justice issued a circular (the "Circular") to provide further guidance to the judicial branch on the use of CJIPs in the international corruption cases, complementing the CJIP Guidelines in terms

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[145] Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Law 2016-1691 of December 9, 2016 relating to the Transparency, the Fight Against the Corruption and the Modernization of the Economic Life), December 10, 2016, https://www.legifrance.gouv.fr/eli/loi/2016/12/9/2016-1691/jo/texte (accessed June 8, 2021), Article 22.

[146] "AVIS SUR UN PROJET DE LOI relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ([(Advisory opinion on Bill relating to the Transparency, Anti-corruption and Modernisation of the Economic Life])," March 30, 2016, https://www.conseil-etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique (accessed June 8, 2021) (the State of Council was suspicious of the ability of the proposed CJIP mechanism to help restore public peace and prevent recidivism and raised concerns about the meaningful judicial oversight, transparency and the rights of the victims).

[147] Des affaires criminelles et des graces, Circulaire relative à la présentation et la mise en œuvre des dispositions pénales prévues par la loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Circular relating to the presentation and implementation of the penal provisions provided for by law n° 2016-1691 of December 9, 2016 relating to transparency, the fight against corruption and the modernization of economic life or II Circular), JUSD1802971C, signed on January 31, 2018, http://www.justice.gouv.fr/bo/2018/20180228/JUSD1802971C.pdf (accessed June 3, 2021), at 10 (noting that the new procedure represents the shared concern for speed between the prosecution and the company involved, therefore lengthy proceedings and uncertainty shall be minimized; Also, it claims that the feature of CJIP, compared with other alternative measures to prosecution, is that it makes it possible to ensure, under the supervision of AFA, that company has an effective system to prevent the recurrence of similar misconducts).

[148] Code of Criminal Procedure, Article 41-1-2; *Sapin* II, Article 17, I and II.

[149] Ophelia Claude, "France Heightens Criminal Enforcement of Tax Fraud," June 19, 2019, https://www.expertguides.com/articles/france-heightens-criminal-enforcement-of-tax-fraud/araqggbd (accessed June 3, 2021).

[150] Code of Criminal Procedure, Article 41-1-3; LOI n° 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée (Law No. 2020-1672 of December 24, 2020 relating to the European Public Prosecutor's Office, environmental justice and specialized criminal justice), JUSX1933222L, December 26 2020, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042737977 (accessed August 7, 2022) (creating a special CJIP procedure for the resolution of cases with substantial harms to the environment and related offenses).

[151] PNF and AFA, Guidelines on the Implementation of the Convention Judiciare D'interet Public, June 26, 2019, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf (accessed June 3, 2021); PNF, Guidelines on the Implementation of the judiciare d'interet public agreement (referred to as the "2023 CJIP Guidelines"), January 16, 2023, https://www.agence-francaise-anticorruption.gouv.fr/files/files/Guidelines%20on%20the%20implementation%20of%20the%20CJIP_PNF_January%2016%202023%20VD.pdf (accessed March 12, 2023).

of the application of CJIPs.[152] The public prosecutor may decide on a case-by-case basis whether CJIP is the most suitable means to resolve the corporate case in line with the public interests, though in practice the legal representative of the company or the lawyer can also indicate their willingness to initiate the CJIP negotiation.[153] Though PNF does not intend to impose pre-conditions for an access to a CJIP aside from the legal requirements, the company is generally expected to demonstrate "good faith" in order to enter into a CJIP.[154] The following factors will be considered to assess the company's good faith: (i) whether the company has voluntarily self-reported the offenses, and the timeliness and scope of self-reporting; (ii) the company's willingness to conduct internal investigations and share the report, as well as the quality of such cooperation; and (iii) the company's voluntary implementation of the anti-corruption compliance program, potential changes to the management team, and proactive compensation to the victims.[155]

B. Terms of CJIPs: Corporate Monetary and Compliance Obligations

When negotiating the terms of CJIPs, corporations are generally required to agree to the statement of facts set forth in the CJIPs (not an admission of guilt), accept responsibility for the alleged wrongdoings and promise not to commit new crimes within the term of the agreement. Three general types of obligations may be imposed under CJIP. Firstly, corporations agreeing to CJIPs are typically required to pay the public interest fine to the Treasury. The amount of restitution fine is calculated based on the illegal proceeds derived from the criminal misconduct, with a cap of 30% of the company's average annual turnover over the previous three years.[156] In addition to the restitution component of the fine, the company will also be required to pay the penalty part of the fine. The penalty fine can be increased or reduced based on a list of aggravating and mitigating factors, including (i) the repeated/systematic nature of the offense (+50%), and seriousness of harms to the public order (+50%); (ii) the company's past judicial, tax or regulatory history (+20%); (iii) voluntary corporate self-disclosure (-50%), active cooperation (-30%) and relevance of internal investigation (-20%); (iv) the effectiveness of the corporate internal control (-10%); and (v) the corporate corrective actions (-20%) and proactive compensation of victims (-40%).[157]

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[152] La garde des sceaux, ministre de la justice, Circulaire de politique pénale en matière de lutte contre la corruption international (Criminal Policy Circular on the Fight against International Corruption), JUSD2007407C, June 11, 2020, https://www.legifrance.gouv.fr/circulaire/id/44989 (accessed June 3, 2021).

[153] 2023 CJIP Guidelines, at 8 ("[i]t is up to the prosecutor to assess the appropriateness of resorting to it [a CJIP] on a case-by-case basis"; "in practice, the legal representative of the company or its lawyer can inform the PNF of their wish to enter into such a judicial agreement").

[154] Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, February 6, 2023, https://www.skadden.com/insights/publications/2023/02/france-further-aligns-corporate-crime-guidance (accessed March 11, 2023) ("[a]side from certain legal requirements, the Guidelines explain that the PNF does not intend to impose *ex ante* conditions to entering into a CJIP. However, the PNF expects companies to demonstrate their good faith throughout the CJIP process").

[155] 2023 CJIP Guidelines, at 9; Bruce E. Yannett, et al, "France's Revised Guidelines for Deferred Prosecution Agreements Promote Voluntary Self-Disclosure," Debevoise & Plimpton LLP, *FCPA Update* 14, no. 7 (February 2023): 8.

[156] Code of Criminal Procedure, Article 41-1-2 I 1°; *Sapin* II Circular, IV-4, p. 17 (reminding that CJIP was adopted for the sake of pragmatism and efficiency, therefore the sanctions imposed by the French court shall be in consistence with international standards; also noting that the co-efficient shall be set at least to two as a rule, in order to prevent the company from benefiting from the crime). Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," (the turnover used as the basis for the calculation of fine refers to the consolidated turnover of the group to which the company belongs, if appliable, instead of the turnover of the individual company, in order to discourage large groups from transferring misconducts to small subsidiaries with low revenues).

[157] 2023 CJIP Guidelines, Section 3.1.3 Assessment of the penalty part of the public interest fine (listing the aggravating and mitigating factors affecting the assessment of punitive fine as well as the weight each factor carries); Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency."

Secondly, companies are generally required to implement a new compliance program or improve their existing compliance program to prevent and detect corruption. The *Sapin* II law requires French companies employing more than 500 employees and with an annual turnover of more than €100 million to implement an anti-corruption compliance program, while describing extensively the measures to be included in such a program.[158] These measures are typically referred to by the public prosecutors when imposing compliance obligations via a CJIP.[159] AFA, the administrative agency created under the *Sapin* II law to assist the implementation of the corporate anti-corruption compliance program, will be appointed, if necessary, to supervise the company's implementation of the compliance obligations for a period of no more than three years.[160] The failure to fulfill the compliance obligations may lead to the resumption of the prosecution proceeding. The costs incurred by the AFA, including the fees of the relevant professionals engaged by the AFA, in connection with the compliance supervision will be borne by the corporation in question, with an upper limit of the costs estimated by the AFA based on the information provided by the company.[161]

Thirdly, when the victims can be identified, the public prosecutors will require the company to compensate the victims for the damages caused by the alleged offense underlying the CJIP.[162] The public prosecutors should inform the victims before the conclusion of CJIP in order to enable the victims to hand in any evidence and information for the identification and assessment of the damages, which, however, does not give the victims the right to challenge the proposal of CJIP.[163]

C. Judicial Oversight and Transparency

Regarding the judicial oversight of the CJIP mechanism, the French authorities adopt the UK model and require the district court to review and validate the agreement before the agreement can come into force. Once the public prosecutor and the corporation come to an agreement, the public prosecutor should send the proposed CJIP, accompanied by a precise statement of facts and the proposed corporate sanctions, to the president of the district court for validation.[164] A hearing will then be held in the open court to decide whether to validate the proposed CJIP by hearing the legal representative of the company at issue and any identified victims.[165] The court is expected to verify (i) the merits of the recourse to the CJIP procedure; (ii) the compliance with the procedural rules; (iii) the conformity of the fine to the statutory upper limit, i.e., 30% of the

[158] *Sapin* II, Article 17, I and II.
[159] 2023 CJIP Guidelines, at 17, ft. 31.
[160] For the mission of the agency, see the AFA website at https://www.agence-francaise-anticorruption.gouv.fr/fr/missions (accessed June 3, 2022); 2023 CJIP Guidelines, at 18 ("[t]he duration and content of the compliance program shall be determined by the public prosecutor's office in coordination with the AFA. In accordance with article 41-1-2, the obligation may not exceed three years"). For the environmental cases resolved via CJIP, specialized environmental agencies, i.e., the Ministry of the Environment and the services of the French Office for Biodiversity, will be appointed and a separate monitoring procedure will follow.
[161] 2023 CJIP Guidelines, at 19.
[162] Code of Criminal Procedure, Article 41-1-2 I 2°, para. 3 (mandating the provision of victim compensation under the CJIP when the victim can be identified).
[163] Code of Criminal Procedure, Article 41-1-2, I 2°, para. 4; 2023 CJIP Guidelines, at 19 ("[t]he victim cannot oppose a CJIP proposal, nor appeal the decision for validation").
[164] The French Code of Criminal Procedure, Article 41-1-2, II, para. 1.
[165] *Ibid,* para. 2.

company's annual turnover over the past three years; and (iv) the proportionality of the agreed measures to the illegal proceeds.[166]

Following the date of the validation order, the company in question has a period of ten days to exercise its right of withdrawal, which has the legal effect of lapsing the public prosecutor's CJIP proposal. Otherwise, the CJIP will take effect for both parties.[167] The court's validation order does not amount to a criminal conviction and will not be registered in the company's criminal record. For the sake of transparency, it is required that the validated CJIPs be made public via press release, and the validation orders published on the website of the Ministry of Justice.[168] If the court blocks the proposed agreement or if the company exercises its right of withdrawal, a criminal investigation and trial will follow. Meanwhile, the public prosecutor is prohibited from using the documents received from the company during the negotiation against the company in the later proceedings, provided that the documents are submitted before the investigating or trial court.[169] For documents that are shared by the company during negotiations and before the formal proposal of the CJIP, the confidentiality clause does not apply.[170]

3.3.2.2 The Application of CJIPs in Practice

Since the inception of the CJIP regime in 2016, the French prosecuting agencies have entered into 31 CJIPs by the end of 2022.[171] Out of all the CJIPs, the PNF has entered into 15 CJIPs in relation to international corruption and tax fraud, with the rest concluded by the local prosecutor's offices.[172] Over €4.5 billion in penalties and disgorgement has been collected through CJIPs, including an eye-catching fine of €2.083 billion in connection with the Airbus settlement.[173]

The CJIP regime enables the French enforcement authority to ramp up its enforcement actions against foreign bribery and make its presence felt by international peers, notably the U.S. enforcement agencies. The availability of CJIP, with considerations and obligations aligned with the U.S. and UK DPA policies, gives the French prosecutors more flexibility and power to extract corporate cooperation and to negotiate global settlements together with other foreign agencies.[174] The CJIP concluded with Société Générale in 2018 with regard to foreign bribery, resulting in the monetary sanctions of $585 million in total, was the first coordinated corporate resolution between the U.S. and French authorities in the foreign bribery area.[175] Moreover, in

[166] *Ibid,* para. 2.
[167] *Ibid,* para. 3.
[168] The French Code of Criminal Procedure, Article 41-1-2, II, para. 6.
[169] The French Code of Criminal Procedure, Article 41-1-2, III, para. 2.
[170] 2023 CJIP Guidelines, at 11 (noting that the confidentiality requirement applies to the documents and information forwarded to the prosecutors before the investigating or trial court, but not those shared during the negotiations and prior to the formal proposal of a CJIP).
[171] AFA, La convention judiciaire d'intérêt public, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public (accessed January 14, 2023); Ministère de la Justice, La convention judiciaire d'intérêt public (CJIP), http://www.justice.gouv.fr/publications-10047/cjip-13002/ (accessed January 14, 2023).
[172] PNF, Convention Judiciaire d'Intérêt Public (CJIP), https://www.tribunal-de-paris.justice.fr/75/convention-judiciaire-dinteret-public-cjip (accessed March 12, 2023).
[173] Guillaume de Rancourt, *Spotlight: Anti-bribery Enforcement in France*, November 8, 2022, https://www.lexology.com/library/detail.aspx?g=1bb9d3e7-22af-476a-871b-4de90ac31d58 (accessed December 8, 2022).
[174] Kirry, et al, "French DPAs—First CJIP Guidelines Published," (noting that while it is unclear whether foreign prosecutors, notably the U.S., will consider a French CJIP adequate as to forestall parallel or successive prosecutions, the mechanism is "a clear attempt by prosecutors in France to obtain flexibility of action and powers more comparable with those of their U.S. and U.K. counterparts").
[175] CJIP between PNF and Société Générale S.A., PNF-15 254 000 424, May 24, 2018, https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/24.05.18_-_CJIP.pdf, para. 55; DOJ Press Release, "Société Générale S.A. Agrees to Pay $860 Million in

coordination with the UK and U.S. authorities, the PNF entered into the tenth CJIP with Airbus and obtained the majority of sanctions in one of the largest global foreign bribery resolutions to date (€2.1 billion out of €3.6 billion in total).[176] In the Airbus settlement, AFA was appointed as the single monitoring body, and agreed to keep the DOJ and SFO informed on the compliance progress in Airbus in compliance with the French blocking statute.[177]

3.4 Comparative Observations of DPA Programs in the U.S., UK and France

After a comprehensive introduction of the DPA programs in the U.S., UK and France, this Section turns to the comparison of those programs. Though varying in terms of the statutory basis, the scope of application and the extent of judicial scrutiny, they are all applied with the intention of achieving some common goals, including (i) encouraging corporate self-reporting and cooperation; (ii) incentivizing corporate cooperation in the prosecution of individuals to promote individual accountability; and (iii) prompting corporate compliance reforms. In order to advance these goals, the three selected jurisdictions adopt divergent approaches when designing and implementing their DPA programs.

3.4.1 Statutory Basis, Scope of Application and Judicial Oversight

The U.S. model of DPA was endorsed and guided by the DOJ, without any congressional authorization or legal basis. The DOJ has not issued any internal guidelines to define the mandatory or common terms of DPAs.[178] In practice, individual prosecutors' office has broad discretion to determine the type and scope of cooperation and compliance duties stipulated in the agreements.[179] In contrast, both the UK DPA program and the French CJIP program are based on formal statutory footing.[180] The endorsement of the parliament following public consultation process, and the statutory guidance for the exercise of prosecutorial discretion certainly enhance the credibility and transparency of the resolution mechanisms.[181]

In addition to the statutory basis, the U.S., UK and French models of DPAs also differ in the scope of application. The U.S. prosecutors can enter into DPAs with both individuals and organizations in relation to almost all types of offenses. In practice, an overwhelming majority of

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Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," June 4, 2018, https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan (accessed June 3, 2021).

[176] CJIP between PNF and Airbus SE, PNF-16159000839, January 29, 2020, paras 164-168.

[177] *Ibid*, para. 180; 2023 CJIP Guidelines, at 24-25 (discussing international coordination of corporate resolutions and the respective role of PNF and AFA).

[178] Brandon L. Garrett, "Structural Reform Prosecution," *Virginia Law Review* 93, no. 4 (2007): 933 ("[t]he DOJ has not publicly reviewed the efficacy of its agreements, nor has it promulgated internal guidelines to guide the content of these agreements; the approach has emerged through ad hoc efforts and replication of other U.S. Attorneys' and agencies' efforts").

[179] Arlen, "Prosecuting Beyond the Rule of Law," 221 (noting that "individual U.S. Attorneys' Offices are free to make their own decisions about when to impose a mandate and what form it should take, without formal ex ante supervision").

[180] UK Ministry of Justice, *DPA Consultation*, para. 70 ("[t]here are opportunities to learn from the US model of deferred prosecution agreements and to develop a bespoke model for England and Wales that provides for better transparency and greater judicial involvement in the process"); Reilly, "Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System," 1158 (noting that in Australia, the UK and Canada, "the DPA program has been formally implemented through some sort of public deliberative process, whether it be a formal legislative process or a public consultation process, which does not play "a role within the creation or functioning of the U.S. corporate DPA program").

[181] Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, para. 5.51 ("[a]s set out above, the DPA process in the UK model is intended to be transparent. To achieve that goal, unlike the US system, the UK model of DPAs is on a statutory footing").

DPAs are signed with organizations instead of individuals.[182] Meanwhile, both the UK DPAs and the French CJIPs are restricted to legal persons only, while individual criminals are excluded from the application of the pre-trial resolution mechanisms.[183] In terms of the types of offenses, the UK prosecutors may leverage DPAs to resolve complex economic or financial offenses, the prosecution of which is extremely burdensome and the undesired collateral consequences are prevailing.[184] Regarding the French CJIPs, the scope of application is even more restricted as CJIPs are only available for legal persons charged with a handful of specified offenses, including the offenses against probity, tax fraud and environmental offenses.

In terms of the judicial involvement in the corporate resolution procedure, the judiciary review is highly deferential and restrained in nature for the U.S. DPAs and non-existent for the NPAs. As summarized by the Second Circuit in the case of *U.S. v. HSBC*, "a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise".[185] There is no general rule requiring the U.S. prosecutors to publish every DPA they conclude. Besides, most of the monitors' reports on the companies' implementation of the DPA-imposed compliance obligations remain confidential.[186] The lack of meaningful judicial scrutiny and transparency fuels concerns over the unfettered prosecutorial discretion in the DPA process and the adequacy of DPA as an alternative to criminal prosecution.[187] In contrast, in order to ensure that entering into DPAs is consistent with the public interests, the judicial scrutiny of the negotiation and implementation of DPAs is incorporated into the core of the UK and French regimes.[188] For the sake of transparency, the courts in the UK and France are required to approve DPAs in open proceedings and publish their opinions. The content of DPAs, including the statement of facts, and the judgement approving the DPAs are required to be made public. Enhanced judicial oversight and transparency are believed to be fundamental to restraining the excessive prosecutorial discretion and to maintaining the proportionality of corporate and individual sanctions, accountability and due process in the DPA procedure.[189]

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[182] See *supra* note 20 and the accompanying text.

[183] UK Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations (Government Response to DPA Consultation),* CP(R)18/2012, October 23, 2012, para. 47 (believing that DPAs should not be used as a means for individuals to avoid being prosecuted for their crimes, as criminal prosecution and different forms of sanctions including imprisonment are effective in dealing with individuals involved in economic crimes); Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 764-65 (noting that "[t]he exclusion of individuals from the process was dictated by political considerations, and compliance with the Legality Principle", and influenced by the Yates Memo that stressed the significance of ensuring individual accountability).

[184] UK Ministry of Justice, *Government Response to DPA Consultation*, para. 46.

[185] *United States v. HSBC Bank USA*, NA, 863 F.3d 125, 129 (2d Cir. 2017).

[186] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 723 & 725-26 (noting that the absence of meaningful follow-up after the monitorship, either through the community of monitors or by the government, makes it difficult to vouch for the accountability or success of the monitorships).

[187] Epstein, "The Deferred Prosecution Racket," (claiming that the use of DPAs and NPAs undermines the principle of the separation of powers by turning prosecutors into both the judge and the jury); Law Reform Commission of Ireland, *Report: Regulatory Powers and Corporate Offences*, LRC 119-2018, para. 5.167 ("the greater concern is that under the existing US model of DPAs, the concentration of powers is in the hands of the prosecutor and not with the courts"); Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements a nd the Erosion of Corporate Criminal Liability," 1307-15 (tracking the evolution of the DOJ's approach to DPAs, whose emphasis has changed from extracting corporate cooperation to avoiding the collateral consequences of corporate prosecution, and claiming that it is "best described as a policy in search of a rationale").

[188] UK Ministry of Justice, *DPA Consultation*, para. 70 ("[t]here are opportunities to learn from the US model of deferred prosecution agreements and to develop a bespoke model for England and Wales that provides for better transparency and greater judicial involvement in the process").

[189] Transparency International, "Can Justice be Achieved through Settlements?" *Policy Brief*, 2015. https://www.transparency.org/whatwedo/publication/can_justice_be_achieved_through_settlements (accessed July 8, 2019) (calling for judicial oversight and public accessibility for the sake of transparency, due process, accountability and victim compensation).

3.4.2 Self-reporting, Cooperation and Corporate Internal Investigation

One of the most important goals of DPAs is to encourage corporations to self-report and to cooperate with the public enforcement agencies.[190] Though the goal is shared by the DPA programs in all the three selected jurisdictions, the policies they have adopted governing the application of DPAs take slightly different approaches in this aspect.

Apart from DPAs and the classic plea agreements, the U.S. prosecutors are armed with additional resolution tools that are unavailable to their counterparts in the UK or France, such as NPAs and declinations with disgorgement.[191] The multiple resolution tools give the U.S. prosecutors greater flexibility in leveraging differential incentives to encourage a range of corporate self-policing measures, including voluntary self-disclosure, timely and full cooperation and remediation.[192] Prosecutors in the UK may make use of DPAs, together with the discretion in seeking fine reduction, when dealing with corporate crimes.[193] In practice, the UK authorities regularly grant a maximum of 50% discount to the financial penalty, slightly lower than the current DOJ policy, to reward corporate voluntary self-disclosure and/or exemplary cooperation in the application of DPAs.[194] Unlike the DOJ policy that provides additional credits for voluntary self-disclosure in addition to the cooperation credits, the UK authorities generally view self-reporting as part of the corporate cooperative efforts.[195] Though the failure to self-report does not necessarily foreclose a DPA, corporations are required to disclose information that is previously unknown to the authority and valuable in establishing the misconduct in the form of either voluntary self-disclosure or extraordinary cooperation in order to be considered for a DPA in the UK.[196] For the purpose of providing more ascertainable and prescriptive incentives, the updated CJIP Guidelines specify the discounts to the financial penalty in reward for corporate self-reporting and cooperation, in line with the U.S. and UK DPA programs.[197] However, the

[190] *SFO v. Sarclad Limited*, Southwark Crown Court, Case No: U20150856, July 11, 2016, para. 16 ("a core purpose of the creation of DPAs to incentivise the exposure and self-reporting of corporate wrongdoing").

[191] Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 699-700 (discussing that the French-style plea agreement, Comparation sur reconnaissance prealable de culpabilite or CRPC, which was introduced in 2014, is hardly used in the financial and corruption cases involving individuals or corporations).

[192] Jennifer Arlen, "Corporate Criminal Liability: Theory and Evidence," in A. Harel & K. Hylton ed. *Research Handbook on the Economics of Criminal Law* (Northampton, MA: Edward Elgar, 2012): 170 ("in order to induce optimal behavior with respect to all forms of policing, the state needs to employ a multi-tiered duty-based sanction regime because firms make policing decisions sequentially (with monitoring preceding self-reporting, which in turn precedes cooperation)").

[193] UK Ministry of Justice, *DPA Consultation*, para. 17 ("[w]e have concluded that non-prosecution agreements are not suitable for this jurisdiction due to their markedly lesser degree of transparency, including the absence of judicial oversight").

[194] Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, paras. 299-300 (citing written evidence from legal firms that advocate a larger financial discount to effectively incentivize corporate self-reporting).

[195] House of Lords, Bribery Act 2010 Committee, Corrected Oral Evidence: Bribery Act 2010, November 13, 2018, Q 151, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/oral/92751.html (accessed November 4, 2019) (Sir Brian Leveson claims that "self-reporting is a mechanism whereby you demonstrate a willingness to co-operate"); *SFO v. Airbus SE*, Southwark Crown Court, Case No: U20200108, January 31, 2020, para. 68 ("there is no necessary bright line between self-reporting and co-operation").

[196] *SFO v. Airbus SE*, Southwark Crown Court, Case No: U20200108, January 31, 2020, para. 68 ("[e]ven if the prosecuting authorities became aware of the relevant conduct by the actions of a third party, if subsequent self-reporting or co-operation overall, is of a high quality and brings significant wrongdoing to light that would not otherwise have co me to the attention of the authorities, this will be a significant factor in favour of a DPA").

[197] Christopher Bolyai, et al, "Transatlantic Approach on Corporate Cooperation: How Newly Issued French and UK Guidance Compare to US Practices," Skadden, Arps, Slate, Meagher & Flom LLP, October 30, 2019, https://www.jdsupra.com/legalnews/transatlantic-approach-on-corporate-34659/#topftn9 (accessed June 16, 2021) ("[t]he French CJIP Guidance provides specific factors that should be considered in determining whether to reduce a fine, … but does not set out specifics on the potential reductions available"); Bruce E. Yannett, et al, "France's Revised Guidelines for Deferred Prosecution Agreements Promote Voluntary Self-Disclosure," at 11 (noting that the significant and measurable incentives offered for corporate self-reporting and cooperation under the CJIP guidelines are comparable to the U.S. policy and could persuade foreign peers to agree that the PNF is an important player in the international stage and able to lead the multijurisdictional investigations).

absence of sentencing guidelines and clear definition of corporate cooperation makes it still challenging for the companies to predict how the CJIP-imposed fine relates to the court-ordered penalty following a conviction. [198]

In addition, the three selected jurisdictions take different attitudes towards the value and independence of corporate internal investigations. The U.S. prosecutors tend to rely on the corporate cooperation in the form of corporate internal investigations to hold corporations and relevant individuals accountable.[199] In the supposedly rare situations where a de-confliction request is made, i.e., the corporation is required to hold off the interview of a witness or other internal investigative steps so that the government can conduct its investigation first, the governmental intervention in the corporate internal investigation is required to be non-directive and narrowly structured.[200] In order to ensure the corporation's ability to seek legal assistance, USJM specifies that cooperation credit is in no way predicated upon the waiver of attorney-client privilege and work product doctrine.[201] In comparison, the UK and French authorities show less enthusiasm for outsourcing the task of criminal investigation to private corporations.[202] Though genuine corporate cooperation is appreciated and encouraged, the authorities are more alert to the corporate internal investigations that may hinder their own investigations.[203] Under the UK Cooperation Guidelines, corporations are advised to "consult in a timely way with the SFO before interviewing potential witnesses … or taking other overt steps … [t]o avoid prejudice to the investigation".[204] Unlike the DOJ's interpretation of corporate cooperation that focuses on the facts related to the wrongdoing to avoid the implication of legal privileges, the UK and French policies require firms seeking cooperation credits to submit reports or even minutes of the

[198] Kirry, et al, "French DPAs—First CJIP Guidelines Published," ("[t]he absence of specific sentencing guidelines for cases going to courts means that it is still quite challenging to estimate how much a prospective defendant may gain in a CJIP compared to a potential court-imposed penalty; the monetary benefit of self-reporting therefore remains less evident in France than it may be in the United States or the United Kingdom"); Bruce E. Yannett, et al, "France's Revised Guidelines for Deferred Prosecution Agreements Promote Voluntary Self-Disclosure," at 11 (noting that unlike the DOJ policies that provide detailed guidance on full cooperation, the CJIP guidelines merely reemphasize the importance of voluntary disclosure for the companies to win active cooperation credits).

[199] Sherman & Sterling, *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practice Act*, January 2019, at 25-26 (noting the US authorities' preference for companies to shoulder the burden of the investigation as a distinct contrast to the stance of the British agency).

[200] USJM, 9-47.120, 9-47.120 – Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, 6. Comment ("[a]lthough the Criminal Division may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Criminal Division will not take any steps to affirmatively direct a company's internal investigation efforts"); Lanny A. Breuer and Mark T. Finucane, "DOJ 'Deconfliction' Requests: Considerations And Concerns," https://www.cov.com/-/media/files/corporate/publications/2017/03/doj_deconfliction_requests_considerations_and_concerns.pdf (accessed June 15, 2022) (presuming that declination request is made by some prosecutors who believe that interviews with company counsel will educate or prepare witnesses in a manner that will disadvantage the government).

[201] USJM, 9-28.720 – Cooperation: Disclosing the Relevant Facts ("[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection"); 9-28.710 – Attorney-Client and Work Product Protections ("[t]he value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments").

[202] Chris Warren-Smith, et al, "Practical Implications of UK Serious Fraud Office's Recent Guidance for International Organizations," September 25, 2019, https://www.lexology.com/library/detail.aspx?g=6677a3ca-2537-497a-bce5-444bde61243e (accessed January 5, 2020) ("the Guidance presents a more restrictive approach to internal investigations than is the practice in the United States"); Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 690-92 (demonstrating the traditional disfavor with corporate internal investigations in the French criminal justice).

[203] Miriam H. Baer, "When the Corporation Investigates Itself," in Jennifer Arlen ed., *Research Handbook on Corporate Crime and Financial Misdealing* (Northampton, MA: Edward Elgar Publishing, 2018), 326-28 (explaining the government's use of de-confliction request and demand for waiver of privileges as the distrust for corporate investigation in light of the corporate practices of detection avoidance).

[204] SFO, *Corporate Co-operation Guidance*, Individuals.

witness interviews.[205] The UK and French authorities may further assess corporate cooperation based on the company's willingness to waive its legal professional privileges.[206]

3.4.3 Individual Accountability

Another key goal of DPAs is to enlist corporate cooperation in holding individual wrongdoers accountable. In all the three selected jurisdictions, the resolution of corporate matters via a DPA only means that the corporation is insulated from full-blown prosecution and conviction. It by no means suggests that the individuals, especially the high-ranking executives, involved in or responsible for the misconduct will also be exempt from punishment.[207] Instead, corporations are expected to collect and disclose not only the evidence and information necessary for the establishment of corporate liability, but also those needed to identify and prosecute responsible individuals in order to gain full cooperative credits.[208] Comparatively speaking, the U.S. adopts the strictest policy on individual accountability by explicitly conditioning *any* cooperation credits on the corporate efforts to identify *all* individuals involved or responsible for the wrongdoing.[209] While the UK and French policies do not make such a rigid distinction, corporate assistance in establishing the individual liability will be an important favorable consideration in the assessment of cooperation credits and the offering of DPA/CJIP.[210]

3.4.4 Compliance Obligations and Monitorships

Prosecutors press DPAs to demand not only traditional financial sanctions, but also corporate compliance reforms and the recruitment of independent monitors to police the firms' compliance with the agreements and relevant laws.[211] Compliance guidelines have been released in all the

[205] SFO, *Corporate Co-operation Guidance*, Witness Accounts and Waiving Privilege (requiring companies to provide witness accounts accompanied by any recording, notes and/or transcripts of the interview to seek co-operation credits); 2023 CJIP Guidelines, at 9 ("the submission of the internal investigation report or the communication of its detailed content within a timeframe compatible with the requirement of the judicial authority is considered as an indication of its willingness to cooperate and the quality of the preservation of evidence as a sign of good faith").

[206] Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," (noting that the previous CJIP guidelines warned that the refusal to provide privileged materials may affect the company's perceived cooperation level. Though the updated Guidelines deletes the relevant part, but the expectations that corporations should share interview summaries, documents and attorney notes remain the same); Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 691 (noting that French in-house counsel are not permitted to be members of the bar and do not possess professional confidentiality).

[207] USJM, 9-28.210 – Focus on Individual Wrongdoers ("regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals"); SFO and CPS, DPA Code of Practice, Article 2.9.1 (recognizing that corporations are incriminated by the actions of individuals and deeming it ordinarily appropriate to investigate, and prosecute if appropriate, those individuals).

[208] USJM, 9-28.700 – The Value of Cooperation ("[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct"); SFO, *Corporate Co-operation Guidance* (defining cooperation as including "identifying suspected wrong-doing and criminal conduct together with the people responsible, regardless of their seniority or position in the organization"); 2023 CJIP Guidelines, at 20 ("it should be noted that the company's good faith in the CJIP negotiation is assessed in particular on the basis of its ability to conduct an internal investigation to identity the main individuals involved in the facts and to disclose them to the public prosecutor's office during the investigations and negotiations").

[209] The Yates Memorandum (requiring corporations to provide all relevant facts about "*all* individuals involved in or responsible for the misconduct at issue" in order to qualify for *any* cooperation credit); "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act," November 29, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 (accessed December 11, 2019) (relaxing the all or nothing policy and requiring firms to identify individuals "substantially" involved in or responsible for the misconduct to obtain cooperation credits); "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021) (re-embracing the all or nothing policy to enhance individual accountability).

[210] Bolyai, et al, "Transatlantic Approach on Corporate Cooperation," ("[w]hile neither the French nor the U.K. guidance make such a granular distinction, they both similarly emphasize the importance of identifying individuals suspected of wrongdoing").

[211] Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014): 6-7 ("the big story of the twenty- first century is not corporate fines or convictions but prosecutors changing the ways that corporations are managed"); Peter Spivack, and Sujit Raman, "Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements," *American Criminal Law Review* 45,

three jurisdictions to guide firms in implementing effective compliance programs or/and to assist prosecutors in assessing the effectiveness of corporate compliance programs for the purpose of making charging decisions and negotiating settlement terms.[212] Compared with the UK practice, the DOJ applies a lower threshold when resorting to external monitorships.[213] A lack of an effective compliance program at the time of the offense may warrant monitorships as part of the DPA.[214] The UK prosecutors are instead required to approach external monitors with care given that the existence of a "genuinely proactive and effective" compliance program is already a precondition for the commencement of the DPA negotiation.[215] External compliance monitors will only be imposed if it is necessary "to positively and genuinely assist in changing corporate behaviour".[216] In practice, external monitorships in the UK are designed and applied to be less intrusive and more targeted at the wrongdoing at issue when compared with the U.S. monitorships.[217]

As to the identity of monitors, the U.S. and UK prosecutors entrust private persons specializing in the relevant areas with the task of monitoring and assessing the corporate compliance progress.[218] The French CJIP regime resorts to AFA, an administrative anti-corruption agency, to supervise the implementation of a compliance program in corporations that are subject to compliance obligations under the *Sapin* II law or a CJIP. Though AFA may engage external professionals to assist its task of supervision at the expense of the corporation, private compliance monitors similar to those in the U.S. and UK DPA regimes are not employed in the French CJIP program.[219]

(2008): 161 ("[i]n a post-Enron world, DOJ officials appear to believe that the principal role of corporate criminal enforcement is to reform corrupt corporate cultures . . . rather than to indict, to prosecute, and to punish").

[212] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated March 2023), https://www.justice.gov/criminal-fraud/page/file/937501/download (accessed April 4, 2023); SFO, Evaluating a Compliance Programme, January 2020, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/evaluating-a-compliance-programme/ (accessed June 17, 2021); *Sapin* II, Article 17-II.

[213] The Benczkowski Memorandum (restricting the monitorships to situations where there is pervasive failure of internal control in the company, and the company has not taken adequate proactive measures to improve its compliance program or the revised compliance program has not been tested to be effective); "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021) (lifting the restrictions in the previous Memorandum).

[214] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 327 (suggesting the use of mandates only when the firm is plagued by the policing agency costs).

[215] SFO and CPS, DPA Code of Practice, Article 2.8.2 (iii) (listing the existence of a proactive compliance program at the time of offending and at the time of reporting as an important factor against prosecution); SFO and CPS, DPA Code of Practice, Article 7.11 (mandating prosecutors to approach monitorships with care); Seddon, Stott and Ivanovs, "Monitorships in the United Kingdom," (noting that the threshold to UK DPA is higher, as "corporate entities ... commonly have put in place arrangements akin to those that may be ordered under monitorship programs in other jurisdictions long before agreements are made with enforcement authorities or ratified by courts").

[216] Camilla de Silva, Joint Head of Bribery and Corruption, speaking at the Herbert Smith Freehills Corporate Crime Conference 2018, "Corporate criminal liability, AI and DPAs," June 21, 2018, https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/ (accessed December 19, 2018).

[217] Seddon, Stott and Ivanovs, "Monitorships in the United Kingdom," (compared to the US monitorship, "the monitorship components of settlements agreed to date" in the UK "could more accurately be described as quasi-monitorships"); Christopher David, and Emily Stark, "Trans-Atlantic Winds of Change for Corporate Monitorships?" *Fraud Intelligence*, November 27, 2018, https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/20181211-trans-atlantic-winds-of-change-for-corporate-monitorships (accessed November 11, 2019) ("whilst it appears the US may be reducing its use of monitors, the SFO may be looking to increase their use").

[218] *SFO v. Standard Bank*, Deferred Prosecution Agreement, para. 28 (PwC is tasked with conducting an independent review of the company's anti-bribery and corruption system and its implementation in practice); *SFO v. Tesco Stores Limited*, Deferred Prosecution Agreement, paras. 25 and 29 (requiring the company to commission Deloitte to advise and produce a two-stage report on company's internal accounting controls and governance).

[219] 2023 CJIP Guidelines, at 19 ("the AFA estimates the maximum costs incurred by its use of experts or qualified persons based on information received from the company").

	U.S.	UK	France
Statutory Basis	No	Yes	Yes
Is NPA Available?	Yes	No	No
Available to Legal Persons?	Yes	Yes	Yes
Available to Individuals?	Yes	No	No
Applicable Offenses	A wide range of offenses, including bribery, fraud, money laundering, safety violations, healthcare and FDA violations, export control, immigration violations, and environment offenses	A list of economic offenses, including bribery, corruption, fraud, false accounting, money laundering, tax and customs violations	A handful of specified offenses: corruption, influence peddling, tax fraud, laundering of the proceeds of tax fraud, and environment offenses
Judicial Involvement	Minimal	Substantial	Substantial
Transparency	Low	High	High
Credits for Self-reporting and Cooperation	Presumptive declination (without aggravating circumstances); A D/NPA or plea with 50%-75% fine discount (with aggravating circumstances)	An opportunity to enter into a DPA; Up to 50% reduction to corporate fine	Positive consideration for CJIPs and reduction to public interest fine, up to 50% reduction to corporate penalty fine
Independence of Corporate Internal Investigations	High	Low	Low
Individual Accountability	Yes	Yes	Yes
Corporate Cooperation in Identifying Individual Wrongdoers	a precondition for any cooperation credits	Positive consideration for cooperation credits and DPA	Positive consideration for CJIPs and reduction to corporate penalty fine
Identity of Monitors	Private persons	Private persons	Special government agency: AFA
Compliance Monitorships	Low threshold, extensive scope	High threshold, limited scope	Low threshold, limited scope

Table 2 Comparison of Elements of DPA Regimes in the U.S., UK and France

3.5 A Chinese Version of DPAs: Advantages and Unanswered Questions

The previous Chapter identified the major difficulties confronting the Chinese authorities in the enforcement of the anti-bribery laws in the corporate context, followed by the discussion of the

procuratorial authority's experimentation of the CNP modeled on the foreign DPA programs. After a detailed introduction and comparison of the DPA programs in the U.S., UK and France, this Section will discuss the question whether the DPA mechanism should be introduced in China with the focus of its (lack of) potential values for tackling the corporate enforcement challenges. Moreover, it also addresses the question as to whether China's existing CNP forms a sufficient alternative to the DPA mechanism for the enforcement of anti-bribery laws. A positive answer to the question may make it unnecessary to introduce DPA into China given the existence of an existing effective mechanism.

3.5.1 DPAs as a Promising Solution to Corporate Enforcement Challenges in China

The factors that explain the prevalent use of DPAs for the resolution of corporate crimes, especially the foreign bribery charges, in the U.S., UK and France are generally pragmatic in nature.[220] The DPA mechanism is applied to tackle enforcement challenges inherent in the criminal investigations and prosecutions of organizations for bribery offenses. First of all, as is pointed out by the OECD Working Group on Bribery, detection is the first step yet a big challenge to any anti-bribery enforcement actions.[221] The complex financial arrangements, organizational structures and transaction modes are often employed to conceal or even to legitimize the bribery transactions.[222] In addition, bribery normally does not generate immediately visible harms or involve an easily identifiable victim, making it less likely for the victims to report a bribery scheme with sufficient information.[223] Following the detection of bribery, corporate bribery investigation is similarly challenging. It often involves the identification, access to, and analysis of, a massive amount of documents and data, which require substantial resources and a high degree of expertise, or even the burdensome mutual legal assistance procedure.[224] Lastly, even if the investigation has been successfully concluded, the criminal prosecution of a company, even an unsuccessful one that does not lead to a conviction, may inflict unbearable pain on a company, triggering negative publicity, slumping share price, lost consumers and even debarment from the government procurement.[225] The collapse of corporations, especially the big and public corporations, could cause serious harm to the innocent third parties, including shareholders, employees, suppliers and customers, making prosecutors reluctant to initiate hard criminal proceedings against corporations.[226]

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[220] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 25.

[221] OECD, *The Detection of Foreign Bribery*, 2017, at 9.

[222] Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-corruption in the UK and Germany* (Surrey: Ashgate Publishing Limited, 2014), 36-37.

[223] Coffee, "'No Soul to Damn: No Body to Kick'," 390-391 (noting that the prevalent unwitting victims render corporate crimes more concealable than classically under-reported crimes such as rape or child abuse); OECD, *The Detection of Foreign Bribery*, 2017, at 9 (noting that there is hardly an identifiable, direct victim in the foreign bribery cases, let alone victims armed with sufficient information to come forward).

[224] Director of the Serious Fraud Office Applicant *versus* Airbus SE, Southwark Crown Court, January 31, 2020, paras. 52-57 (noting that Airbus's internal investigation covered more than 1,750 entities across the world and generated over 30.5 million documents).

[225] Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," *Yale Law Journal* 118, no. 1 (2008): 128-29 ("[i]t is common wisdom within the business community that a conviction amounts to a potentially lethal blow for a corporation, one from which the corporation may not recover even if it is actually innocent").

[226] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed December 5, 2022) ("I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor"); Nick Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review," *The Yale Law Journal* 128, no. 1

As identified in the previous Chapter, the Chinese authorities are faced with similar problems in the enforcement of the anti-bribery laws. The individual-centered, enforcement-oriented and public-actors only approach to the fight against bribery is highly questionable in terms of its sustainability and efficacy.[227] Owing to the restrictive corporate criminal liability rules and the authorities' fear for the economic implications of corporate prosecutions, corporations are subject to especially low criminal enforcement risks for bribery violations.[228] For example, for the fear of driving foreign investment away, the Chinese authorities often chose not to prosecute corporations that had settled the FCPA charges in the U.S. for bribery misconduct originating in China.[229] The anti-bribery strategy featuring sole reliance on the public enforcement has not substantially improved the (perceived) degree of corruption and bribery in the country. Instead, it has caused great pressure on public enforcement resources.[230]

Considering the rationales for the application of DPAs and the impressive corporate enforcement records in the U.S., UK and France, the introduction of DPAs into China could theoretically help address the challenges confronting the Chinese authorities in the following ways. Firstly, DPAs conditioned on the corporate voluntary self-disclosure and full cooperation could enhance the Chinese authorities' ability to detect and investigate corporate crimes without the need to significantly expanding the public enforcement or judicial resources. Compared with the public enforcement agencies, corporations are typically able to detect and investigate corporate misconduct in a more cost-effective manner owing to their unique influence over employees' behavior and ability to access evidence without a similar level of due process restrictions.[231] If strategically designed and applied to incentivize corporations to conduct comprehensive internal investigations and proffer the results to the government, DPAs could allow the public enforcement resources to be saved or more efficiently used to initiate a higher number of corporate investigations and to prosecute more non-cooperative corporations.[232] Moreover, the costs associated with the criminal trial and appeal proceedings could also be saved, mitigating the tension between the large caseload and the acute shortage of judicial personnel in the Chinese judicial system. The efficiency-increasing and cost-saving features of DPAs are especially appealing for the under-funded and under-staffed Chinese enforcement and judicial authorities in times of economic downturn.[233]

(2019): 1378 ("the strategic implications of a conviction's collateral consequences depend on its political-economy context: individual convictions rarely produce systemic risk, layoffs, or permanent shareholder losses").

[227] See Chapter 2, Section 2.3.

[228] See Chapter 2, Sections 2.3.1 and 2.3.3.

[229] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," *法学 (Law Science)*, no. 9, (2014): 103-115 (providing a long list of multinational enterprises receiving hefty penalties from foreign regulators for bribery in China but not being pursued by the Chinese government).

[230] See Chapter 2, Section 2.3.4.

[231] Arlen, "Corporate Criminal Liability: Theory and Evidence," 165-66 (claiming that large corporation is a more cost-effective provider of both monitoring and investigation measures); Coffee, Jr., "'No Soul to Damn: No Body to Kick'," *Michigan Law Review* 79, no. 3 (1981): 408 ("(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards").

[232] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions,* 22 ("[t]o the extent that non-trial resolutions save time and free up resources, law enforcement authorities can use fewer resources to resolve more cases"); Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 688 ("[b]y having corporate defendants bear these costs, governmental authorities conserve scarce resources creating a virtuous cycle of spending little while receiving significant amounts in fines which are then "invested" in initiating and disposing of more cases").

[233] Sharon Oded, "Deferred Prosecution Agreements: Prosecutorial Balance in Times of Economic Meltdown," *Law Journal for Social Justice*, no. 2 (2011): 81-82 (claiming that the DPA regime may mitigate or even eliminate many of the enforcement costs inherent in the traditional

Secondly, prosecutors traditionally have only two blunt choices when dealing with a company suspected of criminal misconduct: bring an indictment or walk away. The binary choice places prosecutors in a dilemma between turning a blind eye towards corporate crimes and inflicting destructive damages on innocent third parties.[234] Such dilemma is highlighted in the Arthur Andersen case and has since then become a major driving force for the introduction and booming development of DPAs in the U.S., UK and France.[235] In China, the frequent use of coercive investigative measures in corporate enforcement actions and the "joint sanction approach" under the controversial Social Credit System could trigger similarly debilitating collateral consequences for the corporations and undermine the leadership's goal of economic recovery.[236]

As a middle ground between outright declination and full-scale prosecution, DPA offers the Procuratorates a pragmatic and quick way to bring corporate offenders to justice while mitigating the spill-over effects of the lengthy criminal proceedings and corporate conviction.[237] Considering the cooperative stance taken by the corporation for the purpose of obtaining a DPA, China's investigative agencies are more likely to find it unnecessary to impose pre-trial coercive measures, thus limiting the disturbance of the criminal enforcement actions to normal business operation.[238] A quicker process is also beneficial for the corporation to the extent of reducing the negative publicity and minimizing the reputational damages.[239]

Thirdly, DPAs could strengthen the authorities' capability to promote corporate compliance. Given the values of DPAs for saving public enforcement costs and mitigating the externalities of corporate enforcement actions, DPAs would greatly relieve the Chinese authorities' scruples about corporate prosecutions. Corporations and responsible personnel involved in bribery and other white-collar offenses in China can thus be subject to higher criminal enforcement risks. A credible threat of corporate prosecution is necessary to incentivize corporations to implement an

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prosecutorial practices, including direct costs associated with prosecution and criminal trial, as well as indirect costs such as alienation costs and error costs. Such public cost-saving feature of DPA makes it especially invaluable in times of economic meltdown).

[234] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012 ("[w]hen the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away").

[235] US Justice Manual, 9-28.1100 – Collateral Consequences ("where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism"); *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc,* Southwark Crown Court, Case No: U20170036, January 17, 2017, paras. 52-57 (citing the potential negative impacts of prosecution for the offering of DPAs, including conviction-triggered debarment that may account for 30% of the company's order, the loss of shareholder confidence and even viability of the company, repercussions to the interests of third parties such as the UK defense industry, employees, pensioners and those in its supply chain); 2023 CJIP Guidelines, at 5 ("[t]he execution of a CJIP terminates indeed prosecution against the company without generating the effects of a court conviction on the continuity of its economic activity. It avoids exclusion from public procurement procedures and does not structurally affect its financing capacities and the quality of its third parties assessment").

[236] European Chamber, and Sinolytics, *The Digital Hand: How China's Corporate Social Credit System Conditions Market Actors*, at 15-16 ("[t]he principle of joint sanctions - meaning that all relevant government authorities levy sanctions based not only on the rating they are directly responsible for, but also in response to negative ratings in all rated fields—is one of the most important characteristics of the Corporate SCS [social credit system"); For Chinese enterprises and individuals backlisted by the World Bank, see "Procurement - World Bank Listing of Ineligible Firms and Individuals," https://www.worldbank.org/en/projects-operations/procurement/debarred-firms (accessed December 22, 2022).

[237] US Justice Manual, 9-28.200 – General Considerations of Corporate Liability (noting that DPAs occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 110 (noting that "CJIP has also led to quicker resolution of these cases with regard to legal persons"; one case related to the Oil for Food program took 16 years to conclude with a court conviction, while the Airbus investigations took 4 years to conclude with a CJIP).

[238] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," *比较法研究 (Journal of Comparative Law),* no. 1 (2020): 21-29 (discussing the compliance incentives created by the reduced use of coercive investigative measures and the diversion from criminal trial).

[239] Greenblum, "What Happens to a Prosecution Deferred?" 1884-89 (discussing the advantages for firms to negotiate a DPA, including protecting the firms from collateral consequences of criminal conviction and reducing adverse publicity).

effective compliance program to monitor and prevent employees' wrongdoings.[240] What is more, DPAs give the Procuratorate more power and flexibility to negotiate tailored non-monetary obligations to reshape the corporate governance and compliance system, which can hardly be achieved via the traditional indict-or-decline strategy.[241] The development of an effective corporate compliance program would not only reduce the Chinese authorities' pressure when combating corporate crimes, but also empower Chinese overseas enterprises to bargain for leniency if being targeted in a foreign enforcement action.[242]

In addition, DPAs are further justified by having "the same punitive, deterrent, and rehabilitative effect as a guilty plea".[243] Corporations are typically required under DPAs to admit the criminal facts and accept responsibility for the alleged violations of laws.[244] The corporations' acceptance of responsibility serves important practical and moral purposes, such as preventing corporations from making contrary claims in the future, facilitating corporate prosecution in the event of a material breach of DPA and expressing moral condemnation of corporate offenses.[245] DPAs could also be utilized to impose substantial monetary sanctions on corporations, which are necessary to deprive the corporations of illegal proceeds, compensate the victims and incentivize corporations to take effective measures to prevent future violations of the law.[246]

Lastly, the introduction of DPAs into China could induce multinational corporations to self-report bribery violations to the Chinese authorities and enable the authorities to combat bribery involving foreign corporations more efficiently. In reality, multinational corporations rarely approach the Chinese agencies voluntarily with information about possible corporate misconducts, unless it is part of their global self-disclosure initiatives.[247] It is feared by the multinational corporations that self-reporting to the Chinese authorities could put them at a

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[240] Alan O. Sykes, "The Economics of Vicarious Liability," *Yale Law Journal* 93, no. 7 (1984): 1246 (identifying the ability of vicarious liability to force the enterprise to "internalize" the full cost of its actions); Kathleen Segerson, and Tom Tietenberg, "The Structure of Penalties in Environmental Enforcement: An Economic Analysis," *Journal of Environmental Economics and* Management 23, no. 2 (1992):179-200 (considering the principal-agent framework under which the firm as the principal chooses the compensation and promotion structure, and the employee as the agent, observing this choice, selects the level of care to take to prevent actions that may criminally implicate the firm).

[241] Garrett, "Structural Reform Prosecution," 861 (noting that prosecutors claim that "[w]e're getting the sort of significant reforms you might not even get following a trial and conviction"); "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012 ("DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe").

[242] Xiaoping Zhu, "企业合规的若干疑难问题 (Several Difficult Problems Associating Enterprise Compliance)," *法治研究 (Research on Rule of Law)*: 4-6 (discussing the values of enterprise compliance, including promoting the governance and high-quality development of enterprises, and empowering Chinese enterprises to actively participate in the international competition).

[243] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012 ("when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability").

[244] *Ibid* ("[p]erhaps most important, whether or not a corporation pleads guilty, as Siemens AG did, or enters into a DPA with the government, the company must virtually always publicly acknowledge its wrongdoing. And it must do so in detail").

[245] Garrett, "Globalized Corporate Prosecutions," 1845 (noting such provision has served a moral purpose and also a practical purpose to bind the firm should it breach the agreement or deny having engaged in the prohibited conducts); Brandon L. Garrett, "Corporate Confessions," *Cardozo Law Review* 30, (2009): 923-24 ("[a] confession brings with it reputational costs to the corporation, though not to the degree that it would if the corporation pleaded guilty and had a conviction").

[246] "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed December 6, 2022) ("It is important to impose penalties on corporations that engage in misconduct. Cases against corporate entities allow us to recover fraudulent proceeds, reimburse victims, and deter future wrongdoing"); UK Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline*, 52 (noting that "the fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law").

[247] Kyle Wombolt, Robert Hunt and Anita Phillips, "Anti-Corruption and Bribery in China," Herbert Smith Freehills LLP, December 13, 2018, https://www.lexology.com/library/detail.aspx?g=760a5dc1-33db-4d92-91de-c475eb4110da (accessed June 8, 2022) (noting that self-reporting to the Chinese government is highly unusual, while self-reporting first to foreign authorities with follow-on report to China is more common).

higher risk of triggering corporate enforcement actions in China and collateral enforcement actions in other countries, especially the U.S. FCPA investigations.[248] Worse still, the absence of a DPA-like mechanism in China allowing corporations to negotiate a way out of criminal conviction further dampens their motives to self-report in China. From the perspective of Chinese authorities, in order to avoid double jeopardy and maintain the appeal to foreign investment, they often opt not to prosecute corporations that have already been sanctioned in the U.S.[249] In this context, a Chinese version of DPAs is advantageous for both the corporation at issue and the Chinese authorities.[250] It opens the door for a coordinated settlement between the corporation and all relevant jurisdictions to resolve bribery schemes originating in China.[251] The corporation is able to achieve a global resolution without the fear of triggering parallel enforcement actions in multiple jurisdictions. Meanwhile, China could safeguard its judicial sovereignty and institute robust investigations into bribery schemes involving foreign corporations without worrying about driving foreign investment away.[252]

3.5.2 CNP: the Chinese Version of DPAs?

As discussed above, the introduction of DPAs into China presents a promising solution to the corporate enforcement challenges in China. As the Procuratorate's attempt to promote corporate compliance without destroying the enterprises or impeding economic development, does CNP constitute an effective substitute for the DPA mechanism? CNP shows major similarities yet important differences when compared with the DPA regimes in the U.S., UK and France. In terms of the rationales for circumventing the full prosecution of corporate offenders, DPAs are used to achieve several goals in principal, including (i) minimizing the undesired collateral consequences of corporate indictment; (ii) incentivizing corporate voluntary self-disclosure, cooperation and remediation; (iii) holding corporate and individual wrongdoers accountable and deterring the commission of corporate wrongdoings; and (iv) reforming corporate organizations.[253] While CNP is similarly justified by the necessity to mitigate the negative

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[248] Chow, "The Interplay between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act," 1018 ("[t]he real risks posed by commercial bribery cases brought under PRC law are not the actions themselves, but the collateral FCPA prosecutions launched by DOJ that might ensue"). In addition, the $490 million criminal fine imposed by the Chinese court on GSKCI did not stop the U.S.'s DOJ and SEC and the UK's SFO from launching their own investigations into the company. Though the investigations by the DOJ and SFO were later dropped, GSK paid $20 million in civil penalties to settle the FCPA charges with the SEC, see Administrative Proceeding, "GlaxoSmithKline Pays $20 Million Penalty to Settle FCPA Violations," File No. 3-17606, September 30, 2016, https://www.sec.gov/litigation/admin/2016/34-79005-s.pdf (accessed June 13, 2022).

[249] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," 103-115 (providing a long list of multinational enterprises receiving hefty penalties from foreign regulators for bribery in China but not being pursued by the Chinese government); Daniel C.K. Chow, "China's Crack down on Commercial Bribery, Corruption in State-Owned Enterprises, and the Impact on U.S.-based Multinational Companies Doing Business in China," November 21, 2013, https://www.cecc.gov/sites/chinacommission.house.gov/files/CECC%20Roundtable%20-%20Corruption%20in%20China%20-%20Daniel%20Chow%20Written%20Statement.pdf (accessed June 20, 2022) ("[a]lthough the CPC might pursue individual executives within an MNC and even impose prison sentences on such executives, …(it) realizes that shutting down or inflicting serious losses on MNCs and disrupting their businesses will ultimately harm China's economy and China's own long term interests").

[250] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 38 ("[w]hen circumstances allow for multi-jurisdictional non-trial resolutions, all stakeholders tend to benefit from the finality of the resolution with the cooperating jurisdictions").

[251] *Ibid*, at 37-41 (discussing the trends of resolution of large multi-jurisdictional cases).

[252] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," 115 (calling for Chinese agencies to enhance cooperation with international communities to strengthen the global fight against commercial bribery); Chong Yu, "在华外国公司商业贿赂犯罪的实证研究与刑法规制(Empirical Research and Criminal Law Regulation of Commercial Bribery Crime Committed by Foreign Companies Operating in China)," *犯罪研究 (Criminal Research)*, no. 1 (2013): 55-57 (claiming that the Chinese authority should strengthen its will and capability to combat commercial bribery involving foreign corporations).

[253] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, (claiming that the use of DPAs enables "far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts"); UK Ministry of Justice,

externalities of corporate prosecution and promote corporate compliance reform, the Chinese authorities show little enthusiasm about incentivizing corporate voluntary self-disclosure and cooperation, or pursing individual liability alongside corporate resolution.[254]

In terms of the specific elements of the corporate settlement mechanism, CNP is also different from the DPA programs in several key aspects. Firstly, CNP is based on the Procuratorate's voluntary decisions to take the corporate compliance commitments and efforts into consideration when exercising its prosecuting authority.[255] Considering the huge power imbalance between the Procuratorate and the corporate defendant, CNP is more of "a mercy shown to the defendant in a condescending manner rather than equal negotiation".[256] In contrast, DPA is in essence an agreement negotiated between the prosecutor and the corporate defendant, though the prosecutor is often believed to enjoy substantially more leverage over the corporation in the negotiation process with the threat of criminal prosecution.[257] Regarding the scope of application, China's CNP seems to have adopted a similarly broad approach as the U.S. DPA program. CNP can be applied to resolve both corporate charges and individual charges with regard to a wide range of corporate offenses, including bribery and corruption, financial, fraud and tax crimes, product quality and safety violations, environmental crimes, and crimes against intellectual property.[258] With regard to the external oversight of the resolutions, judicial oversight is included in the DPA regimes in all the three selected foreign jurisdictions to varying degrees. However, China's CNP has completely excluded the court from the process, as the Procuratorates' charging decisions are not subject to the courts' scrutiny in China's criminal justice system.[259] In this sense, CNP bears a stronger resemblance to the U.S. NPA mechanism than any DPA mechanism.

Secondly, while incentivizing corporate self-reporting and cooperation is a main goal of the DPA regime, no substantial efforts have been made under the CNP in this aspect. Corporate voluntary

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DPA Consultation, para. 75 (claiming that the DPA should fulfill similar purposes as the court's criminal sentence, including (i) punishment; (ii) reduction of crime (including by deterrence); (iii) rehabilitation of offenders; (iv) public protection; (v) restitution to victims); 2023 CJIP Guidelines, at 4-5 (claiming that CJIP promotes both public interests and the interests of the company).

[254] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2020): 62 (justifying the seemingly excessive leniency of the CNP, compared with the DPA system in the U.S., through its rationale of restorative justice instead of deterrence and the fact that most enterprises implicated in the criminal cases are small and medium-sized private enterprises); Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," *中国法学 (China Legal Science),* no. 6 (2020): 241-242 (claiming that the Procuratorial organ abandons the rationales of retribution and deterrence in the promotion of the CNP system. Instead, the prevention of crime is emphasized as the priority goal).

[255] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (arguing that the attitude from the enterprise is only an important consideration of the Procuratorate's charging decision, and that CNP shall not be interpretated as a reconciliation or agreement between the Procuratorial organ and the relevant enterprise).

[256] *Ibid*, 57 (arguing that CNP shall be designed with the same rationale for the already existing legal systems: criminal reconciliation system and leniency system); Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," *法学研究 (Chinese Journal of Law)*, no. 4 (2016): 83 (criticizing the leniency System for being "a mercy shown to the defendant in a condescending manner rather than equal negotiation").

[257] Greenblum, "What Happens to a Prosecution Deferred?" 1865 (noting that DPA is "effectively an extrajudicial contract"), and 1885 ("[t]he corporate offender's unique adverse publicity and collateral consequences sets the stage negotiation that 'stack[s] the deck against defendants' and calls into question whether the choice to enter into deferral is really a choice at all").

[258] Zhicheng Zhao, "企业合规第三方监督评估机制及其启示 (Third-party Supervision and Evaluation Mechanism of Enterprise Compliance and Its Enlightenment)," Zhong Lun, June 7, 2021, http://www.zhonglun.com/Content/2021/06-07/1654483661.html (accessed June 22, 2021) (noting that in light of the pilot work of local Procuratorates, the cases that may be resolved through CNP include production safety crimes, commercial bribery and corruption crimes, environmental crimes, crimes against intellectual property rights; financial, fraud and tax crimes).

[259] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," *法制与社会发展 (Law and Social Development)*, no. 1 (2022): 54 (noting that China does not have the judicial review system involving the court).

self-disclosure and cooperation in the form of corporate internal investigations are neither mandatory preconditions for CNP nor common obligations imposed through CNP.

Thirdly, regarding the corporate obligations imposed via settlement agreements, corporations are required under China's CNP, just as foreign DPA programs, to accept responsibility for the alleged offense and commit to implement or improve their compliance program. In addition, the corporate voluntary actions to turn over the ill-gotten profits and compensate victims are often perceived by the Procuratorate as preconditions for the application of CNP.[260] However, unlike the three selected jurisdictions that place great emphasis on individual accountability in the context of corporate DPAs, corporations under CNP are not required to cooperate with the public investigations into relevant individuals. Instead, both corporations and individuals may be granted a non-prosecution decision following the successful completion of the program.[261]

Lastly, a common focus between the selected DPA programs and China's CNP is the promotion of corporate compliance development. Both mechanisms aim to induce corporations to take genuine remedial measures to enhance their compliance program before and/or after the settlement. For this sake, the status of corporate compliance program is set as a crucial precondition for the initiation of the negotiation procedure and for the conclusion of the prosecution proceedings, accompanied by periodical self-reporting requirements and compliance monitorships. As for the identity of monitors, China's CNP adopts a unique approach compared with the private professionals in the U.S. and UK DPA programs or the designated administrative agency under France's CJIP regime. An *ad hoc* third-party organization on a case-by-case basis, consisting of private experts and/or representatives from the relevant regulatory agencies and industry associations, will be established to inspect and assess the corporate compliance progress.[262] However, the third-party inspection system is still at a nascent stage. Many issues concerning the expertise and will of the parties involved in the compliance inspection, the inspection period, and the benchmark for the assessment of corporate compliance program remain unsettled.[263]

In a word, as the Procuratorate's ground-breaking attempt to address difficulties associated with the corporate criminal enforcement, CNP includes key rationales and emphasis that are common to DPAs. Both regimes aim to resolve corporate matters and promote corporate compliance development without causing disproportional damage to the innocent employees and the market. However, China's CNP falls short of the key rationales for DPAs, such as incentivizing corporate self-reporting and cooperation and enhancing individual accountability, and is relatively immature in the regime designed to monitor the corporate compliance reforms.

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[260] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," *中国刑事法杂志 (Criminal Science)*, no. 1 (2021): 87 (noting that though the Procuratorates are not authorized to impose substantive actions, they may precondition CNP on the enterprises' willingness to disgorge the illegal benefits, pay the fine and compensate the victims).

[261] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," *法治日报 (Legal Daily)*, September 23, 2020, https://www.spp.gov.cn/spp/zdgz/202009/t20200923_480702.shtml (accessed April 15, 2021); 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), December 16, 2020, http://www.148hb.com/newsview/8572.html (accessed April 15, 2021), Article 4.

[262] Third-Party Compliance Supervision Guidelines, Article 10.

[263] See Chapter 2, Section 2.4.3.3.

In light of the multiple advantages of DPAs in the fight against corporate bribery, the introduction of DPAs into China merits serious consideration. Given the similarities shared between China's CNP and the DPA mechanism, the Procuratorates' attempts in the experimentation of CNP and the ancillary third-party compliance inspection system are valuable for designing the Chinese model of DPAs. However, a number of questions remain to be answered for the designing and implementation of a Chinese version of DPAs based on CNP. What are the social values of corporate self-reporting and cooperation, individual prosecutions in the context of corporate resolution and corporate compliance reforms, which are important goals of the DPA programs? How to design and implement the DPA program to enable the authorities to achieve such goals? With crucial differences between China's CNP and the DPA programs in the U.S., UK and France, will CNP prevent Chinese authorities from achieving a similar level of success in the anti-bribery enforcement as the selected foreign jurisdictions? How to reform CNP to effectively address China's corporate enforcement challenges and facilitate the enforcement of anti-bribery laws? As the DPA programs in the three selected jurisdictions show important differences in key elements between themselves, as identified in Section 3.4, based on which model should China's DPA program be designed and applied?

3.6 Conclusion

Facing increasing international pressure on foreign bribery enforcement and the difficulties of doing so, a growing number of jurisdictions are turning to the DPA mechanism as a valuable middle ground between outright declination and full-scale prosecution. The DPA regime is expanding from the U.S. to other jurisdictions due to its pragmatic value for incentivizing corporate voluntary self-disclosure and cooperation, reforming troubled organizations and reducing the undesired collateral consequences of corporate conviction. From the perspective of the origins and evolution of DPAs, the general design of the DPA regimes and the implementation in practice, this Chapter introduces and compares the DPA regimes in the U.S., UK and France, the most active players in the foreign bribery enforcement area. It is believed that the DPA mechanism, if introduced into China, could present a promising solution to China's existing corporate enforcement challenges.

In order to build a Chinese version of DPAs, China's CNP that is inspired by the DPA programs and represents the Procuratorate's innovative attempt to address the corporate enforcement challenges could form an important basis. Both mechanisms present a pragmatic way to resolve corporate criminal matters while minimizing the undesired externalities of corporate prosecution. In addition, they show similar emphasis on the importance of the corporate governance and compliance program, though CNP is relatively crude in its design to promote corporate compliance development. On the other hand, while a major purpose of DPAs is to incentivize corporate voluntary self-disclosure and cooperation, including cooperation in the individual proceedings, China's Procuratorates show less interest in these aspects in the application of CNP.

Currently, CNP is still at the pilot stage. Following a successful completion of the pilot program, it is expected that the PRC Criminal Procedure Law and possibly also the PRC Criminal Law

will be revised to formalize the resolution mechanism.[264] In order to provide useful recommendations for the Chinese policymakers as to the reform of the CNP and the development of a Chinese version of DPAs, the following Chapters 4 to 6 will be devoted to examining the policies governing the use of DPAs and the practices in the U.S., UK and France. The DPA programs in the three selected jurisdictions will be examined with respect to the goals of incentivizing corporate self-reporting and cooperation, achieving individual accountability and promoting corporate compliance development. The aim is to identify lessons regarding the designing and application of DPAs for China and other jurisdictions contemplating the adoption of the DPA mechanism, with the ultimate purpose of facilitating the effective enforcement of anti-bribery laws in the corporate context.

[264] Yuguan Yang, "企业合规与刑事诉讼法修改 (Enterprise Compliance and Amendment to the PRC Criminal Procedure Law)," *中国刑事法杂志 (Criminal Science),* no. 6 (2021): 144-162.

Chapter 4 Incentivizing Corporate Self-reporting of Bribery Issues through DPAs

4.1 Introduction

Incentivizing corporate self-reporting is one of the core purposes of the DPA regime.[1] As emphasized by the OECD in its special report, the detection of corporate bribery is the first step, and a big challenge, to effective anti-bribery enforcement.[2] Unlike many other criminal offenses, bribery generally does not cause immediately visible harms or involve easily identifiable victims that may come forward to alert the authorities to the misconduct.[3] Complex financial arrangements and organizational structure, as well as regulatory differences across borders are often employed to conceal or even to legitimize bribery payments. Owing to its intrinsically secretive nature, a fairly large number of bribery schemes may never come to light unless one party involved in the conspiracy chooses to come forward.[4] Corporate voluntary self-disclosure and active cooperation with the government's investigation have a significantly positive impact on the government's ability to detect and prosecute bribery issues.[5] As a matter of fact, 22% of foreign bribery enforcement actions within the 44 signatories to the OECD Anti-bribery Convection from 1999 to 2017 were triggered by self-reporting, significantly higher than any other known sources.[6]

In order to incentivize corporate self-reporting of bribery violations, the U.S., UK and French enforcement authorities are using corporate enforcement policies to offer great benefits to corporations that have self-reported and cooperated. Corporations that have voluntarily self-reported and fully cooperated are likely to be offered a pre-trial resolution agreement, which gives them a way to resolve the criminal matter efficiently without going to the trial or suffering the collateral consequences of criminal conviction. Prompt corporate self-reporting that alerts the authorities to the possible wrongdoings within the firm, accompanied by supporting evidence about relevant facts and individual wrongdoers, is a central factor considered by the prosecutors

[1] *SFO v. Sarclad Limited*, Southwark Crown Court, Case No: U20150856, July 11, 2016, para. 16 ("a core purpose of the creation of DPAs to incentivise the exposure and self-reporting of corporate wrongdoing").

[2] OECD, *The Detection of Foreign Bribery*, 2017, www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery.pdf, at 9.

[3] John C. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 390-91 (noting that the prevalent unwitting victims render corporate crimes more concealable than classically under-reported crimes such as rape or child abuse); OECD, *The Detection of Foreign Bribery*, 2017, at 9 (noting that there is hardly an identifiable, direct victim in foreign bribery cases, let alone victims armed with sufficient information to come forward).

[4] Jennifer Arlen, and Samuel W. Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," *Southern California Law Review* 93, no. (2020): 716-17 (claiming that "such crimes are rarely provable without the testimony of those who were themselves involved in illegal activity, because violators tend to keep wrongdoing secret from those who are not members of criminal conspiracies").

[5] OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention: Phase 4 Report- United States*, October 2020, para. 69 ("the U.S. authorities stress that because much of the conduct often occurs in a foreign country, and because the bribe payments are often routed through numerous foreign jurisdictions (and often disguised using shell companies and other methods of concealment), voluntary self-disclosures and cooperation can have a significant positive impact on the government's ability to resolve with the culpable individuals and entities").

[6] OECD, *The Detection of Foreign Bribery*, 2017, at 13 (Of the 263 foreign bribery schemes that have resulted in definitive sanctions since the entry into force of the OECD Anti-Bribery Convention, 23% (or 59) were detected via self-reporting, while the second important source, mutual legal assistance, accounts for only 7%).

in offering a DPA or even a declination.[7] In addition, firms that engage in voluntary self-disclosure are more likely to win favorable settlement terms under the DPA, including financial penalty reduced by up to 50%-75% and/or an exemption from external monitorships.[8]

From the perspective of corporate actors, voluntary self-disclosure of bribery issues presents major benefits and risks at the same time. The benefits associated with self-reporting may include a pre-trial agreement that allows a quick resolution of corporate investigations without criminal convictions, less severe financial and compliance obligations, and greater latitude to minimize any reputational losses.[9] On the other hand, corporations implicated in bribery violations are exposed to probabilistic sanctions as the wrongdoings may go unnoticed by the authorities. Even when the authorities have learned of the existence of corporate wrongdoings, substantial barriers stand between the detection of corporate wrongdoings and successful prosecution of corporate wrongdoers. When a corporation opts to self-report, the probability of detection is increased to one hundred percent and the expected costs of the wrongdoing are thus increased.[10] Self-reporting is therefore not a rational choice for a corporation, unless real threats of governmental detection exist and substantial benefits can be achieved via self-reporting to offset the increased costs.

This Chapter examines the phenomenon of corporate self-reporting of bribery issues and analyzes how the DPA mechanism impacts the corporate incentives and disincentives to self-report. It proceeds as follows. Following the introduction, Section 4.2 provides an overview of the current legal policies in the U.S., UK and France regarding the interpretation of, and the incentives provided for, corporate self-reporting of bribery issues. In order to determine the merits of the policy incentivizing corporate self-reporting, Section 4.3 discusses the social advantages of corporate self-reporting. It is found that increased corporate self-reporting enables the authorities to use enforcement resources more efficiently, secure the benefits of cooperation and remediation, and reduce the avoidance costs. The next Section addresses the question of how to effectively incentivize corporate self-reporting of bribery issues. For this purpose, the corporate decision-making process regarding voluntary self-disclosure is examined. It is found that corporations will only self-report if they are provided with significant and predictable benefits that make them better off than otherwise, and the threats of detection and sanction are real for corporations that chose not to come forward. In accordance with this theoretical insight,

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[7] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, updated January 2023, https://www.justice.gov/criminal-fraud/file/1562831/download (accessed March 12, 2023); SFO and CPS, Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013 (DPA Code of Practice), Article 2.8.2 https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (accessed November 3, 2022); PNF, PNF, Guidelines on the Implementation of the judiciare d'interet public agreement (referred to as the "2023 CJIP Guidelines"), January 16, 2023, https://www.agence-francaise-anticorruption.gouv.fr/files/files/Guidelines%20on%20the%20implementation%20of%20the%20CJIP_PNF_January%2016%202023%20VD.pdf (accessed March 12, 2023), at 9.

[8] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[9] Miriam F. Weismann, *Crime, Incorporated: Legal and Financial Implications of Corporate Misconduct* (American Bar Association, 2009), 64 (listing the benefits of alternative resolutions for corporations and claiming that corporations' main purpose is damage control); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 22 (noting that non-trial resolutions save time-consuming trials and enable the law enforcement authorities to increase the pace of enforcement investigations, thus leading to shorter proceedings).

[10] Sharon Oded, "Coughing Up Executives or Rolling the Dice? Individual Accountability for Corporate Corruption," *Yale Law & Policy Review* 35, no. 1 (2016): 74 ("[w]hen corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability. Therefore, in the absence of other sources of motivation (e.g., a reduction of the severity of the fine due to self-reporting), one should not expect rational corporations to voluntarily self-report bribery and to cooperate with public investigations").

Section 4.5 reviews the corporate enforcement regimes in U.S. and UK as an example, involving involving the DPA policy, whistleblower mechanism, corporate liability rule and international cooperation, and compares their impacts on the corporate's incentives and disincentives to self-report. Finally, it concludes by summarizing the lessons that can be learned from the corporate enforcement practices in the selected jurisdictions.

4.2 Self-reporting of Bribery Violations: Interpretation and Credits

Before turning to the analysis of the social advantages of corporate self-reporting and the evaluation of the DPA regime's impact on a corporation's calculations of the costs and benefits of self-reporting, this Section will provide a general overview of how corporate self-reporting is interpreted and credited under the current legal framework in the U.S., UK and France.

4.2.1 Interpretation of Corporate Self-Reporting

First of all, enforcement authorities in all the three jurisdictions demand corporations to self-report within a reasonable period of time after becoming aware of the offense.[11] Regarding the timeliness of voluntary self-disclosure, it is impossible to standardize or quantify the requirement. It would be improper to say that two weeks or one month is a reasonably prompt time for timely corporate self-reporting. Specific circumstances of the case, including the scale and complexity of the misconduct and the seniority of the individuals involved, affect the time needed for the company to get a preliminary understanding of the potential misconduct.[12] Prosecutors have broad discretion in determining whether the corporate decision of not self-reporting earlier has jeopardized the public investigation. They might even require the company to demonstrate the promptness of its self-disclosure.[13] Nonetheless, in no case does it constitute a voluntary self-disclosure if the disclosure is made after the authorities' knowledge about the misconduct at issue via alternative means, such as whistleblower's tips.[14] Furthermore, CEP adopts an even stricter interpretation of voluntary self-disclosure and requires it to be made "prior to an imminent threat of disclosure or government investigation".[15] Accordingly, firms that self-report even before the existence of any public information about the misconduct may still run the risk

[11] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (corporate self-report will only get the credit for voluntary self-disclosure if it is made "prior to an imminent threat of disclosure or government investigation", and "within a reasonably prompt time after becoming aware of the misconduct"); SFO and CPS, DPA Code of Practice, Article 2.8.1 (demanding corporations to report "within reasonable time of the offending conduct coming to light" to avoid prosecution); PNF, 2023 CJIP Guidelines, at 9 (requiring self-reporting to be made within " reasonable timeframe" since "the company's knowledge of the facts").

[12] Matthew Wagstaff, Joint head of Bribery & Corruption of the SFO, "The Role and Remit of the SFO," May 18, 2016, https://www.sfo.gov.uk/2016/05/18/role-remit-sfo/ (accessed June 8, 2020) (acknowledging that it is unrealistic to expect a company to pick up the phone to the SFO at the very moment it first becomes aware of potential wrongdoing as it takes time for companies to verify the concerns and to seek advices).

[13] SFO and CPS, DPA Code of Practice, Article 2.9.3 (authorizing the prosecutors to consider whether any actions taken by the corporation by not self-reporting earlier may have prejudiced the investigation into that corporation or the individuals that incriminate corporation); PNF, 2023 CJIP Guidelines, at 9 ("[i]nternal investigation acts carried out during judicial proceedings are usefully submitted to the attention of the public prosecutor's office in order to ensure that they do not interfere with the judicial inquiry").

[14] Lisa Osofsky, Director of the SFO, "Keynote address at the FCPA Conference," December 4, 2018, https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/ (accessed December 15, 2019) (interpreting full cooperation as "tell[ing] us something we don't know").

[15] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

of not obtaining the credits for voluntary self-disclosure if the misconduct is otherwise subject to an imminent danger of exposure.[16]

Secondly, corporate self-reporting is generally expected to be followed with cooperative and remedial activities. Generally speaking, self-reporting is not the end but the first step in a long process towards the possibility of obtaining a DPA.[17] By engaging in voluntary self-disclosure, the corporation opens the door for the authorities' further requests for follow-up cooperation and remediation. According to Sir Brian Leveson, who approved the first four DPAs in the UK as the then president of the Queen's Bench Division, "self-reporting is a mechanism whereby you demonstrate a willingness to co-operate".[18] Self-reporting is an irreversible process and what is disclosed cannot be withdrawn. Knowing that the authorities have been made aware of the potential wrongdoings as a result of voluntary self-disclosure, the only rational action for the corporation is to continually provide assistance as required or expected, hoping to win credits for full cooperation.[19] As will be detailed later in this Chapter, the government's requests for cooperation and remediation can be quite broad and burdensome, including comprehensive internal investigation, waiver of legal professional privileges, replacement of culpable management or overhauling of the corporate compliance program.

Finally, according to the DPA policies in the U.S. and the UK and the French CJIP Guidelines, self-reporting should include both the materials related to corporate wrongdoings and the information about the individuals involved in, or responsible for, the wrongdoings.[20] In other words, corporate self-reporting should include the disclosure of not only crimes committed by the self-reporter itself, as is often the case with individual self-reporting, but also offenses committed by associated persons.[21] Corporations that withhold materials to the extent of prejudicing the government's investigation into relevant individuals when making a self-report may be deprived of the voluntary disclosure credits under the CEP in the U.S., or be refused a DPA in the UK.[22] However, it is still unclear how the corporation's failure to identify individual

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[16] Ruth Cowley, et al, "Self-reporting Bribery: the Ongoing Dilemma," Norton Rose Fulbright, August 2018, https://www.nortonrosefulbright.com/en-nl/knowledge/publications/37889dc7/self-reporting-bribery-the-ongoing-dilemma (accessed June 9, 2020) ("[w]orse still, the 'imminent threat' language could disqualify disclosure by a company even where no public information exists at the time of the disclosure; if the DOJ determines that the information might have become known, it can deny credit and pursue a prosecution").

[17] *Ibid* ("[d]eciding whether, when and how to report are just the first steps in a long process towards potentially receiving a deferred prosecution agreement (DPA)").

[18] House of Lords, Bribery Act 2010 Committee, "Corrected Oral Evidence: Bribery Act 2010," November 13, 2018, Q 151, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/oral/92751.html (accessed November 4, 2019).

[19] Richard Marshall, "Uuuhhh, Look, We Messed Up Here," *Corporate Counsel*, January 28, 2010, https://www.law.com/corpcounsel/almID/1202439516493/ (accessed June 5, 2020) ("[I]t makes little sense to self-report a problem to the government then later seek to obstruct the government's investigation of the problem").

[20] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (providing that in order to receive voluntary self-disclosure credits, corporations shall disclose "all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue"); SFO and CPS, DPA Code of Practice, Article 2.9.1 ("[i]t must be remembered that when (a corporation) self-reports it will have been incriminated by the actions of individuals"); PNF, 2023 CJIP Guidelines, at 20 ("it should be noted that the company's good faith in the CJIP negotiation is assessed in particular on the basis of its ability to conduct an internal investigation to identity the main individuals involved in the facts and to disclose them to the public prosecutor's office during the investigations and negotiations").

[21] OECD, *The Detection of Foreign Bribery*, 2017, at 13 ("[g]enerally, the notion of self-reporting applies to companies, whereas individuals reporting themselves would be considered as confidential informants or cooperating witnesses").

[22] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (specifying that the disclosure of "all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue" is required "for a company to receive credit for voluntary self-disclosure of wrongdoing"); SFO and CPS, DPA Code of Practice, Article 2.9.1 ("[the corporation] must ensure in its provision of material as part of the self-report that it does not withhold material that

wrongdoers would affect the French authorities' view of corporate self-reporting in terms of assessing the public corporate fine.[23]

4.2.2 Self-reporting Credits: Prosecution and Sentencing Stage

As discussed in detail in Chapter 3, prosecutors in the U.S., UK and France are authorized to take into consideration a series of factors when making charging decisions. Such factors include the company's criminal record, the severity of the charges for the wrongful actions, the collateral consequences of prosecution, the existence and adequacy of corporate compliance program, as well as the corporate self-disclosure, cooperation and remediation.[24] In all the three jurisdictions, the fact that a corporation chooses to provide prompt self-reporting plays a crucial role in persuading prosecutors to resolve the corporate investigations with a DPA, CJIP, or declination with favorable resolution terms.[25] The UK authorities adopt a strict standard regarding the use of DPAs to reward corporate self-reporting. It is explicitly claimed by David Green, the former SFO director, that no self-report means no DPA.[26] Though the SFO has so far concluded several DPAs with corporations that did not self-report in the beginning, such as Rolls-Royce and Airbus, such DPAs were approved by the court based on the fact that the corporations had provided extraordinary cooperation leading to the exposure of misconduct of which the authority was not aware.[27] Aside from the opportunity to enter into a DPA, it is common practice in the UK that a 50% reduction to the corporate fine will be granted under the DPA to reward corporate self-reporting and/or extraordinary cooperation.[28] In France, the latest CJIP Guidelines also provide 50% fine deduction for corporations that choose to voluntarily self-disclose the corporate misconduct.[29] In the U.S., voluntary self-disclosure, full cooperation and remediation without aggravating circumstances would even win corporations a presumptive declination with disgorgement under CEP. Even when a DPA is adopted and a corporate fine is imposed under the DPA, a self-reporting corporation may obtain a discount as high as 75% off the low end of the range of fine calculated under the U.S. Orgnizational Sentencing Guidelines.[30]

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would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution").

[23] Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, February 6, 2023, https://www.skadden.com/insights/publications/2023/02/france-further-aligns-corporate-crime-guidance (accessed March 14, 2023) (the CJIP guidelines expect companies to identify all relevant personnel involved in the misconduct but does not mention how the failure to do so would affect the corporate fine).

[24] USJM, 9-28.300 – Factors to be Considered; SFO and CPS, DPA Code of Practice, Articles 2.4-2.10; PNF, 2023 CJIP Guidelines, at 9.

[25] USJM, 9-28.900 – Voluntary Disclosures; SFO and CPS, DPA Code of Practice, Article 2.9.1; PNF, 2023 CJIP Guidelines, at 9.

[26] Marieke Breijer, "David Green: No Self-report – No DPA," *Global Investigation Review*, March 2, 2018 https://globalinvestigationsreview.com/article/1166243/david-green-no-self-report-%E2%80%93-no-dpa (accessed December 15, 2019).

[27] *SFO v. Rolls Royce PLC; Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, para. 123 (justifying the DPA with 50% discount to financial penalty by the "extraordinary cooperation" demonstrated by the company' though it did not self-report); *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, para. 68 (claiming that the high quality of subsequent co-operation overall in exposing wrongdoings that would not otherwise have come to the attention of the authorities is a significant factor in favour of a DPA, even if the prosecuting authorities became aware of the relevant conduct by the actions of a third party. "To that extent, there is no necessary bright line between self-reporting and co-operation").

[28] Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, March 14, 2019, paras. 284-94 (documenting the judicial practices that continually to offer DPAs with financial penalties of 50% discount to reward corporate self-reporting and/or extraordinary cooperation since the second DPA in the UK).

[29] PNF, Lignes directrices sur la mise en oeuvre de la convention judiciaire d'Intérêt public ("Guidelines on the Implementation of the Judicial Convention of Public Interest"), January 16, 2023, https://www.tribunal-de-paris.justice.fr/sites/default/files/2023-01/Lignes%20directrices%20sur%20la%20mise%20en%20oeuvre%20de%20la%20convention%20judiciaire%20d%27int%C3%A9r%C3%AAt%20public%20PNF%20version%20sign%C3%A9e.pdf (accessed March 14, 2023).

[30] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

Rewarding corporate self-reporting with leniency is not a unique feature restricted to the prosecution stage.[31] The approach of incentivizing corporate self-reporting can also be found in the U.S. Sentencing Guidelines for Organizations and the UK Definitive Guideline for fraud, bribery and money laundering offenses, though specific sentencing guidelines are absent in France.[32] Under the U.S. Sentencing Guidelines for Organizations, the organizations charged with criminal violations can demonstrate reduced culpability and incur a mitigated penalty by self-reporting, cooperating with the government's investigation and improving the corporate compliance program.[33] Voluntary self-disclosure can reduce the corporate culpability score by 5 points and would thus significantly reduce the ultimate fine.[34] A similar approach is adopted in the UK Sentencing Guidelines for bribery cases. Cooperation with the government's investigation, early admission and voluntary self-reporting are considered as mitigating factors that would help reduce the harm figure multiplier, resulting in a reduction of the penalty.[35] It is noteworthy that the direct impact of the Sentencing Guidelines is rather limited in the bribery context, as most corporate bribery investigations based on the FCPA and UKBA are resolved without corporate trials or sentences. Nevertheless, sentencing guidelines play a big role in the pre-trial resolution stage as the corporate fine calculated on the basis of the sentencing guidelines serves an important reference for the negotiation between the prosecutors and the corporations on the financial penalties imposed via a DPA.[36]

	U.S.	UK	France
Timing of self-reporting	"prior to an imminent threat of disclosure or government investigation", and "within a reasonably prompt time after becoming aware of the misconduct"	"within reasonable time of the offending conduct coming to light"	within "reasonable time" after "the top executives of the legal person became aware of the offenses"

[31] Lisa Kern Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," *New York University Law Review* 82, no. 2 (2007): 316-18 (noting that "cooperation between internal investigators and government regulators is not a new development" by citing the SEC's voluntary disclosure program and the U.S. Sentencing Guidelines); William S. Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," *Iowa Law Review* 87, no. 2 (2002): 644-45 (praising the carrot and stick approach in the U.S. Sentencing Guideline and Prosecution Guideline for being necessary to "encourag[e] businesses to join the government in the battle against corporate crime").

[32] Antoire F. Kirry, et al, "French DPAs—First CJIP Guidelines Published," Debevoise & Plimpton, July 9, 2019, https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines (accessed June 3, 2021) ("[t]he absence of specific sentencing guidelines for cases going to courts means that it is still quite challenging to estimate how much a prospective defendant may gain in a CJIP compared to a potential court-imposed penalty; the monetary benefit of self-reporting therefore remains less evident in France than it may be in the United States or the United Kingdom").

[33] U.S. Sentencing Commission, *Guidelines Manual*, Chapter 8, (1991) (amended 2016) ("[t]he two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility").

[34] U.S. Sentencing Commission, Guidelines Manual, Chapter 8, (1991) (amended 2016), Article 8C 2.5 (g).

[35] Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline*, became effective as of October 1, 2014 and updated in May 2016 (fine is calculated under the Guideline by multiplying the harm of the offenses ("harm figure") by a figure based on the corporate offender's culpability ("culpability multiplier"), which is categorized as "high" (250-400%), "medium" (100%-300%), or "lesser" (20%-150%); corporate cooperation with the investigation, an early admission or voluntary disclosure, among others, are factors that will reduce the culpability multiplier); Karlos Seeger, Matthew Getz and Robin Lööf, "U.K. Sentencing Guidelines for Organizations: Implications for Violators of the U.K. Anti-Bribery Regime," *FCPA Professor*, February 25, 2014, http://fcpaprofessor.com/u-k-sentencing-guidelines-for-organizations-implications-for-violators-of-the-u-k-anti-bribery-regime/ (accessed July 1, 2021) ("it is not unreasonable to assume that an organisation facing charges under the corporate offence could benefit from a reduction of any financial penalties of between 50-75% under a DPA compared to the fine it would face if it lost a trial on the adequacy of its anti-bribery programme").

[36] Crime and Courts Act 2013, c. 22, Schedule 17, paragraph 5(3) (providing that the amount of any financial penalty agreed under DPA must be broadly comparable to the fine that a court would have imposed for the alleged offense following a guilty plea); Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1848 (noting that though organizational sentencing guidelines are only advisory in nature and not used in cases negotiated out of court in D/NPA, the Guidelines can still have an effect on negotiations between prosecutors and companies").

Is self-reporting a consideration of prosecution?	Yes	Yes	Yes
Self-reporting credits in the prosecution stage	A presumptive declination off the low end of the Sentencing Guideline fine range (without aggravating circumstances); A D/NPA or plea with 50%-75% fine discount (with aggravating circumstances)	An opportunity to enter into a DPA; Up to 50% reduction of corporate fine	Favorably considered by prosecutors in the choice of the CJIP procedure; Up to 50% reduction of corporate fine
Credits for cooperation but no self-reporting in the charging stage	An opportunity to enter into a D/NPA or plea; up to 50% fine discount	No access to a DPA in principle, unless the cooperation is considered as extraordinary	Up to 30% reduction of corporate fine
Is self-reporting a consideration of sentencing	Yes	Yes	N/A
Self-reporting credits in the sentencing stage	Corporate culpability score reduced by 5 points	Mitigating corporate culpability level	N/A

Table 3 Definition and Credits for Self-reporting in the U.S., UK and France

In a word, self-reporting is crucial for corporations to qualify for a pre-trial resolution with favorable terms. Even when the case is later brought to the court and results in a criminal conviction, a corporation that provides prompt and voluntary self-disclosure could still win a generous reduction of the criminal penalty.

4.3 Social Advantages of Corporate Self-reporting

The previous Section outlined the efforts of the U.S., UK and French authorities to encourage voluntary corporate self-disclosure of potential bribery violations in the prosecution and sentencing stage. Following the introduction of the current legal framework in the three selected jurisdictions, this Section aims to analyze the social advantages of incentivizing corporate self-reporting. This issue is crucial as it deals with the rationale for the DPA regime and could provide an important theoretical basis for other jurisdictions that are considering the adoption of DPA or DPA-like mechanisms.

4.3.1 Economizing on Enforcement Costs and Promoting Deterrence

An effective enforcement of foreign bribery laws is especially costly for the public enforcement agencies. This statement is true not only for developing countries where enforcement agencies are poorly funded and enforcement resources are inadequate, but also for enforcement agencies

in the highly developed nations.[37] The detection of foreign bribery suffers from unique challenges. The collusion between bribe givers and recipients as well as the lack of easily identifiable victims render the detection of bribery from the outside extremely difficult.[38] The increasing organizational complexity and skill differentiation further lower the visibility of bribery conspiracies, reducing both the likelihood and reliability of whistleblowing.[39] As a result, the enforcement agencies need to invest huge resources in the monitoring and detecting of possible violations to generate a sufficient level of deterrence, namely, deterring bribery by increasing the probability of detection and the expected costs to the extent that bribery is no more profitable for potential wrongdoers.[40]

By voluntarily coming forward to alert the authorities to possible wrongdoings in the form of self-reporting, firms help save public enforcement resources and increase the cost-effectiveness of the authorities' monitoring efforts. Self-reporting involves a company informing the authorities of the existence of a suspected criminal offense, of which the authorities were not aware.[41] By encouraging firms to voluntarily approach the authorities with information about the potential wrongdoing, public enforcement resources are saved from identifying those who were implicated in the bribery schemes and later self-reported.[42] Owing to the decreased number of potential violators that need to be detected to maintain the given probability of detection, more self-reporting means that fewer public enforcement resources are needed to monitor the market.[43] On the other hand, if the government monitoring activities remain unchanged, a higher level of deterrence can be achieved when self-reporting is successfully incentivized. Self-reporting allows the finite enforcement resources to be more efficiently deployed to target non-reporters and to increase their expected liability.[44]

By complementing the government's monitoring efforts with corporate monitoring, self-reporting also benefits the society as a whole in terms of economizing on the monitoring

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[37] OECD, *Exporting Corruption? Country Enforcement of the OECD Anti-bribery Convention, Progress Report*, 2012, http://files.transparency.org/content/download/510/2109/file/2012_ExportingCorruption_OECDProgress_EN.pdf (accessed April 16, 2020), at 37 (expressing concerns that resources for the enforcement of the Bribery Act 2010 may be insufficient because of the budget cut and the institutional instability, which may also cause downgraded priority attached to foreign bribery).

[38] Tanja Rabl, and Torsten M. Kuhlmann, "Understanding Corruption in Organizations – Development and Empirical Assessment of an Action Model," *Journal of Business Ethics* 82, (2008): 477–78 (noting that the absence of direct victims and secrecy are the two essential dimensions of corruption); OECD, *The Detection of Foreign Bribery*, 2017, at 9 (noting that there is hardly an identifiable, direct victim in foreign bribery cases, let alone victims armed with sufficient information to come forward).

[39] David Freeman Engstrom, "Bounty Regimes," in *Research Handbook on Corporate Crime and Financial Misdealing,* ed. Jennifer Arlen (Northampton, MA: Edward Elgar Publishing, 2018), 352-53 (noting that organizational complexity and skill differentiation reduce the observability of wrongdoing by insiders).

[40] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 646 ("[g]iven extremely limited resources, the complex nature of the corporate form, and the accompanying evidentiary challenges facing prosecutors, it is little wonder that the government often exchanges leniency for conciliatory post-offense behavior"); Steven R. Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense," *American Business Law Journal* 55, no. 3 (2018): 489 ("[c]onsidering the challenges of addressing cross-border criminal activity, it is not surprising that enforcement agencies seek innovative ways to be efficient and effective in their work").

[41] OECD, *The Detection of Foreign Bribery*, 2017, at 13 ("[g]enerally, the notion of self-reporting applies to companies, whereas individuals reporting themselves would be considered as confidential informants or cooperating witnesses").

[42] Louis Kaplow, and Steven Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," *Journal of Political Economy* 102, no. 3 (1994): 601 ("self-reporting does not merely reduce enforcement costs, it eliminates them: once someone confesses, others need not be investigated").

[43] *Ibid,* 584 (claiming that one of the social advantages offered by the enforcement schemes with self-reporting is that enforcement re-sources are saved); Robert Innes, "Remediation and Self-reporting in Optimal Law Enforcement," *Journal of Public Economics* 72, no. 3 (1999): 389 ("enforcement costs are economized with self-reporting by permitting the costless imposition of stiffer non-reporter penalties that reduces the government monitoring required for a given level of violation deterrence").

[44] Claudia M. Landeo, and Kathryn E. Spier, "Optimal Law Enforcement with Ordered Leniency," NBER Working Paper No. 25095, (2018): 36 ("[h]olding the fine and the costs of enforcement fixed, the optimal ordered-leniency policy will increase the expected fine, thus raising level of deterrence and increasing social welfare").

resources. Detection of an employee's wrongdoings is generally less expensive for the corporation, which is possessed with the existing monitoring mechanism and subject to lower procedural restrictions.[45] Employees with information about potential wrongdoings are more likely to report via the internal channels rather than going directly to the regulators in order to establish a sense of legitimacy and to prove their allegiance to the corporate group.[46] With a better understanding of the division of authority and the high-risk areas that were flagged by the internal audit and whistleblowing reports, firms are generally more capable of detecting misconduct, identifying employees with information and locating relevant documents.[47]

4.3.2 Maximizing Benefits of Cooperation and Remediation

Self-reporting also helps the government to secure the benefits of corporate cooperation and remediation at an earlier stage. As noted above regarding the features of voluntary self-disclosure, corporate self-reporting is generally followed with the cooperative and remediate measures. Such measures include conducting a thorough internal investigation and handing over the results of the investigation together with relevant data, documents and emails to the government; identifying individuals involved in, or responsible for, the wrongdoings and facilitating the pursuing of individual liability; replacing responsible individuals and overhauling the defected corporate compliance program.[48] On the other hand, corporate cooperation and remediation can either follow the previous decision of self-reporting or occur independently without self-reporting. The sequential order of self-reporting, cooperation and remediation gives self-reporting an additional social advantage: corporate self-reporting boosts the state's chance of acquiring the benefits associated with corporate cooperation and remediation.[49]

Corporate self-reporting maximizes the social benefits of corporate cooperation and remediation by enabling the authorities' early involvement in the corporate internal investigation. The authorities could thus direct the corporate internal investigation to focus on particular matters or persons, or provide a timeline for the company's periodic reports.[50] The authorities' early

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[45] Jennifer Arlen, "Corporate Criminal Liability: Theory and Evidence," in *Research Handbook on the Economics of Criminal Law*, eds. A. Harel and K. Hylton (Northampton, MA: Edward Elgar, 2012), 165-66 (claiming that large corporation is a more cost-effective provider of both monitoring and investigation measures); Coffee, Jr., "'No Soul to Damn: No Body to Kick'," *Michigan Law Review* 79, no. 3 (1981): 408 ("(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards").

[46] Aaron S., Kesselheim, David M. Studdert, and Michelle M. Mello, "Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies," *New England Journal of Medicine* 362 (2010): 1834 (finding that nearly all (18 of 22) corporate employees first tried to fix matters internally before lodging *qui tam* complaints); National Whistleblowers Center, *Impact of Qui Tam Laws on Internal Compliance: A Report to the Securities Exchange Commission*, 2010, at 4 ("89.7% of employees who would eventually file a *qui tam* case initially reported their concerns internally, either to supervisors or compliance departments").

[47] John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," *Michigan Law Review* 80, no. 7 (1982): 1466 ("corporate compliance personnel are more likely than government inspectors to know where 'the bodies were buried,' and to be able to detect cover-ups"); Eugene F. Soltes, "The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality," *Journal of Financial Crime* 26, no. 4 (2019): 923–937 (based on analysis of confidential firm records describing misconduct within organizations, demonstrating that public enforcement statistics significantly underestimate the amount of malfeasance within large organizations).

[48] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (defining full cooperation, as well as timely and appropriate Rremediation).

[49] Innes, "Remediation and Self-reporting in Optimal Law Enforcement," 389 (claiming that self-reporting enjoys additional economic advantage of "increasing ex-post benefits of clean-up/remediation by increasing the likelihood that clean-up occurs"); Landeo, and Spier, "Optimal Law Enforcement with Ordered Leniency," 36 ("[f]aster detection may have independent value, insofar as it allows the agency to prevent the crime from continuing, helps mitigate the harm, and economizes on future detection efforts").

[50] Judith Seddon, et al, "Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective," in *The Practitioner's Guide to Global Investigations (Fourth Edition),* January 3, 2020, https://globalinvestigationsreview.com/benchmarking/the-practitioner%E2%80%99s-guide-to-global-investigations-fourth-edition/1212369/self-reporting-to-the-authorities-and-other-disclosure-obligations-the-uk-perspective#footnote-110-backlink (accessed June 5, 2020) (citing the speech from Sir David Green QC, the former Director of the SFO, noting

involvement in the corporate internal investigation helps prevent aimless or excessive internal investigations.[51] Such corporate internal investigations are rarely socially desirable as they unnecessarily generate substantial corporate expenditures and prolong corporate resolution, and may even scare off future cooperators and undermine justice.

The corporate cooperative and remedial efforts are beneficial for the enforcement authorities and the society as a whole. Firstly, corporate cooperation complements the limited enforcement resources and is of great value to the overburdened and understaffed enforcement agencies.[52] Since the private firms are the ones that bear the costs of internal investigation, enforcement agencies can relocate their scare resources to prosecute other un-cooperative corporations and recalcitrant individuals, aiming to generate a higher level of deterrence.[53]

Secondly, the enforcement agency would economize on its investigating resources by requiring private investigators, who are generally more efficient than public investigators, to conduct internal investigations and then report the findings to the authorities. Foreign bribery investigations are especially costly for the enforcement agencies, especially when it comes to bribery schemes that are pervasive in the whole company and span over decades and across several borders. Such investigations can easily generate millions of documents and involve the interviewing of hundreds of employees located domestically and overseas.[54] The identification and analysis of such huge amounts of evidence call for significant resource input and a high degree of expertise, which are frequently not possessed by the public agencies.[55] Compared with public investigators, corporations can often investigate violations in a more cost-effective manner owing to the unique tools enjoyed by themselves to influence employees' behavior and to access documents without a similar level of due process rules restricting the actions of public investigators.[56] In the U.S., for example, firms enjoy considerable influence, including the threat of demotion or redundancy, to pressure knowledgeable individuals to talk to the in-house counsel

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that "the SFO might specify particular areas or issues to be included in the firm's investigation, how the investigation ought to be conducted in relation to particular issues or persons, and to provide updates to the SFO, usually within agreed time frames").

[51] Michael J. Shepard, "No Security: Internal Investigations into Violations of Security Laws," in *Internal Corporate Investigations*, 3rd ed., Barry F. McNeil & Brad D. Brian (Section of Litigation, American Bar Association, 2007), 389 (noting that private law firms may have incentives to undertake earth-scorched investigations that may even cause the bankruptcy of the company in order to build their good reputation with the regulator).

[52] John T. Scholz, "Voluntary Compliance and Regulatory Enforcement," *Law & Policy* 6, no. 4 (1984): 385-86 (claiming that the cooperation between agency and firm reduces both the enforcement costs and compliance costs); Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75, no. 101 (2000): 663 (acknowledging the role of private actors in the enforcement area by shouldering the agency's enforcement burden, which is greatly valuable to the understaffed and overburdened regulators).

[53] Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," 1480 (noting that under the enforced self-regulation, business operators would bear more of the enforcement cost); John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law and Society Review* 18, no. 2 (1984): 184 ("agencies can shift scarce monitoring and prosecutorial resources from cooperative firms to bad firms, thereby increasing, through deterrence, the level of compliance among bad firms"); Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 340 ("the organizational guidelines were adopted in part on the theory that strong private corporate compliance efforts would augment limited government resources").

[54] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 52-57 (noting that Airbus's internal investigation covered more than 1,750 entities across the world and generated over 30.5 million documents); *SFO v. Rolls Royce PLC; Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017 (acknowledging the work undertaken by Rolls Royce, which had conducted 229 internal investigation interviews, reviewed over 250 intermediary relationships and over 30 million documents, which amounted to £123,115,643 as of December 2016).

[55] UK Ministry of Justice, *DPA Consultation,* para. 41 ("investigating and then prosecuting a case which results in a late guilty plea costs the SFO around £1.6 million and takes around eight years to conclude").

[56] Arlen, "Corporate Criminal Liability: Theory and Evidence," 165-66 (claiming that large corporation is a more cost-effective provider of both monitoring and investigation measures); Coffee, Jr., "'No Soul to Damn: No Body to Kick'," *Michigan Law Review* 79, no. 3 (1981): 408 ("(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards").

without the fear of violating their Fifth Amendment rights.[57] An Upjohn warning cautioning the employee that the attorney represents the company instead of individual employees in the corporate internal investigations is sufficient instead of a higher-level obligation of giving the Miranda warning.[58] Besides, multinational corporations generally have a competitive edge over government actors in locating and assessing employees' e-mails and other crucial data and documents as a result of the specialized personnel and adequate resources at their disposal, as well as lower procedural and privacy restraints.[59]

Thirdly, remediation in the foreign bribery context typically includes terminating the bribery transactions, identifying the root cause of the misconduct and taking prompt corrective measures, disciplining wayward employees and high-ranking managers, and strengthening the corporate compliance and ethics program.[60] Such remedial measures, the probability of which is significantly increased by corporate self-reporting, impart substantial social advantages. Corporations that timely block the bribery transactions and voluntarily compensate the victims can significantly reduce damages caused by bribery, saving the authorities from burdensome efforts in tracking bribery payments and seeking recovery.[61] Corporate disciplinary measures against individual wrongdoers are crucial to deterrence in the sense that the individuals' expected liability in relation to bribery is increased. Owing to the unique influence enjoyed by the corporations over the employees' actions, corporate disciplinary measures can be more effective in deterring employees' wrongdoings than the remote probability of governmental sanctions.[62] Furthermore, by lessening the risks of future violations, measures that promote corporate compliance and rehabilitation are valuable for the society to the extent of reducing not only the costs of bribery but also the costs associated with the enforcement actions against bribery.[63]

4.3.3 Reducing Avoidance Costs

Corporate self-reporting benefits both the corporation and the government by eliminating the necessity for the detection avoidance activities. Detection avoidance activities are costly, for both

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[57] *Gilman v. Marsh & McLennan Cos*., 826 F.3d 69 (2d Cir. 2016) (noting that corporations interacting with employees as part of the internal investigation are generally not government actors under U.S. constitutional law, even when the investigation is aimed for the future cooperation with the government, and affirming employer's right to terminate an employee who refused to cooperate in an internal investigation); Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," 1469 (noting that corporate inspectors have greater power than public investigators in trapping suspected wrongdoers or entering a location).

[58] The Upjohn warning, known as corporate Miranda Warning, stems from the case *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and requires the corporate attorney to disclose to the employee subject to internal investigation that (i) the attorney represents the corporations only, (ii) the communication between attorney and client is confidential and protected by the attorney-client privilege; (iii) the privilege is owned exclusively by corporations, who may choose to waive the privilege and disclose the information to the third party, including the government actors.

[59] See Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," *U.C. Davis Law Review* 49, (2015): 523 (coining the term of FCPA Inc. to describe a multi-billion-dollar industry developed to suit the corporation's need to conduct internal investigation and cooperate with the authority). However, the investigative edge enjoyed by the corporate actors seems to be shrinking with the global trends of tightening data privacy and security laws in relation to the collection and transfer of information.

[60] See USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (listing the authority's expectations about timely and appropriate remediation in the FCPA matters and other corporate crimes resolved by the DOJ's Criminal Division); SFO and CPS, DPA Code of Practice, Article 2.8.2 (suggesting that remedial measures include compensating victims).

[61] Jacinta Anyango Oduor et al, Stolen Asset Recovery Initiative, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington D.C.: World Bank, 2013), 2 (finding that significant monetary sanctions have been imposed through foreign bribery settlements with hardly any of the respective assets being returned to the countries whose officials have allegedly been bribed).

[62] Coffee, Jr., "'No Soul to Damn: No Body to Kick'," *Michigan Law Review* 79, no. 3 (1981): 399 (observing that in comparison with the criminal sanctions that occasionally and indirectly fall on the middle managers, the threat of dismissal for failing to meet the target is an imminent danger).

[63] Oded, "Coughing Up Executives or Rolling the Dice?" 67-68 ("[t]o maximize total social welfare, an anti-bribery enforcement policy should minimize the sum of the social costs associated with bribery and with its prevention, including the cost of enforcement").

the corporations and the enforcement agencies, which need to invest more resources and increase their monitoring efforts to maintain the given the rate of detection and level of deterrence.[64] Companies are more likely to avoid taking evasive, antagonistic or resistant measures that may be viewed by the public authorities as un-cooperative after stepping forward in the first place.[65] The government's involvement in the corporate internal investigation following self-reporting could further reduce the corporations' incentives to engage in avoidance or scapegoating activities that may jeopardize the government's own investigations.[66]

4.4 Incentivizing Corporate Self-reporting through DPAs: A Doctrinal Analysis

As identified in Section 4.3, corporate self-reporting has multiple social advantages. Corporate self-reporting of bribery violations benefits the enforcement agencies and the society by reducing the anti-bribery enforcement costs and mitigating the harms of bribery.[67] The resource-constrained enforcement agencies can deter bribery more effectively by partnering with the private corporate organizations and encouraging them to actively prevent and self-report bribery violations. Then it comes to the crux of the matter: how could the state best incentivize corporate self-reporting? This Section aims to address this question from the perspective of corporations in view of the corporate decision-making process regarding self-reporting.

4.4.1 Corporate Decision-Making on Voluntary Self-disclosure

Corporations are typically profit-oriented actors and their principal goal is to maximize the interests of shareholders.[68] With the assistance of consultants and analysts in predicting and calculating the benefits and costs involved in a specific corporate decision, corporations are often well informed of the commercial and legal consequences following self-reporting of bribery issues.[69] In most situations, corporations are under no legal obligations to self-report potential criminal wrongdoings.[70] Whether or not to make voluntary self-disclosure is essentially a

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[64] Robert Innes, "Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement," *Journal of Law, Economics, and Organization* 17, no. 1 (2001): 240-41 (noting that another advantage follows the elimination of avoidance cots by self-reporting: the government are enabled to set the non-reporting sanction to the maximal level to achieve the given level of deterrence with less enforcement efforts without worrying about increased avoidance costs).

[65] Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," 184 ("cooperative firms and agencies avoid the high legal costs incurred when coercive agencies battle evasive firms").

[66] Miriam H. Baer, "When the Corporation Investigates Itself," in *Research Handbook on Corporate Crime and Financial Misdealing, ed.* Jennifer Arlen (Northampton, MA: Edward Elgar Publishing, 2018), 326-28 (claiming that the presence of detection avoidance explains the fight between the government and company over legal privileges, as well as the government's continual investment in whistleblowing program and intrusive wiretap measures).

[67] Oded, "Coughing Up Executives or Rolling the Dice?" 67-68 ("[t]o maximize total social welfare, an anti-bribery enforcement policy should minimize the sum of the social costs associated with bribery and with its prevention, including the cost of enforcement").

[68] Charles J. Walsh, and Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?" *Rutgers Law Review* 47, no. 2 (1995): 633 (noting that corporations are typically viewed as calculating actors, who presumably act in the economic best interests and are more likely than individuals to weigh costs and benefits before undertaking an action).

[69] Brent Fisse, and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1983), 46 ("[c]orporations, it may be argued, have a number of advantages when it comes to rational decision making, including access to a pool of intelligence and the resources to acquire a superior knowledge of legal and other obligations").

[70] Notably, some corporations are obligated to report potential wrongdoings and suspicious activities to specific government agencies according to certain statutes or contracts, such as the Sarbanes-Oxley Act of 2002, the US Bank Secrecy Act of 1970, or a previous DPA, see https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2020/article/self-reporting-the-authorities-and-other-disclosure-obligations-the-us-perspective (accessed October 2, 2021).

business decision.[71] When allegations or red flags on possible bribery violations are raised within the corporations, the decision of whether to self-report will be made by the corporations based on the expected costs and benefits of self-reporting and those of the alternative, i.e., remaining silent and start cooperating when the prosecutors knock on the door. They will only have incentives to self-report when they are better off with self-reporting or at least not worse than the "wait and see" approach.[72] Moreover, corporations not only need to make the decision on whether to self-report, but also on when to self-report. The decision on the optimal timing of self-reporting is an important one as corporations may gain a better understanding of the wrongdoings at issue in a later stage, while they might also lose the disclosure credits if the authorities learn about the wrongdoings through alternative means, such as whistleblowing or the media.[73] A series of common factors will be considered by the corporations to assess the probability and magnitude of the costs and benefits associated with self-reporting, including particularly the scale and severity of the wrongdoings, the risks of such wrongdoings being discovered by the authorities through alternative means, the potential legal and reputational consequences, as well as the corporate enforcement policies and practices incentivizing voluntary voluntary self-disclosure.[74]

Self-reporting of foreign bribery issues is increasingly becoming a decision beyond one jurisdiction with more and more countries joining the U.S. in the anti-bribery battlefield by introducing or reforming their own anti-bribery laws and settlement tools.[75] Foreign bribery schemes are covered by a number of laws within or beyond one jurisdiction, giving multiple agencies the power to initiate their own enforcement actions and litigation.[76] Thanks to the endeavors of the OECD and UN, anti-bribery agencies are working regularly with their peers in another jurisdiction through sharing information about potential violations, conducting joint investigation and striking multi-jurisdictional coordinated resolutions.[77] As a consequence, information disclosed to one agency is highly likely to be shared with other relevant domestic or foreign agencies, fueling parallel investigations into the same misconduct. Therefore, in many cases, the decision to self-report a specific misconduct to one agency should be considered as a decision to disclose to all the relevant agencies and even foreign authorities.

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[71] Rachel Louise Ensign, "Why Companies Might Opt to Self-Report Potential Bribery Issues," *Wall Street Journal*, November 2, 2014, https://www.wsj.com/articles/why-companies-might-opt-to-self-report-potential-bribery-issues-1414974824 (accessed June 5, 2020) (quoting Laurence Urgenson, a partner at law firm Mayer Brown LLP, "voluntary disclosure is a business decision"…"What are the costs and the benefits?").

[72] Innes, "Remediation and Self-reporting in Optimal Law Enforcement," 381 ("a firm will only be prompted to self-report if it is promised a penalty that is no greater than can be expected without self-reporting"); Kaplow, and Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not").

[73] Cowley, et al, "Self-reporting Bribery: the Ongoing Dilemma," ("despite the time pressures that may exist when deciding whether to self-report, companies must keep in mind that their decision-making processes will be scrutinized not just by the US DOJ, but also potentially by their own shareholders").

[74] Lindsey Fetzer, Thad Mcbride and Abby Yi, "Inconsistencies in FCPA Enforcement: Key Considerations for a Potential FCPA Voluntary Disclosure," *Corporate Compliance Insights*, November 11, 2019, https://www.corporatecomplianceinsights.com/considerations-fcpa-voluntary-disclosure/ (accessed June 9, 2020) (listing a number of factors for companies considering whether to self-report potential FCPA violations to take into account).

[75] Evan Epstein, "FCPA, International Cooperation, Global Settlements and Focus on Latin America," *Medium*, May 29, 2018, https://medium.com/@evan.epstein/fcpa-international-cooperation-global-settlements-and-latin-america-focus-649d77ba4780 (accessed June 19, 2020) (noting the creation of new enforcement tools in the U.K., Canada and France, and more prominent anti-bribery regimes in many Latin American countries).

[76] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, December 2, 2014, 31 (noting that owing to the expansive jurisdictional application of anti-bribery laws in many countries, defendant may have been sanctioned in multiple jurisdictions for the same foreign bribery scheme).

[77] Epstein, "FCPA, International Cooperation, Global Settlements and Focus on Latin America," (noting that information sharing among prosecutors in different jurisdictions is becoming more efficient as the trust gained among them and more direct and informal communication is allowed).

Companies are usually under a great deal of pressure to make self-reporting decisions before a complete understanding of the matter in question, in view of the government's emphasis on the timeliness of self-reporting.[78] Bribery and other white-collar crimes are different from the traditional street crimes as it is often unclear whether crimes actually occurred in the initial stage of investigation.[79] After receiving allegations of wrongdoings or identifying red flags, companies need to conduct an initial investigation to determine the probability of the occurrence of the alleged misconduct, understand the scope and nature of the underlying facts, and identify the individuals involved, in or responsible for, the misconduct. In terms of the foreign bribery violations, a properly conducted internal investigation may stretch over several years to develop a full understanding of the bribery scheme.[80] Companies virtually need to make the decision on whether to self-report, and, if so, when to self-report and to which authority in the presence of considerable uncertainty about the potential wrongdoings.

4.4.2 Potential Costs of Corporate Self-reporting

Voluntary self-disclosure is far from free but can be especially costly and risky for the corporations. Firstly, self-reporting necessarily means that the bribery schemes have to be terminated. As offering bribes is an illegal yet effective way to secure business contracts or help the corporation survive government inspection, bribery schemes can be quite profitable for the company. For instance, in the enforcement actions brought by the SEC against Ericsson, it is alleged that bribes of approximately $62 million paid to public officials in China, Saudi Arabia and Djibouti had earned the company about $427 million in profits.[81] Terminating the practice of bribery may cause companies to lose competitive advantages in the industry.

Secondly, self-reporting is not the end but the beginning of a long and painful process of cooperation throughout the criminal proceedings.[82] After their initial notification, companies are expected to continually cooperate by gathering and handing over relevant documents and making witnesses available for interviews, and to remediate the situation by sanctioning responsible individuals and reinforcing the compliance and ethics program.[83] It is true that large corporations routinely launch internal investigations and take corrective measures once potential bribery schemes are detected within the organization, even without considering self-reporting in the

[78] Cowley, et al, "Self-reporting Bribery: the Ongoing Dilemma," ("[g]iven the importance of the timeliness of the self-disclosure, companies will often have to make a decision on self-reporting at an early stage, before a proper internal investigation can be completed and before the extent of the alleged misconduct may be understood").

[79] Samuel W. Buell, "Criminal Procedure Within the Firm," *Stanford Law Review* 59, no. 6 (2007): 1627 (noting that compared to street crimes, "when the substantive wrong involves fraud or other forms of harmful deception, however, often the primary issue for the legal system is determining whether a crime has been committed").

[80] OECD, *OECD Foreign Bribery Report*, at 34 ("[f]oreign bribery cases have continued up to 15 years after the last corrupt act, with almost half of the cases taking between 5 and 10 years to finalise").

[81] *SEC vs. Telefonaktiebolaget Lm Ericsson*, United States Court Southern District of New York, Case NO.: 19-cv-11214, December 6, 2019, para. 2.

[82] Lisa Osofsky, Director of the SFO, "Keynote address at the FCPA Conference," December 4, 2018, https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/ (accessed December 15, 2019) ("[w]e will use what you give us as a starting point, not an end point"); Cowley, et al, "Self-reporting Bribery: the Ongoing Dilemma," ("[d]eciding whether, when and how to report are just the first steps in a long process towards potentially receiving a deferred prosecution agreement (DPA)").

[83] U.S. Justice Manual, 9-28.700 – The Value of Cooperation, ft. 1 (claiming that the Department does not expect that self-disclosure to be complete, but does expect that "the company will move in a timely fashion to conduct an appropriate investigation and provide timely factual updates to the Department"); Seddon, et al, "Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective," (claiming that according to the choice of words under the DPA Code of Practice, the UK authorities expect to receive an initial notification of circumstances giving rise to concerns that criminal wrongdoing may have occurred, but not a completed investigation report in the beginning).

future.[84] However, corporate self-reporting and the subsequent involvement of the government could greatly expand the scope of internal investigation and raise the standard for remediation. In addition to the particular misconduct voluntarily disclosed to the government, the company may be required to cooperate broadly regarding any potential misconduct into which the prosecutors might inquire and cooperate in the relevant individual proceedings.[85] Cooperative and remedial measures can be especially costly in financial terms. The Walmart investigation, which started after the media exposure of bribery schemes in Mexico in 2012 and being later expanded to three other jurisdictions, provides a startling example. Over a period of seven years, the investigative, remedial and compliance efforts cost the retailing giant over $900 million, more than three times the amount ($282 million) it agreed to pay to resolve the FCPA charges with the U.S. agencies.[86]

Thirdly, self-reporting of detected wrongdoings could make the corporate situation worse by increasing the probability of being detected and sanctioned, probably in multiple jurisdictions.[87] It is especially true when the potential wrongdoings would not have come to light but for the voluntary self-disclosure, or the corporation has provided incriminating evidence that would not have been otherwise obtained by the authorities. Self-reporting and the subsequent cooperation may lead to criminal conviction conviction if a DPA cannot be obtained, triggering a large corporate fine and even exclusion from the governmental contracts in the future.[88] Even if a DPA is secured by corporations that chose to self-report, such agreements often demand corporations to commit to onerous monetary, cooperative and compliance duties.[89] What is more, self-reporting and the ensuing cooperation with one agency may provide ammunition for piling-on enforcement actions in multiple jurisdictions. In order to enter into a DPA with the U.S. and UK agencies, corporations are routinely required to provide relevant information regarding alleged wrongdoings, admit the criminal facts and provide ongoing cooperation with other relevant authorities.[90] With the criminal facts admitted by the corporation itself and its commitment to cooperation following the publication of DPAs, authorities in other jurisdictions would find it fairly easy to initiate their own investigations, leaving the corporation with no other options but to cooperate in the hope of pursuing favorable resolutions.

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[84] Baer, "When the Corporation Investigates Itself," 311 (noting that "firms retain strong economic and reputational incentives to identify and punish some employee misconduct, regardless of any outstanding liability rule").

[85] Karolos Seeger, and Bruce E. Yannett, "UK vs US: An Analysis of Key DPA Terms and Their Impact on Corporate Parties," in *The International Comparative Legal Guide to Business Crime 2019 (9th Edition),* Global Legal Group, 6 ("once under a DPA, the DOJ could effectively compel a company to produce any non-privileged documents in its control, regardless of the subject matter").

[86] Dylan Tokar, "Walmart's Spend-and-Tell Strategy Paid Off in Bribery Settlement," *Wall Street Journal*, June 26, 2019, https://www.wsj.com/articles/analysis-walmarts-spend-and-tell-strategy-paid-off-in-bribery-settlement-11561585841 (accessed June 8, 2020).

[87] Cowley, et al, "Self-reporting Bribery: the Ongoing Dilemma," ("self-reporting starts a process over which the company has little control and which, if it does not co-operate to the prosecutor's satisfaction, may put it in a worse position than it started in").

[88] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, 64-66 (discussing the case involving Skansen, which was prosecuted by the CPS rather than being offered a DPA despite the fact that the company had self-reported, extensively cooperated, disciplined rogue employees and taken remedial changes).

[89] Alexandra Webster and Stephen Gentle, "DPAs: Worth the Price of Cooperation for Companies Fighting Multiple Fronts?" *Global Investigation Interview*, March 6, 2020, https://globalinvestigationsreview.com/article/1215918/dpas-worth-the-price-of-cooperation-for-companies-fighting-multiple-fronts (accessed April 4, 2020) (noting that owing to the collateral litigation, corporate cooperation in reward for a DPA might bring the companies multiple risks, including a loss of control over witness interview, pressure of waiver of legal privilege, the fueling of potentially individual prosecutions, alienation of employer-employee relationship, and and the requirement of estoppels).

[90] Brandon L. Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (2011): 1845 (noting that such provision has served a moral purpose and also a practical purpose to bind the firm should it breach the agreement or deny having engaged in the prohibited conducts); However, the France's DPA-like agreement, Judicial Public Interest Agreements (CJIP), may present an exception. See Laurent Cohen-Tanugi, "Anti-Corruption in France," in *Get the Deal Through, Market Intelligence: Anti-corruption*, 2018, at 21 ("[a] company is not required to admit to any wrongdoing if the CJIP is signed before the company is formally charged before a judge").

4.4.3 How to Effectively Incentivize Corporate Self-reporting through DPAs?

In order to effectively encourage corporate voluntary disclosure, a carrot-and-stick approach should be adopted to affect the corporations' analysis of the costs and benefits associated with the self-reporting decisions in accordance with the traditional law and economics literature.[91] To the extent that the corporate decision to self-report is an option rather than obligation enjoying the features of time-sensitiveness, irreversibility and uncertainty, which are similar to the options, the criminal option model that applies the financial model in the criminal context is valuable in designing the enforcement policies in order to incentivize corporate self-reporting.[92] This Section also borrows some useful insights form the criminal option model.

4.4.3.1 Substantial, Incremental and Certain Incentives for Self-reporting

As identified above, voluntary self-disclosure is associated with a series of costs and uncertainty and could render corporations even worse off than those that did not come forward in the first place. In view of the corporate decision-making process regarding self-reporting, corporations will only self-report if they are provided with adequate and clear incentives to the extent of making them better off than otherwise.[93] Incentives need to be substantial and predictable enough to mitigate the extra costs triggered by self-reporting and to make self-reporting corporations better off than others taking the "wait and see" approach.[94]

The DPA mechanism, which provides the corporations with both substantive and procedural incentives, could be strategically utilized to incentivize corporate self-reporting. Corporate organizations have a natural aversion to criminal prosecution proceedings. Criminal prosecution of corporations, even an unsuccessful one that does not lead to a conviction in the end, may inflict unbearable pain on a company, including slumping share price, lost consumers and severe business disruptions.[95] For companies whose core business greatly depends on the corporate reputation or governmental contracts, e.g., accounting firms, healthcare providers and defense enterprises, the criminal stigma and potential debarment from the governmental procurement following a criminal conviction could even drive them out of business.[96] Therefore, the possibility to enter into a DPA or declination with the prosecutors to circumvent the formal prosecution process offers a company the greatest incentives to act in line with the government's

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[91] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 169-217; Robert Cooter, and Thomas Ulen, *Law and Economics*, 6th edition (Berkeley Law Books: 2016), 460-84.

[92] Peter-Jan Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," *European Journal of Law and Economics 17,* (2004): 329-52 ("all criminal decisions can be analyzed as real options, in a sense that they confer the possibility but not the obligation to commit a crime in the future"); Danny Cassimon, Peter-Jan Engelen, and Luc Van Liedekerke, "When do Firms Invest in Corporate Social Responsibility? A Real Option Framework," *Journal of Bus Ethics* 137, (2016): 15-29.

[93] Oded, "Coughing Up Executives or Rolling the Dice?" 74 ("[w]hen corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability. Therefore, in the absence of other sources of motivation (e.g., a reduction of the severity of the fine due to self-reporting), one should not expect rational corporations to voluntarily self-report bribery and to cooperate with public investigations").

[94] Isaac Ehrlich, "Participation in Illegitimate Activities: A Theoretical Andempirical Investigation," *Journal of Political Economy 81*, no. 3 (1973): 521-65 (showing that opportunity costs to engage in illegal activities are also determinants of criminal behavior).

[95] Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1884-89 ("[t]he adverse publicity that accompanies a prosecution can devastate a corporation, particularly one that relies heavily on its reputation in the marketplace, because of the effect on relationships with customers, creditors and the public at large").

[96] Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-first Century," *University of Pennsylvania Journal of Business Law* 15, (2013): 834 (establishing the hypothesis based on the Core Business Model that "a conviction will only cause a corporation to go out of business when it threatens the corporation's ability to conduct its core business", which explains the demise of Arthur Andersen after conviction as its accounting practices depends on the trustworthiness of its name).

policy or expectation.[97] In addition, compared to the full-scale prosecution that involves fierce confrontation between the prosecution and the defense, as well as the lengthy criminal investigation and trial process, the DPA negotiation based on self-reporting and cooperation is generally more efficient.[98] A quick resolution protects the corporation from continuous exposure to negative publicity throughout the prolonged investigation and trial process and saves the corporation from typically exorbitant litigation costs. What is more, the fact that a company has timely notified the authorities of potential wrongdoings and later entered into a resolution agreement with the government can be strategically interpreted to sustain the corporate image and minimize reputational losses.[99]

Given the corporation's desire for a pre-trial resolution, the authorities can incentivize corporate self-reporting by making self-reporting a precondition for an access to a DPA or declination with maximal incentives. As noted previously, self-reporting is an irreversible process and would generally trigger the government's request for further information and remedial measures. Cooperation, however, can either follow the previous decision of self-disclosure or occur independently without self-reporting.[100] In light of the sequential order between self-reporting and cooperation, the incentivization of self-reporting should be the priority of corporate enforcement policies. [101] The authorities should make sure that corporations that have self-reported and fully cooperated are better off than corporations that chose not to self-report but started to cooperate in the later stage.[102] If a corporation can win a DPA and the same degree of penalty reductions by starting to cooperate following the initiation of the government's investigation, it would understandably have few incentives to self-disclose any misconduct unknown to the authority.[103]

In addition, the policy that offers a presumptive DPA or declination for self-reporting corporations would bolster the corporate incentives to self-report. As discussed above, corporations have to make the decision on whether or not to self-report in the preliminary stage of the internal investigation with much uncertainty about the alleged wrongdoing and the possible outcomes of self-reporting. [104] Uncertainty about obtaining a DPA or declination presents a real and significant risk for the company that opts to self-report.[105] If a DPA is not

[97] Greenblum, "What Happens to a Prosecution Deferred?" 1884-89 (discussing the advantages for firms to negotiate a DPA, including eliminating the most common pretext-criminal conviction-for the collateral consequences).
[98] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 22 (noting that non-trial resolutions save time-consuming trials and enable the law enforcement authorities to increase the pace of enforcement investigations, thus leading to shorter proceedings).
[99] Miriam F. Weismann, *Crime, Incorporated: Legal and Financial Implications of Corporate Misconduct* (American Bar Association, 2009): 64 (listing the benefits of alternative resolutions for corporations and claiming that corporations' main purpose is damage control).
[100] See *supra* Section 4.2.1 and Section 4.4.2.
[101] Arlen, "Corporate Criminal Liability: Theory and Evidence," 177 (noting that "firms make policing decisions sequentially (with monitoring preceding self- reporting, which in turn precedes cooperation)").
[102] *Ibid* (proposing that the state shall impose a duty on the firms to monitor optimally, and "firms with detected wrongdoing should face an additional special sanction if, but only if, they fail to self-report detected wrongdoing, and an additional, and very serious, sanction if, but only if, they fail to cooperate fully with the government's enforcement efforts").
[103] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, para. 301 ("[i]f self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not").
[104] See *supra* Section 4.4.1.
[105] *Ibid*, paras. 218-226 (Skansen was prosecuted by the CPS rather than being offered a DPA despite the fact that the company had self-reported, extensively cooperated, disciplined rogue employees and taken remedial changes). Press Release, "Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges," March 9, 2019, https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve (accessed December 11, 2019) (although the company voluntarily reported the misconduct and enhanced its compliance program, the DOJ decided to resolve FCPA

secured in the end, a corporation that has self-reported may find itself in a worse situation as the potential wrongdoings might not have come to the government's attention but for self-reporting.[106] It is admitted that corporate self-disclosure alone is not sufficient to win the corporation a DPA. Adequate prosecutorial discretion that allows the prosecutors to factor in all relevant circumstances, such as the severity of the wrongdoings and the overall corporate cooperation, is needed to make sure that the resolution serves the justice.[107] However, excessive uncertainty over the possibility of entering into a DPA following voluntary self-disclosure and full cooperation would become a major disincentive to corporate self-disclosure.[108] The enforcement authorities may reduce such uncertainty by making it a default rule that corporations opting to voluntarily self-report, fully and timely cooperate and remediate can generally expect a DPA or declination, in absence of aggravating circumstances. In addition, the authorities can also reduce the uncertainty facing the potential self-reporting corporations by consistently applying the DPA policies in practice and publicizing the corporate resolutions involving the use of self-reporting credits and the corresponding circumstances of the case.[109]

4.4.3.2 Minimize the Costs of Self-reporting

It is noteworthy that the resolution of corporate crimes with overly generous terms is not advisable as it would hinder the corporation's motives to undertake adequate preventive measures and thus undermine deterrence.[110] When designing the corporate liability regime, the authorities should take into account not only its implications for the corporate incentives to self-report and cooperate, but also the impacts on the deterrence of criminal wrongdoings.[111] When the expected costs of criminal wrongdoings are lower than the illegal proceeds, considering the reduced penalty and the public relations benefits as a result of corporate self-reporting and the use of DPAs, the corporation is unlikely to be willing to implement adequate measures to prevent

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charge through NPA instead of declinations, citing the absence of full cooperation, the expansive, long-running and lucrative bribery scheme, and the untested compliance reform).

[106] Oded, "Coughing Up Executives or Rolling the Dice?" 74 ("[w]hen corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability").

[107] Scholz, "Deterrence, and the Ecology of Regulatory Enforcement," 211 (noting that the attempts to restrict agency discretion "have made it more difficult, both politically and legally, for agencies to allow cost-saving tradeoffs or alter levels of enforcement for cooperative firms"…"limiting their ability to pursue an optimal combined strategy").

[108] Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 341-42 (believing that the corporate enforcement policy should be clear and consistently applied in order to decrease the uncertainty of the return of crimes, which affects the criminal decisions on whether and when to commit crimes according to the criminal option theory); Sacha Harber-Kelly, Patrick Doris and Shruti Chandhok, "The UK Serious Fraud Office's Latest Guidance on Corporate Co-operation – Great Expectations Fulfilled or Left Asking for More?" Gibson Dunn, September 10, 2019, https://www.gibsondunn.com/uk-serious-fraud-office-latest-guidance-on-corporate-cooperation-great-expectations-fulfilled-or-left-asking/ (accessed June 8, 2020) ("[w]hilst discretion may therefore be welcome, the unqualified words that "even full, robust co-operation – does not guarantee any particular outcome" suggests that the SFO has missed the opportunity to maximise the incentivisation for self-reporting and other co-operation").

[109] Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 341-42 ("[a] consistent prosecution of all cases of insider trading can be an efficient signal to potential criminals. In this way, the criminal is confronted with less uncertainty about the enforcement policy. Also, a clear and consistent communication of every inquiry into possible cases of insider trading to the market can add to the reduction of uncertainty").

[110] Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion," *Annual Review of Law and Social Science* 6, no. 1 (2010): 221 (noting that "possible tension between the goals of signaling credible expected punishments and using the law to induce perpetrators to provide evidence" is one conundrum for anticorruption efforts); Heiko Gerlach, "Self-Reporting, Investigation, and Evidentiary Standards," *Journal of Law & Economics* 56, no. 4 (2013): 1063 ("[a] more lenient scheme strengthens the incentives to self-report but, at the same time, weakens deterrence").

[111] Jennifer Arlen, and Refier Kraaman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *New York University Law Review* 72, no. 4 (1997): 692 (identifying two goals of corporate liability: inducing firms to select efficient levels of productive activity (the activity level goal) and to implement enforcement measures that can minimize the joint costs of misconduct and enforcement (the enforcement goal))".

employees' wrongdoings that are profitable to itself.[112] In addition to rewarding corporate self-report and cooperation with a DPA or declination, the enforcement authorities should insist that the corporation surrender the proceeds and pay a sufficiently large fine to ensure that it does not benefit from the criminal wrongdoings.[113] This line of theory is consistent with the OECD 2021 Recommendation that stresses the importance of imposing "effective, proportionate and dissuasive sanctions" in the foreign bribery cases resolved via the non-trial resolution mechanism.[114]

Given the undesirability of using uncapped credits to incentivize corporate self-reporting, it is also important to boost the corporate incentives to self-report by minimizing the corporate costs associated with self-reporting.[115] As identified above, the costs associated with self-reporting arise primarily from the necessity to terminate the lucrative bribery schemes, the onerous cooperative and remedial obligations following self-reporting, and the severe monetary and compliance obligations imposed by the one or more enforcement agencies.[116] Accordingly, the state can reduce the costs of voluntary self-disclosure and thus encourage corporate self-reporting by clarifying the standards for voluntary self-disclosure and full cooperation, restraining itself from demanding overly burdensome cooperative measures and sanctions, and protecting corporations from duplicative sanctions imposed by multiple authorities.[117]

A clear definition of the conditions for an access to a DPA and a transparent and consistent approach in the application of DPAs facilitate corporate self-reporting and cooperation by enabling the corporations to predict the outcome of their actions from an earlier stage and make an informed decision accordingly.[118] It also reduces the possibility that an aimless and overly broad corporate internal investigation is taken by a corporation that attempts to obtain a DPA. Scorched-earth investigation that digs up matters irrelevant to the wrongdoing in question or targets peripheral individual wrongdoers would add greatly to the costs of self-reporting. Nor is it desirable for the enforcement authorities as it would postpone the corporate resolution.[119]

[112] Arun S Malik, "Self-reporting and the Design of Policies for Regulating Stochastic Pollution," *Journal of Environmental Economics and Management* 24, no. 3 (1993): 255-56 (noting that the optimal enforcement policy shall impose sanctions on the firm whenever it self-reports the violations); Joseph W. Yocket, "Choosing Governance in the FCPA Reform Debate," *The Journal of Corporation Law 38*, no. 2 (2013): 346 ("[r]eputational costs further need to be offset by other considerations, including any corresponding public relations benefits that follow from settlement").

[113] Arlen, "Corporate Criminal Liability: Theory and Evidence," 185-189 (claiming that "the state needs to subject firms that engage in optimal policing to significant civil residual liability designed to provide firms with optimal incentives to prevent wrongdoing and to induce optimal activity levels").

[114] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, adopted on November 26, 2009 and amended on November 26, 2021, at 10, XVIII-v.

[115] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 85 (noting that the costs associated with cooperative measures and compliance obligations in the context of DPAs are typically deemed by experts as part of the overall amount of sanction and weaken the cost-reducing advantage of DPA).

[116] See *supra* Section 4.4.2.

[117] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, adopted on November 26, 2009 and amended on November 26, 2021, at 10, XVIII (recommending the adoption of clear and transparent framework and criteria regarding the use of non-trial resolution mechanism, and having transparent, effective, proportionate and dissuasive sanctions in place for foreign bribery resolved via the non-trial resolution mechanism).

[118] OECD, *The Detection of Foreign Bribery*, 2017, at 22 ("[c]lear guidance as to the definition or criteria used to define a self-report together with any ongoing expectations relating to co-operation will be of assistance to any company in its decision whether or not to report"); Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 341-42 ("[a] consistent prosecution of all cases of insider trading can be an efficient signal to potential criminals. In this way, the criminal is confronted with less uncertainty about the enforcement policy").

[119] "Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement," April 17, 2015, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-

Clarified and predictable requirements of self-reporting and cooperation are thus called for in order to reduce the costs and uncertainty associated with self-reporting and to strengthen the corporate motives to self-report and cooperate. Clear and transparent criteria are also highly emphasized by the OECD in its 2021 Recommendation for member states regarding the use of DPAs to resolve foreign bribery cases.[120]

Moreover, the increasingly robust enforcement of anti-bribery laws worldwide has caused an unintended consequence that discourages voluntary self-disclosure from the corporation.[121] Though self-reporting may persuade the prosecuting agency to offer a DPA with lenient terms, a DPA with a single agency provides no guarantee of finality that precludes piling-on enforcement actions launched by other agencies or foreign authorities.[122] The parallel enforcement actions and duplicative sanctions could dwarf the benefits promised by any single agency in one jurisdiction and deter corporations from self-reporting in the first place.[123] Accordingly, both the UN and the OECD are calling for effective trans-agency and trans-national coordination between the enforcement authorities to protect the corporation from duplicative sanctions for the same misconduct in nature.[124] Multi-jurisdictional resolution, which enables the company to settle the foreign bribery charge with all relevant jurisdictions simultaneously, could effectively enhance the finality of corporate negotiation and mitigate the risks of duplicative and disproportionately punitive punishment.[125]

4.4.3.3 Real Threats of Detection and Prosecution for Non-self-reporting Corporations

Lastly but not the least, the incentive is only as appealing as the threat is intimidating.[126] The DPA regime will only be effective in incentivizing corporations to self-report and cooperate when the corporations are otherwise subject to credible and perceivable threats of detection and

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university-law (accessed October 4, 2021) ("[a]lthough we expect internal investigations to be thorough, we do not expect companies to aimlessly boil the ocean … "overly broad and needlessly costly investigations" … "delay our ability to resolve matters in a timely fashion").

[120] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at 10, XVIII-ii.

[121] OECD, *OECD Foreign Bribery Report*, at 31 (noting that owing to the expansive jurisdictional application of anti-bribery laws in many countries, defendant may be sanctioned in multiple jurisdictions for the same foreign bribery scheme); Eversheds Sutherland, "Beneath the Surface: The Business Response to Bribery and Corruption," May 11, 2016, https://www.fiduciaryregulatory.com/portalresource/BeneaththeSurface_BusinessResponsetoBriberyandCorruption.pdf (accessed June 8, 2020), 28 ("[s]ubsequently, an unintended consequence of greater enforcement by more jurisdictions may be that self-reporting in any jurisdiction is less attractive").

[122] An international double jeopardy rule is not recognized in some jurisdictions, such as the U.S., and even in jurisdictions where the rule of international double jeopardy is recognized, whether a DPA has the same legal effect as a formally concluded prosecution in terms of barring a successive prosecution is debatable. *Gamble v. United States,* 139 S. Ct. 1965 (2019) (holding that the Double Jeopardy Clause protects against punishment twice, not for the same conduct, but for "the same offence", while a crime under one sovereign's laws is not "the same offence" as a crime under the laws of another sovereign); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 168 (noting that among the countries where the double jeopardy principle is applied at the international level, 33% indicated that the principle would apply only to a court judgement).

[123] Matthew Stephenson, "What's Left Out of 'Left Out of the Bargain'," *Global Anti-corruption Blog*, March 18, 2014, https://globalanticorruptionblog.com/2014/03/18/whats-left-out-of-left-out-of-the-bargain/ (accessed October 10, 2021) ("[i]f, on the other hand, the company's officers cannot be sure what their ultimate liability might be…they might decide in the end that the costs of self-disclosure outweigh the benefits, and they're willing to run the (usually very low) risk that the violations will eventually be discovered").

[124] United Nations Office on Drugs and Crime, *United Nations Conventions against Corruption*, October 31, 2003, Article 43 (mandating state parties to cooperate in the criminal matters related to corruption); OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, entered into force on February 15, 1999, Articles 9 (requiring the state to provide prompt and effective legal assistance to another Party for the investigation and prosecution of foreign bribery); OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at 10, XVIII-vi (calling for the non-trial resolution of foreign bribery cases to allow for effective international cooperation).

[125] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 37- 39 ("[w]hen circumstances allow for multi-jurisdictional non-trial resolutions, all stakeholders tend to benefit from the finality of the resolution with the cooperating jurisdictions").

[126] *Ibid,* at 82 ("the carrot is only as enticing as the stick is menacing").

prosecution.[127] In addition to rewarding corporate self-reporting, the government could compel corporate wrongdoers to turn themselves in by increasing the probability for non-self-reporters to get detected and punished.[128] If a misconduct would eventually come to light even without self-reporting, voluntary self-disclosure is the only reasonable and sound business choice for the corporations involved in the misconduct. In addition, the real possibility of criminal conviction is needed to make its alternative, a DPA with onerous monetary, cooperative and compliance obligations, attractive to corporations to the extent of effectively incentivizing corporate self-reporting and cooperation.[129]

In addition to corporate voluntary self-disclosure, the government's own monitoring efforts and whistleblowers are also important sources of corporate enforcement actions.[130] The alternative means of detection increases the opportunity costs for the corporations adopting the approach of waiting to see and forces them to self-report at an early stage.[131] On the one hand, the law enforcement agency can reinforce its own capability to monitor and detect corporate misconduct by securing adequate resources and expertise.[132] On the other hand, it could pose credible threats for corporations that did not self-report by encouraging whistleblowers to come forward and alert the authorities to potential corporate misconduct.[133] In view of the risks of retaliation confronting whistleblowers, the protection of confidentiality, the anti-retaliation schemes and the financial rewards for whistleblowers are needed to make the whistleblower program attractive and encourage whistleblowers and confidential informants to report directly to the authorities.[134]

In order to ensure the appeal of a DPA to corporations, the existence of a credible threat of criminal prosecution and conviction is fundamental. In this sense, sufficiently broad substantive criminal laws and corporate liability schemes that cover a broad scope of bribery violations and

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[127] *Ibid* (the "carrot and stick" approach demonstrates that the resolution systems can only work where "a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public"); Kaplow, and Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not").

[128] Innes, "Remediation and self-reporting in optimal law enforcement," 381 (acknowledging the necessity for the government investment in monitoring to penalize prospective non-reporters, and thus providing firms with the needed incentive to self-report).

[129] Luigi Alberto Franzoni, "Negotiated Enforcement and Credible Deterrence," *The Economic Journal* 109, no. 458 (1999): 509-35 (finding that self-report and negotiated enforcement will only increase deterrence if the government can commit to predetermined level of investigative effort should the negotiation fail and ensure the threats of conviction); Caroline Binham, "Call to Make Companies Liable for Failure to Prevent Fraud," *Financial Times*, June 5, 2013, https://www.ft.com/content/4900db34-cdf4-11e2-a13e-00144feab7de (accessed April 5, 2022) (David Green, the former director of the SFO, calls for the extension of the identification doctrine to assist in the application of DPA, claiming that "if a corporate can't be prosecuted, why should it agree to a DPA?").

[130] OECD, *The Detection of Foreign Bribery*, 2017 (investigating different sources that could expose foreign bribery schemes and trigger investigation, including whistleblowers, confident informants and cooperative witnesses, media and investigating journalism, and other domestic and foreign agencies); Landeo, and Spier, "Optimal Law Enforcement with Ordered Leniency," 2 (noting that the likelihood of detection itself depends on both the enforcement efforts of the agency and the self-reporting decision of the other injurer).

[131] Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 341-42 (claiming that the supervising authorities can increase the opportunity costs over the lifetime of the option for the criminals and thus restrict insider trading by stimulating other communication channels with the market that can signal the private information to the market).

[132] OECD, *The Detection of Foreign Bribery*, 2017, at 25 ("ensuring that law enforcement has adequate resources and expertise, as well as the necessary investigative powers for foreign bribery enforcement is an essential element in incentivising self-reporting").

[133] *Ibid,* at 29 ("[w]histleblowers are an important source of foreign bribery cases and they often provide pivotal evidence for a successful prosecution").

[134] *Ibid,* at 29-30 (blaming the lack of effective legal protections of whistleblowers in many jurisdictions for the relatively low percentage of whistleblowing directly to the enforcement authorities); Alexander Dyck, Adair Morse and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" *The Journal of Finance* 65, no. 6 (2010): 2213-53 (the analysis of all reported fraud cases in large US corporations from 1996 to 2004 found that employees, media and industry regulator play a major role in fraud detection, and monetary incentives can best explain employee whistleblowing).

lower the threshold for pursing corporate liability, are critical.[135] Bribery violations could take in various forms, depending on the methods and status of bribery payments, the nature of the bribe payers and recipients, the involvement of intermediaries, among others.[136] Anti-bribery laws covering limited types of bribery schemes, containing a *de-minimis* threshold, or adopting strict requirements as to the bribers' mental state and the law's jurisdictional reach could make the investigations and prosecutions into corporate bribery even more challenging.[137] Besides, the complex structure of modern corporations, characterized by decentralization and delegation of authority, makes it especially challenging for the prosecutors to link senior executives that are often distanced from day-to-day operation with a particular bribery scheme.[138] Corporate criminal liability that holds corporations criminally liable for wrongdoings of senior executives and rank-and-file employees alike is thus critical to ensuring credible threats of corporate conviction, which complements the strategy of leveraging DPAs to induce voluntary self-disclosure and cooperation from corporations.[139]

4.5 Assessment of the Corporate Enforcement Policies in the U.S. and UK

In light of the features of corporate decision-making process and the potential costs associated with self-reporting, the previous Section identified several hallmarks of optimal enforcement policy in theory for the purpose of effectively incentivizing corporate self-reporting. This Section employs the above-identified hallmarks to evaluate the corporate enforcement policies in the U.S. and UK. The U.S. enforcement agencies have enjoyed unparalleled success in the area of foreign bribery enforcement in terms of incentivizing corporations to voluntarily self-report bribery violations and fully cooperate with the government's investigations via the pre-trial resolution mechanisms.[140] It is documented that around 30% of the DOJ's enforcement actions against foreign bribery were detected through corporate voluntary self-disclosure.[141] Though a similar mechanism is also available to prosecutors in the UK and France, they are to varying degrees

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[135] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 82-83 (discussing also the importance of the statute of limitations and the enforcement budget for the authorities' capacity to enforce the anti-bribery laws and impose corporate sanctions).

[136] OECD Working Group on Bribery, *Typologies on the Role of Intermediaries in International Business Transactions*, 2009, https://www.oecd.org/daf/anti-bribery/43879503.pdf, at 6-12 (identifying three basic *modus operandi* of foreign bribery through intermediaries and their variations, which would greatly complicate the detection and investigation of foreign bribery schemes).

[137] *Ibid*, at 13 (contrasting the FCPA, under which the accounting provisions allows the prosecution to secure a conviction by demonstrating the existence of accounting violations, with other anti-bribery laws that require the proof of the full chains of crimes ultimately leading to foreign bribery).

[138] *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1006 (9th Cir. 1973) ("[c]omplex business structures, characterized by decentralization and delegation of authority, commonly adopted by corporations for business purposes, make it difficult to identify the particular corporate agents responsible"); "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed July 1, 2020) ("blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme").

[139] Working Group on Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, November 26, 2009, Annex I (B) (recommending parties to take a flexible approach regarding "the level of authority of the person whose conduct triggers the liability of the legal person" to reflect "the wide variety of decision-making systems in legal persons").

[140] OECD Working Group on Bribery, *2021 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions*, December 20, 2022, https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf (accessed January 10, 2023) (155 out of 264 organizations sanctioned for foreign bribery worldwide were sanctioned by the U.S. agencies); Stanford Law School, Sullivan &Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse, Key Statistics, http://fcpa.stanford.edu/statistics-analytics.html?tab=2 (accessed January 10, 2023) (the total sanctions imposed on entity groups for FCPA violations since the enactment of the law amount to $28.7 billion, while over $28.3 billion of fine is imposed in and after 2008).

[141] OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United States*, at 13 ("approximately 30% of the DOJ's concluded foreign bribery cases were detected through voluntary self-disclosure of companies").

less successful than their U.S. peers in incentivizing corporate self-reporting and boosting foreign bribery enforcement. Why do similar approaches of leveraging DPAs to incentivize corporate self-reporting lead to different results? Are the criteria identified in Section 4.4.3 useful to explain such differences? What are the lessons for other jurisdictions that are considering adopting DPAs to boost the enforcement of anti-bribery laws?

This Section aims to address these questions by explaining the reasons for the different outcomes in the U.S. and UK referring to the previously identified best practices in terms of incentivizing corporate self-reporting. It is acknowledged that the French regime does stand out with certain unique features, including the expansive anti-corruption law, i.e., the *Sapin* II law, the legal norm that prioritizes public criminal investigation over corporate internal investigation, the blocking statute, and the moral vigilance against whistleblowers that underlies the higher legal threshold for invoking the protection mechanism for whistleblowers.[142] Due to space limitations, I choose to focus on the contrasting examples of the corporate enforcement system in the U.S. and UK to make my point. The results of the discussion are believed to be similarly useful for the assessment of the corporate enforcement policy in France and other jurisdictions.

4.5.1 Exploring the Reasons for the Success in Incentivizing Corporate Self-reporting in the U.S.

What would surprise the business community in other countries and make foreign enforcement authorities jealous is that a great number of the FCPA investigations are triggered by voluntary self-disclosure from the corporations. It is noted that 42% of all FCPA enforcement actions against corporate entities since the promulgation of the law in 1977 are built on corporate self-reporting.[143] According to the Phase-4 Report on the U.S.'s implementation of the OECD Anti-bribery Convention, the DOJ reported that around 30% of its concluded foreign bribery resolutions were based on corporate self-reporting, the most important source of the detection of foreign bribery.[144] As discussed in Section 3.2.3 and Section 4.2.2, the most important policy aimed at incentivizing corporate self-reporting of FCPA violations is the CEP, which was introduced in 2017 following a one-year FCPA Pilot program. Within the one and a half years since the initiation of the Pilot program, the FCPA Unit received 30 corporate voluntary self-disclosures, compared with 18 disclosures during the same period before the program took into effect.[145] In addition, 17 declination letters have so far been issued under the FCPA Pilot program and the CEP based on the company's prompt voluntary self-disclosure, timely and full cooperation and remediation.[146] In view of the success of the CEP in incentivizing voluntary

[142] Fred Einbinder, "Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice," *International Comparative, Policy & Ethics Law Review* 3, no. 3 (2020): 673-730 (exploring the fundamental differences between the U.S. and French criminal procedures).

[143] Stanford Law School, Sullivan & Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse-Key Statistics from 1977 to Present, http://fcpa.stanford.edu/statistics-keys.html (accessed April 30, 2022).

[144] OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United States*, at 13 (apart from corporate self-reporting, 20% of DOJ's finalized foreign bribery cases are based on whistleblower reports, 20% come from referrals from foreign and civil authorities, another 10% are evenly based on other relevant enforcement activities, and media reports).

[145] "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act," November 29, 2017, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (accessed June 30, 2021).

[146] For all the current FCPA declinations under the CEP, see Corporate Enforcement Policy-Declinations, https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations (updated April 5, 2023).

self-disclosure of FCPA violations, the DOJ has extended the CEP beyond the FCPA context to other corporate offenses investigated by the Criminal Division.[147]

4.5.1.1 Corporate Enforcement Policy

In addition to a series of Memos issued by the DOJ to guide the prosecutors' resolution of corporate issues, the CEP provides additional and more predictable benefits for corporations that choose to voluntarily self-disclose.[148] The CEP is generally consistent with the above identified optimal policy for the purpose of incentivizing corporate self-reporting and cooperation.[149]

First of all, the CEP provides a strict and clarified interpretation of voluntary self-disclosure. Under the CEP, self-disclosure will only be considered as voluntary if it is made by the company without existing obligations to self-report "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the misconduct".[150] By emphasizing the timeliness of self-disclosure, the DOJ aims to ensure that the benefits for voluntary self-disclosure are restricted to corporations whose self-reporting enhances the authorities' capability of detection. Besides, the CEP specifically demands that the self-disclosure be made to the DOJ's Criminal Division.[151] In accordance with the Yates Memo on individual accountability, the corporation is required to disclose "all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue".[152] The clear expectation about the timing, method and content of voluntary self-disclosure, together with the generous and predictable benefits that will soon be discussed in this Section, largely explains the booming corporate self-reporting of foreign bribery under the FCPA Pilot Program and the CEP.[153]

Secondly, the CEP provides material and certain benefits for corporations that have satisfied all the requirements of voluntary self-disclosure, full cooperation, and timely and appropriate

[147] "Deputy Assistant Attorney General Matthew S. Miner of the Justice Department's Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event," September 27, 2018, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division (accessed June 20, 2020) (noting that "then-Acting Assistant Attorney General John Cronan announced that the Criminal Division would consider the FCPA Corporate Enforcement Policy as 'nonbinding guidance' in all Criminal Division corporate criminal cases, not just those involving violations of the FCPA," owing to the policy's advantages to both the DOJ and the corporations); "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy," January 17, 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law (accessed February 18, 2023).

[148] Ephraim (Fry) Wernick, et al, "Carrots Take Root: DOJ Significantly Revamps Corporate Enforcement Policy to Increase Incentives for Companies to Cooperate," Vinson & Elkins, February 1, 2023, https://www.velaw.com/insights/carrots-take-root-doj-significantly-revamps-corporate-enforcement-policy-to-increase-incentives-for-companies-to-cooperate/ (accessed February 4, 2023).

[149] Sharon Oded, "Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy," *Columbia Law Review Online* 118, (2017-2018): 135-52 (believing that CEP is in many aspects consistent with an efficient-cooperative regime, but the exclusion of corporate recidivists could weaken its effect).

[150] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[151] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy, 6-Comment (clarifying that the CEP will also be applied "where a company made a good faith disclosure to another office or component of the Department of Justice and the matter is partnered with or transferred to, and resolved with, the Criminal Division").

[152] The original version of CEP that was issued in November 2017 required self-disclosure to include "all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law", while the updated version released in March 2019, demands the company to disclose "all relevant facts known to it, including all relevant facts about all individuals *substantially* involved in *or responsible for* the violation of law". See "DOJ Makes Revisions to Its FCPA Corporate Enforcement Policy," *FCPA Professor*, March 13, 2019, https://fcpaprofessor.com/doj-makes-revisions-fcpa-corporate-enforcement-policy/ (accessed February 18, 2023).

[153] OECD, *The Detection of Foreign Bribery*, 2017, at 22 (praising CEP for providing "the most structured guidance on self-reporting").

remediation.[154] For corporations that have taken all the required steps, a declination will be presumptively awarded in absence of aggravating factors. Notably, the existence of aggravating factors, such as the involvement of high-level executives in the misconduct, does not necessarily preclude a declination if other requirements are fulfilled.[155] The prosecutors may determine based on discretion that a declination is appropriate considering the circumstances.[156] When the investigation is resolved via a declination, no charge will be filed with the court and the released statement of facts will be rather brief, offering corporations greater latitude to minimize the reputational damages.[157] Even if a D/NPA is adopted instead of declinations as a result of the aggravating factors, firms that have self-reported can still expect a maximum of 75% penalty reduction, and will generally avoid external monitorships.[158] The provision of a presumptive declination or a D/NPA with significantly reduced monetary sanctions, and the self-restriction on the use of external compliance monitorships provide self-reporting corporations significant and predictable benefits to mitigate the potential costs associated with self-reporting.

Moreover, differential incentives are available to reward corporations that have provided both voluntary self-disclosure and full cooperation, and those that have only cooperated. A presumptive declination and DPAs with penalty discounts over 50% are restricted to firms that stepped forward in the first place.[159] Firms that did not self-report but later provided full or partial cooperation at the authorities' request can still obtain certain yet limited credits under the CEP in proportionate to the extent and quality of their cooperative efforts.[160] The diversity of resolution vehicles including declinations, DPAs and NPAs, together with the use of monetary and compliance obligations, gives the U.S. prosecutors' great latitude in granting proportionate and attractive benefits to the corporations based on the value of the corporate self-reporting and cooperative measures. The incremental leniency mechanism is laudable in terms of inducing firms to promptly self-report and cooperate, while ensuring their willingness to cooperate even when they failed to come forward in the first place.[161]

4.5.1.2 "Anti-piling on" Policy and International Coordination

The DOJ attempts to reduce the costs of self-reporting by coordinating the various sources of corporate liability. Though voluntary self-disclosure and full cooperation could help a company

[154] Ephraim (Fry) Wernick, et al, "Carrots Take Root: DOJ Significantly Revamps Corporate Enforcement Policy to Increase Incentives for Companies to Cooperate," Vinson & Elkins, February 1, 2023, https://www.velaw.com/insights/carrots-take-root-doj-significantly-revamps-corporate-enforcement-policy-to-increase-incentives-for-companies-to-cooperate/ (accessed February 4, 2023).

[155] "Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference," March 8, 2019, https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national (accessed July 2, 2022) (claiming that aggravating factors like high-level executive involvement in the misconduct will not necessarily preclude a declination if other requirements are fulfilled).

[156] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy ("[a]lthough a company will not qualify for a presumption of a declination if aggravating circumstances are present, prosecutors may nonetheless determine that a declination is an appropriate outcome if the company demonstrates to the Criminal Division that it has met all of the following factors" of voluntary self-disclosure, full cooperation, and timely and appropriate remediation).

[157] For example, in the declination letter addressed to the World Acceptance Corporation, the prosecutors include only the findings of its own investigations and the reasons for the decision of declination, without requiring the companies to accept responsibility for the alleged crimes or provide continual cooperation in relevant proceedings. See In re: World Acceptance Corporation, August 5, 2020, https://www.justice.gov/criminal-fraud/file/1301826/download (accessed October 5, 2021).

[158] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[159] *Ibid.*

[160] *Ibid,* 6.Comment (noting that companies that do not satisfy all the components of full cooperation will still be eligible for some cooperation credits on the basis of the level and quality of cooperation, but the credits will be markedly less than that for full cooperation).

[161] Arlen, "Corporate Criminal Liability: Theory and Evidence," 177 ("the state needs to ensure that, at each stage in the policing process, the firm is better off responding optimally (even if it failed to respond optimally in the prior period)").

achieve a declination from the DOJ, they do not protect the company from investigations by the SEC or foreign authorities.[162] In order to prevent duplicative and unfair sanctions, a self-restricting "anti-piling on policy" was introduced in 2018 by the DOJ to promote its coordination with other U.S. agencies and foreign authorities.[163] The policy mandates federal prosecutors to coordinate with other domestic or foreign law enforcement agencies and to consider the fine paid by the company to other agencies considering the totality of penalties when reaching corporate resolutions.[164] Owing to the broader reach and lower standard of proof of the FCPA's accounting provisions, the DOJ is increasingly willing to step back and rely on the SEC to file civil charges and claim for disgorgement.[165] Beyond the domestic landscape, the U.S. agencies are regularly working together with foreign agencies to enforce anti-bribery laws. Since 2016, a dozen major corporate resolutions have been concluded by the U.S. agencies in coordination with a number of foreign authorities to resolve foreign bribery issues, resulting in financial penalty of tens of billions of dollars.[166]

In accordance with the "anti-piling on" policy, the DOJ regularly agrees to credit a certain amount of financial penalties paid by the corporation to other relevant agencies when settling with corporations involved in the cross-border criminal matters.[167] The leading role played by the DOJ in the cross-agency and cross-national cooperation provides greater certainty for the corporations that managed to resolve the corporate matters with the DOJ.[168] Meanwhile, foreign authorities are invited to work together with the U.S. in the enforcement actions in order to take a share of the blockbuster sanctions. Closer transnational cooperation also enhances the U.S. authorities' capability to uncover foreign bribery, conduct effective criminal investigations and extradite individual offenders.[169] The greater finality of pre-trial resolutions on the one hand and

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[162] Jonathan R. Barr, and Marco Molina, "DOJ Announces Revised FCPA Corporate Enforcement Policy," *BakerHostetler*, December 4, 2017, https://www.bakerlaw.com/alerts/doj-announces-revised-fcpa-corporate-enforcement-policy (accessed October 6, 2021) ("SEC registrants weighing the complex decision of whether to self-disclose to DOJ must still consider the likelihood that self-disclosure could lead to an SEC enforcement action under the FCPA, even where DOJ may decline prosecution under the revised FCPA Corporate Enforcement Policy").

[163] Memorandum from Deputy Attorney General Rod J. Rosenstein, *Policy on Coordination of Corporate Resolution Penalties*, May 9, 2018 (requiring the Department attorneys to coordinate with other enforcement authorities to avoid the unnecessary imposition of duplicative penalties against the company for the same misconduct).

[164] *Ibid.*

[165] Stuart H. Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (New York: Oxford University Press, 2014), 246-65 (noting that the accounting and record-keeping provisions have a much broader reach, as they are not limited to the making of improper inducements to foreign public officials and can provide almost endless series of bases for the SEC to take actions against an issuer); Gibson Dunn, *2019 Year-end FCPA Update*, January 6, 2020, https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-fcpa-update.pdf (accessed April 9, 2020), 2 (noting that prosecutors and regulators frequently invoke the accounting provisions when they cannot establish the elements of the anti-bribery provisions or as a mechanism for compromise in settlement negotiations).

[166] OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United States*, at 79 (noting that from 2016 to 2020, the US has concluded at least 9 major multi-jurisdictional resolutions for FCPA anti-bribery violations by collaborating with enforcement agencies from Brazil, France, the Netherlands, Switzerland, and the UK); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 38 (noting that the trend of global resolution "is likely to continue, especially as countries continue to cooperate in the investigatory stages, strengthen their anti-corruption laws, and prioritize prosecutions of foreign bribery").

[167] "Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan," September 21, 2017, https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965 (accessed December 13, 2019) (the SEC agreed in the settlement with Telia that regarding a total disgorgement of $457 million, up to half of which could be offset by any disgorged profits Telia would pay to the Swedish or Dutch agencies).

[168] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 38-41 (claiming that "coordinated multi-jurisdictional resolutions have often proven to be an advantageous way to resolve cases for both prosecuting authorities and defendants", as the foreign sanctions are considered and credited, the jurisdiction is fairly distributed, defendants commit to cooperate with foreign agencies and non-prosecution in certain jurisdictions makes more predictable results); Victoriya Levina, "Coordination of Corporate Resolution Penalties Is Unlikely to Address the 'Piling On' Problem in FCPA Prosecutions," September 14, 2018, https://globalanticorruptionblog.com/2018/09/14/coordination-of-corporate-resolution-penalties-is-unlikely-to-address-the-piling-on-problem-in-fcpa-prosecutions/ (accessed October 7, 2021) (pointing out the presumed limitation of the policy to countries with which the US has favorable diplomatic relations).

[169] Michael Griffiths, "Cooperate With Everyone Simultaneously to Avoid Piling On, says FCPA Chief," *Global Investigation Review*, June 14, 2018, https://globalinvestigationsreview.com/cooperate-everyone-simultaneously-avoid-piling-says-fcpa-chief (accessed October 9, 2021)

the higher probability of being detected and sanctioned on the other hand contribute together to the high number of corporate self-disclosure of bribery schemes to the U.S. agencies.

4.5.1.3 FCPA, Whistleblower Program and Vicarious Corporate Liability Rule

As identified above, the DPA regime can only be effective in incentivizing voluntary self-disclosure from corporations if they are faced with credible threats of detection and conviction. The rules that encourage whistleblowers to report corporate misconduct and subject corporations to broad criminal liability for bribery are believed to be essential to the detection and conviction of corporate wrongdoings.[170] Regarding the *de jure* corporate liability, the FCPA is among the most frightening anti-bribery laws worldwide in terms of its extra-territorial reach, the regulation of both actual bribery and internal control and accounting deficits, as well as the severe penalties against corporate and individual wrongdoers.[171]

The threats of detection and criminal sanctions for the FCPA violations are materialized by the various tools available to the U.S. authorities for detecting and prosecuting foreign bribery.[172] Firstly, as part of the Dodd-Frank Act, the SEC introduces the cash-for-information bounty program to attract whistleblowing tips regarding securities violations.[173] The SEC promises financial rewards of 10% to 30% of the sanctions recovered to the whistleblowers providing the agency with original information about securities violations that leads to a successful administrative action with collected monetary sanctions of over one million dollars.[174] From the first award in 2012 to the end of 2022, the SEC has awarded over $1.3 billion to 207 whistleblowers, with the largest award reaching up to $114 million.[175] In addition to the financial incentives, whistleblowers are protected from any form of retaliation from the employer and enjoy a private right of action to file a retaliation complaint.[176] Benefiting from the tempting

(praising closer cooperation with other jurisdictions for facilitating DOJ's collection of evidence concerning participants throughout the corruption scheme); OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, at 21 (noting that cooperation in the investigatory stage, involving information exchange on an "informal" or police-to-police/prosecutor-to-prosecutor level, increases the efficiency of enforcement in comparison with the formal procedure of seeking mutual legal assistance that may take sometimes take months, if not years, before assistance is provided).

[170] See *supra* Section 4.4.3.3.

[171] Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense," 491-93 (noting that the widespread use of DPAs to settle FCPA cases leads to "the shortage of judicial interpretation of the vagaries of the FCPA", which enhances the discretionary power of prosecutors and the harshness of FCPA).

[172] Jennifer Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," in Tina Søreide, and Abiola Makinwa (ed.), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Northampton, MA: Edward Elgar Publishing, 2019), 168-77 (stressing also the role of broad corporate liability rule, sufficient funding to the enforcement agency and effective whistleblower program in forcing firms to self-disclose and to cooperate).

[173] Engstrom, "Bounty Regimes," 335-36 (differentiating two types of whistleblower bounty regimes, the "cash-for-information" scheme established by Dodd-Frank Act, and the *qui tam* scheme established by False Claims Act's (FCA) that permits whistleblowers with the knowledge of fraud committed against the federal government to bring lawsuits on behalf of the government and retain 15%-25% of any awards or settlement).

[174] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, Article 922, 124 Stat. at 1841-44 (2010) (to be codified at 15 U.S.C. Article 78u-6) (whistleblowers voluntarily providing the SEC with original information that leads to a successful administrative action involving monetary sanctions over $ 1 million are eligible for an award ranging from 10 percent to 30 percent of the money collected); 17 C.F.R. Article 240.21 F-4(d)(3)(i)-(ii) (inducing a DPA or NPA in the definition of "administrative action"); "SEC Amends Whistleblower Rules to Incentivize Whistleblower Tips," August 26, 2022, https://www.sec.gov/news/press-release/2022-151 (accessed February 19, 2023) (The whistleblower program was amended to allow the SEC to pay whistleblowers for their assistance in connection with non-SEC actions in additional circumstances under the SEC program, and to even increase the award in special cases).

[175] See Press Release, "Agency's Program Tops $1.3 Billion in Awards since Inception; Rapid Growth in Tips and Awards Continues," November 15, 2022, https://www.sec.gov/files/2022_ow_ar.pdf (accessed February 19, 2023); Press Release, "SEC Issues Record $114 Million Whistleblower Award," October 22, 2020, https://www.sec.gov/news/press-release/2020-266 (accessed February 19, 2023).

[176] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Article 922, 124 Stat. at 1845-46 (2010) (to be codified at 15 U.S.C. Article 78u-6) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment …"); Iskra Miralem, "Comment, the SEC's Whistleblower Program and Its Effect on

returns and extensive protection, as well as assistance from specialized whistleblower lawyers, 3,305 whistleblowers from 119 countries worldwide were reported to have resorted to the whistleblower bounty program in the FCPA cases from 2011 to 2018.[177] The SEC's whistleblower program forces companies to strengthen their compliance program aimed at inducing knowledgeable individuals to ring the internal reporting hotline first and, if it fails, to quickly self-report to the authorities in a race to the courthouse against individual whistleblowers and to benefit from the voluntary self-disclosure credits.[178]

Next, the threat of corporate criminal sanctions is further exacerbated by the broad vicarious liability rule prevailing in the U.S. federal law. Under the vicarious liability rule, a corporation is held strictly liable for the criminal wrongdoings committed by its employees within the scope of their employment and with the motive, at least in part, to benefit the corporation.[179] The U.S. corporate liability rule has been broadly interpreted by the courts. The *actus reus* and *mens rea* of not only the high-rank executives, but also those of the low-level employees, such as sales-man or the driver, can be imputed to the corporation to justify corporate liability.[180] In addition, when no single employee but a group of several employees possess sufficient knowledge that a criminal wrongdoing has been committed, the concept of "collective knowledge" can be used to establish the requisite *mens rea* in corporate prosecution.[181] Moreover, the condition of "within the scope of employment" can be easily satisfied if the employee has apparent authority, even if a specific authorization from the corporation is lacking, to conduct the activity in question.[182] Last but not the least, it constitutes no defense for the corporation that an adequate corporate

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Internal Compliance Programs," *Case Western Reserve Law Review* 62, no. 1 (2011): 345–46 (noting that the SEC's whistleblower rules based on the Dodd-Frank Act "provide greater anti-retaliation protections than the Sarbanes-Oxley Act of 2002, which was 'the first comprehensive statute of national scope' that provided protections to corporate whistleblowers").

[177] National Whistleblower Center, "Foreign Corrupt Practices Act: How the Whistleblower Reward Provisions Have Worked," August 2018, https://www.whistleblowers.org/wp-content/uploads/2018/12/nwc-fcpa-report.pdf, at 30 (accessed October 26, 2019); Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (NY: Oxford University Press, 2019), 155-56 (noting that the private regulation largely benefits from the highly-developed compliance market in the U.S., which cannot be easily exported to a foreign country to suit the local enforcement landscape).

[178] Miralem, "Comment, the SEC's Whistleblower Program and Its Effect on Internal Compliance Programs," 346-47 (noting that the threats of external reporting induce firms to strengthen their own internal compliance program to make it more attractive for whistleblowers in the competition with the SEC); Daniel Fisher, "SEC Whistleblower Rule Means More Work for Lawyers," *Forbes*, May 26, 2011, https://www.forbes.com/sites/danielfisher/2011/05/26/sec-whistleblower-rule-means-more-work-for-lawyers/#172c984c4a8a (accessed April 9, 2020) (noting that "the company that is alerted to unusual revenue-recognition practices…might have dismissed it as immaterial before but now will feel compelled to run to the SEC before one of its employees gets there first").

[179] *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) ("the corporation may be criminally bound by the acts of subordinate, even menial, employees"); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972) (the corporation was liable for acts of its agents within the scope of their authority even if the acts were in contrary to the corporate policy or explicit instructions, and the general policy statements from the corporate president presents no defense); Preet Bharara, "Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants," *American Criminal Law Review* 44, no. 1 (2007): 57-87 (arguing that the source of the prosecutorial leverage over corporations comes from the broad corporate criminal liability law established by the judiciary).

[180] *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) ("the corporation may be criminally bound by the acts of subordinate, even menial, employees"); Andrew Weissmann, "A New Approach to Corporate Criminal Liability," *American Criminal Law Review* 44, no. 4 (2007): 1320, ft. 6 (observing corporate convictions for wrongdoings involving superintendent, foreman, and backhoe operator, truck driver, clerical worker and salesman).

[181] *United States v Bank of New England NA*, 821 F2d 844, 855-56 (1st Cir 1987) (the Court observed that "if employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all"; in addition to the collective knowledge, the prosecutors shall also establish its causal relationship with the flagrant corporate indifference).

[182] Michael E. Tigar, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law," *American Journal of Criminal Law* 17, no. 3 (1990): 229-30; *United States v. Inv. Enters., Inc.,* 10 F.3d 263, 266 (5th Cir. 1993) ("a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent"); *United States v. American Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971) ("[i]n order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. …. Apparent authority is the authority which outsiders would normally assume the agent to have, judging from his position with the company and the circumstances surrounding his past conduct").

compliance procedure is in place to prevent such wrongdoings, or the wrongdoings are against the explicit order of the management.[183]

In a word, the U.S. corporate enforcement policies are generally consistent with the previously identified "stick and carrot" approach for the purpose of effectively encouraging corporate voluntary self-disclosure. CEP provides clear definition of voluntary self-disclosure, promises a presumptive declination for corporations that have voluntarily self-disclosed, fully cooperated and remediated, and it caps the fine reduction at 50% for corporations that did not self-report. On the other hand, the effective whistleblower program and the broad corporate liability rule, accompanied by close international cooperation, greatly advance the capability of U.S. prosecutors to pose real threats of detection and conviction for corporations that did not come forward promptly. The substantial and predictable benefits for self-reporting corporations, together with the credible threats for non-self-reporters, render voluntary self-disclosure the only sound business option for corporations with detected wrongdoings.[184]

4.5.2 Assessment of Corporate Enforcement Policies in the UK

Corporate self-reporting is identified by the UK authorities as a major source of foreign bribery enforcement actions.[185] Voluntary self-disclosure has so far contributed to four out of the seven published DPAs for the resolution of bribery-related charges.[186] Two bribery prosecutions involving Sweet Group and Skansen that eventually led to convictions were also based on voluntary self-disclosure.[187] In addition, the UK authorities indicated that a large proportion of the ongoing bribery investigations were also triggered by corporate self-reports.[188] On the other hand, though foreign bribery enforcement has been increasingly active since the promulgation of the UKBA in 2010 and the introduction of DPAs in 2014, the relatively low number of ongoing and finalized foreign bribery cases in the UK compared to the size of its economy has greatly concerned the international community.[189] In the latest report on the UK's implementation of the OECD Anti-bribery Convention, the OECD Working Group called for more measures to be taken by the UK authorities to enhance the detection of foreign bribery violations.[190] How does

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[183] *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1004-07 (9th Cir. 1972) (the corporation was liable for acts of its agents within the scope of their authority even if the acts were in contrary to the corporate policy or explicit instructions, and the general policy statements from the corporate president presents no defense); *United States v. Twentieth Century Fox Film Corp.,* 882 F.2d 656, 660 (2d Cir. 1989) ("Fox's compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree").

[184] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 82 (the "carrot and stick" approach demonstrates that the resolution systems can only work where "a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public").

[185] OECD, *Implementing the OECD Anti-bribery Convention Phase 4 Report - United Kingdom,* 2017, para. 21 ("[t]he UK authorities point to company self-reporting as a major source of detection of foreign bribery").

[186] DPAs entered into by SFO with Standard Bank, Sarclad Ltd, Güralp Systems Ltd, and Airline Services Ltd are based on corporate self-reporting of bribery violations, while a DPA has been signed with Rolls-Royce, the Airbus, and Amec Foster Wheeler Energy to resolve bribery charges even though the company did not self-report.

[187] OECD, *Implementing the OECD Anti-bribery Convention Phase 4 Report - United Kingdom,* 2017, at 13 (regarding the case involving Sweet Group, noting that "the foreign bribery aspect of the case was detected through a regulatory report by the company"); House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, paras. 218-226 (identifying and analyzing criticisms of the prosecution of Skansen even though the company had self-reported and given extensive assistance to the police).

[188] OECD, *Implementing the OECD Anti-bribery Convention Phase 4 Report - United Kingdom,* 2017, paras. 21& 22 (recognizing that a large proportion of ongoing investigations into foreign bribery were triggered by corporate self-reports).

[189] OECD, *Implementing the OECD Anti-bribery Convention Phase 4 Two Year Follow-up Report - United Kingdom,* 2019, para 2 ("[d]espite an increased level of enforcement of foreign bribery laws, the total number of finalised and ongoing cases relative to the UK economy remains relatively low").

[190] *Ibid* (calling for enhanced whistleblower awareness, more effective anti-money laundering reporting and exploration of other sources to enhance the detection of foreign bribery).

the ability of UK authorities to detect foreign bribery violations affect the value of the DPA regime in incentivizing corporations to self-report? As with the previous Section on the U.S. corporate enforcement policy, this Section will assess the DPA regime and the broader legal system, which determine the benefits of self-reporting, as well as the probability of detection and penalty for corporations that did not self-report, to understand the current status of corporate self-reporting in the UK.

4.5.2.1 Incentives for Corporate Self-report: Statutory Rules and Enforcement Practices

The UK DPA regime provides fairly strong incentives for corporations to self-report and cooperate, including access to a DPA and significantly reduced corporate fines, as already discussed in Section 4.2.2. However, such incentives have been denounced by some critics for falling short of the desired level of certainty and sufficiency.[191] Regarding the access to a DPA, the law on paper authorizes prosecutors to negotiate a DPA when doing so is consistent with the public interests.[192] A non-exhaustive list of public interest factors in favor of or against prosecution, including the promptness and quality of corporate self-reporting and cooperation, are provided for the prosecutors to balance when making the charging or settling decision.[193] Prosecutors are given broad discretion to consider which factor is relevant and what weight to give to each factor in a specific case.[194] Moreover, even if prosecutors believe that a DPA is consistent with public interests in light of all circumstances, the court has the final say over the appropriateness of a DPA. Therefore, corporations are faced with a great deal of uncertainty over the access to a DPA in the UK even after self-reporting.[195] The relative paucity of DPAs and foreign bribery enforcement actions in the UK exacerbate such uncertainty, as corporations are less able to predict the consequences of self-reporting by examining the precedents.[196] The SFO Corporate Cooperation Guidance gives a fair warning that "co-operation – even full, robust co-operation – does not guarantee any particular outcome".[197] Regarding the reduced financial penalty as an incentive for self-reporting, the statutory rule stipulates that the financial penalty agreed under a DPA shall be broadly comparable to the fine a court would have imposed

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[191] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements outside the U.S.," 180-81 (noting that the UK DPA statute and policies "do not ensure that DPAs are guaranteed for, and restricted to, companies that provide government officials with material information"); House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, para. 304 (citing the comments given by Corruption Watch that offering a DPA with 50% fine discount to self-reporting companies shall be "developed formally and through consultation", rather than just by one judge's decision).

[192] SFO and CPS, DPA Code of Practice, Article 1.2 (prosecutors shall be satisfied that a two-stage test is met before offering a DPA: whether the existing evidence or further obtainable evidence will sustain a realistic prospect of conviction (evidential stage), and whether a DPA will serve the public interests (public interests stage)).

[193] SFO and CPS, DPA Code of Practice, Article 2.8 (providing a non-exhaustive list of factors in favor of or against prosecution in addition to those set out in the Code for Crown Prosecutors, including previous misconducts, the severity, pervasiveness and harms of the offense, the existence of corporate compliance program and its effectiveness, the timeliness and quality of self-report, cooperation and collateral consequences of conviction).

[194] SFO and CPS, DPA Code of Practice, Article 2.6 (noting that the application of the public interest is "an exercise of discretion. Which factors are considered relevant and what weight is given to each are matters for the individual prosecutor. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction").

[195] Sacha Harber-Kelly, Patrick Doris and Shruti Chandhok, "The UK Serious Fraud Office's Latest Guidance on Corporate Co-operation – Great Expectations Fulfilled or Left Asking for More?" *Gibson Dunn*, September 10, 2019, https://www.gibsondunn.com/uk-serious-fraud-office-latest-guidance-on-corporate-cooperation-great-expectations-fulfilled-or-left-asking/ (accessed June 8, 2020) ("[w]hilst discretion may therefore be welcome, the unqualified words that "even full, robust co-operation – does not guarantee any particular outcome" suggests that the SFO has missed the opportunity to maximise the incentivisation for self-reporting and other co-operation").

[196] Bribery & Corruption 2021: United Kingdom, *Global Legal Insights*, https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/united-kingdom (accessed October 9, 2021) (listing the DPAs related to foreign bribery and organizational prosecutions for failing to prevent bribery, including one case involving Sweet Group leading to a guilty plea, and another case involving Skansen leading to a conviction).

[197] SFO, *Corporate Co-operation Guidance*.

following a guilty plea, which is up to one-third off the base penalty.[198] This rule was met with fierce criticism from legal practitioners, who complained that the one-third discount of the financial penalty is much lower than the incentives available under the DOJ policy and insufficient to incentivize corporate self-reporting.[199]

On the other hand, the corporate enforcement practices in the UK have to a certain extent made up for the statutory deficiency and share some important features with the previously identified best practices for incentivizing corporate self-reporting and cooperation. Despite the broad discretion available to prosecutors, DPAs in practice have been confined to cases where new information is provided to the government in the form of voluntary self-disclosure or extraordinary cooperation.[200] In terms of the financial incentives, the court responsible for approving DPAs has routinely granted a 50% fine discount to reward voluntary self-disclosures and/or exemplary cooperation since the second DPA.[201] By restricting the access to a DPA and the maximum fine reduction to firms that have self-reported and/or provided extraordinary cooperation, the authorities provide significant incentives for corporations to self-report and fully cooperate.[202] The incentives offered in the enforcement practices beyond the statutory provisions are further strengthened by the centralized enforcement regime. Unlike the decentralized approach in the U.S., where federal, state, and county prosecutors all have the power to negotiate a DPA, the UK DPA system has so far been interpreted by only a few actors, i.e., the head of the SFO, and the presidents of the Queen's Bench Division of the High Court.[203] The centralized enforcement structure and the limited number of actors responsible for interpreting the law in the enforcement practices promote the consistency and predictability of incentives for corporate self-reporting and cooperation.

Still, compared with the best practices, the UK DPA policies and enforcement practices lack the distinctive benefits exclusive to self-reporting corporations. The independent factor of self-reporting, beyond corporate cooperation, is not incentivized through additional benefits. Despite the claim of "no self-report, no DPA", DPAs with a 50% fine reduction have been negotiated by the SFO with Rolls-Royce and Airbus, whose voluntary self-disclosure is lacking or deemed too

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[198] Crime and Courts Act 2013, c. 22, Schedule 17, paragraph 5(3) (providing that the amount of any financial penalty agreed under DPA must be broadly comparable to the fine that a court would have imposed for the alleged offense following a guilty plea); Sentencing Council, *Reduction in Sentence for a Guilty Plea - First Hearing before 1 June 2017*, https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-before-1-june-2017/ (accessed October 11, 2019) (the greatest reduction will be given where the plea was indicated at the "first reasonable opportunity" where the recommended reduction is 1/3, which will be generally followed unless there are good reasons for lower amount).

[199] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, paras. 299-301 (reviewing the argument for using an extra 17% penalty discount to incentivize self-reporting, yet finding such argument unconvincing as DPA has already offered corporations a way out of criminal prosecution, which is supposedly the main incentive for self-reporting).

[200] Lisa Osofsky, Director of the SFO, "Keynote Address at the FCPA Conference," December 4, 2018, https://www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/ (accessed December 15, 2019) (interpreting full cooperation as "tell us something we don't know").

[201] Regarding the ten published DPAs so far, the exceptions to the 50% discount rule include the first DPA involving Standard Bank (30% discount), the eighth DPA involving G4S Care & Justice Services based on fraud charges (40% discount), and the tenth DPA involving Amec Foster Wheeler Energy (a more complex approach is adopted to include discounts for various elements and a totality discount).

[202] Corruption Watch – Written Evidence (BRI0039), para. 5.9 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/written/87293.html (accessed September 30, 2021) (believing that the judge's decision to raise the discount in fine under DPAs beyond the statute rule "raises serious questions about how DPA policy is being developed beyond the original scope intended by Parliament" and arguing that the enforcement policy rewarding corporate self-reporting shall "be developed formally and through consultation").

[203] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements outside the U.S.," 181-82 (believing that the centralized judicial practice facilitates the consistency of the interpenetration of DPA, but is somehow vulnerable to personnel changes).

slow.[204] The court cited their extraordinary cooperation with the government's investigation in the judgement approving the two DPAs.[205] It was argued that self-reporting is part of the broader corporate cooperative efforts and "there is no necessary bright line between self-reporting and co-operation."[206] The understanding of self-reporting as part of the broader corporate cooperative efforts, as well as the lack of differential incentives for the firms that have only cooperated compared with the firms that have both self-reported and cooperated, would seriously discourage firms from self-reporting in the first place. They have few incentives to self-report before being caught by the authorities if they could obtain an access to a DPA and the same penalty reductions by offering extraordinary cooperation in the later stage without voluntary self-disclosure.[207] Given the essential values of self-reporting for the law enforcement authorities, as identified in Section 4.3, the lack of sufficient incentives for voluntary self-disclosure could undermine the enforcement authorities' ability to detect corporate wrongdoings and to engage early in the corporate internal investigations in order to ensure the benefits of genuine cooperation and remediation.

4.5.2.2 Transnational Cooperation in the Fight against Bribery

Cooperating with the investigators and prosecutors around the world has been a long-standing priority in the SFO's policy for combating economic crimes, especially since Lisa Osofsky took office as the head of SFO in September 2018.[208] The emphasis on transnational cooperation has greatly enhanced the SFO's capability to detect bribery and bring successful corporate enforcement actions. According to the Phase-4 report prepared by the OECD Working Group on Bribery regarding the UK's enforcement of the OECD Anti-bribery Convention, three finalized foreign bribery cases had been detected via foreign jurisdictions or joint investigations by 2017.[209] Before the introduction of DPAs, the SFO had already joined the U.S. agencies in

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[204] Sue Hawley, "A Failure of Nerve: the SFO's Settlement with Rolls-Royce," *Transparency International UK*, January 30, 2017, https://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/ (accessed April 15, 2020) (criticizing the Rolls-Royce settlement for establishing a bad precedent that the following-on extraordinary cooperation can offset the lack of self-reporting in the beginning, and would therefore potentially undermine incentives for companies to self-report); Matt Getz, Tracey Dovaston and Irene Ding, "Insights: Airbus's Groundbreaking Regulatory Settlement," *Boies Schiller Flexner LLP*, February 18, 2020, https://www.lexology.com/library/detail.aspx?g=a3306406-6a8b-4fdb-a82c-b8025252c604 (accessed June 20, 2020).

[205] *SFO v. Rolls Royce PLC; Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, para. 123 (justifying the 50% discount by the "extraordinary cooperation" demonstrated by the company' though it did not self-report); *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 69, 70 and 112 (describing the company's initial response to the wrongdoings as a slow start, but believing that a further discount of 16.7% to 50% of penalty reduction is justified when taking account of Airbus's exemplary cooperation and remediation).

[206] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, para. 68 (claiming that the high quality of subsequent co-operation overall in exposing wrongdoings that would not otherwise have come to the attention of the authorities is a significant factor in favour of a DPA, even if the prosecuting authorities became aware of the relevant conduct by the actions of a third party. "To that extent, there is no necessary bright line between self-reporting and co-operation"); House of Lords, Bribery Act 2010 Committee, Corrected Oral Evidence: Bribery Act 2010, November 13, 2018, Q 151, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/bribery-act-2010-committee/bribery-act-2010/oral/92751.html (accessed November 4, 2019) (Sir Brian Leveson claimed that "self-reporting is a mechanism whereby you demonstrate a willingness to co-operate").

[207] Sue Hawley, "A Failure of Nerve: the SFO's Settlement with Rolls-Royce," (criticizing the Rolls-Royce settlement for establishing a bad precedent that the following-on extraordinary cooperation can offset the lack of self-reporting in the beginning, and would therefore potentially undermine incentives for companies to self-report).

[208] "Lisa Osofsky, Director of the Serious Fraud Office speaking at the Cambridge Symposium on Economic Crime", September 2, 2019, https://www.sfo.gov.uk/2019/09/02/cambridge-symposium-2019/ (accessed December 20, 2019) (stressing the necessity of both prosecutor to prosecutor cooperation and corporate to prosecutor cooperation); Matthew Wagstaff, Joint Head of Bribery & Corruption, speaking at The Lawyer's Managing Risk and Litigation 2018 Conference, "Current priorities and future directions," November 21, 2018, https://www.sfo.gov.uk/2018/11/21/current-priorities-and-future-directions/ (accessed December 20, 2019) (highlighting the SFO's focus on working collaboratively with the DOJ and relevant EU agencies as well as other domestic agencies).

[209] OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United Kingdom*, 2017, para. 48.

coordinating a $40.2 million global settlement, under which Innospec paid $12.7 million to the SFO.[210] Armed with the tool of DPA, the SFO has frequently participated in the global settlements, typically with the U.S. enforcement agencies. Four out of the ten published DPAs so far have been concluded by the SFO in coordination with its foreign peers.[211] The highlight is the DPA negotiated by the SFO with Airbus involving €991 million in financial penalty, as part of the global resolution of €3.6 billion in total paid by the company to the U.S., UK and French agencies.[212]

However, the UK enforcement agencies acknowledge that obtaining international cooperation in the foreign bribery investigations and prosecutions, such as information exchange, evidence collection or the extradition of individual offenders from some jurisdictions, remain challenging.[213] In addition, Brexit is likely to further complicate the relationship between the UK and its European partners regarding any cooperation in foreign bribery enforcement.[214] As discussed before, closer international cooperation boosts corporate self-reporting by enhancing the authorities' ability to detect and penalize bribery schemes, and protecting the corporation from unfairly duplicative sanctions.[215] From the perspective of corporations, those implicated in foreign bribery schemes that might be exposed and sanctioned in the U.S. are likely to make voluntary self-disclosure to the SFO as well in light of the enhanced cooperation between the U.S. agencies and the SFO. On the other hand, the difficulties in the investigation and prosecution of foreign bribery schemes involving other jurisdictions could have adverse impacts on the corporate incentives to surrender themselves to the SFO and provide full cooperation with the SFO's investigations.

4.5.2.3 UKBA, Whistleblower Rules, and Too big to Indict

Considering the risks of being detected and held accountable for bribery violations, firms implicated in foreign bribery schemes might have mixed incentives to self-report to the SFO. On the one hand, the tough anti-bribery law and the new prosecutor-friendly offense of failure to prevent bribery pose serious threats of criminal sanctions for commercial organizations involved in bribery. The UKBA that overhauls the nation's once obsolete and fragmented anti-bribery legal framework is described as "the toughest anti-corruption legislation in the world".[216] It even

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[210] Press Release, "Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations, Admits to Violating the U.S. Embargo Against Cuba: Coordinated Global Enforcement Action by DOJ, SEC, OFAC and United Kingdom's Serious Fraud Office," March 18, 2010, https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-admits-violating-us (accessed October 7, 2019).

[211] For the links to the DPAs and relevant documents signed into by SFO, see Deferred Prosecution Agreements, SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ (accessed October, 2021).

[212] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, para. 1 (noting that it is "greater than the total of all the previous sums paid pursuant to previous DPAs and more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018").

[213] OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United Kingdom*, 2017, para. 174 ("[a]ccording to the UK, obtaining evidence from multiple jurisdictions is one of the principal challenges encountered in investigating and prosecuting foreign bribery. The authorities acknowledge that it can be extremely difficult to get MLA, or even intelligence sharing, from some jurisdictions. Extradition issues can also be complex, in particular where there may be double jeopardy").

[214] *Ibid*, at para. 198 ("commentators agree that Brexit is likely to lead to a reduction in cooperation in criminal and policing matters between the UK and the EU, although the significance of the change is obviously still difficult to measure at the time of this report").

[215] See *supra* section 4.5.1.2.

[216] The Law Commission, "Reforming Bribery: A Consultation Paper," Consultation Paper No. 185, 13-20 (calling for the reform of the fragmented and complex anti-bribery legal instruments and empathizing the need for a more rational and simplified anti-bribery law); Darryl Lew, et al, "The Bribery Act: The Changing Face of Corporate Liability," White & Case, October 5, 2016 ,

prevails over the far-reaching FCPA in several aspects, such as the coverage of private bribery and active bribery, the extraterritorial jurisdiction, and the outlawing of facilitation payment.[217]

The new corporate liability rule under the offense of failure to prevent bribery materializes the corporate sanctions by making it significantly easier for the prosecutors to hold corporations criminally liable.[218] Under the previous corporate liability rule based on the identification doctrine, prosecutors had to prove the involvement of the high echelons of corporate management in the bribery scheme in order to hold corporations accountable for the bribery charges.[219] Instead, prosecutors can establish corporate liability now by proving only that any person associated with the corporation, including a low-level employee or agent, commits bribery with the intention of obtaining or retaining business or commercial advantages for that corporation.[220] However, the narrow corporate liability rule based on the identification doctrine is still the dominant rule in the field of most other economic crimes.[221] Such a restricting corporate liability rule is ill-suited to prosecute big corporations. It also largely explains the fact that the majority of DPAs negotiated by the SFO so far (9 out of 12) are based on the organizational offense of failure to prevent bribery, though DPA is legally applicable to other economic and financial crimes as well.[222]

On the other hand, as a result of the deficient whistleblower rule and the dilemma of too big to indict, the SFO may lack sufficient strength to detect foreign bribery and bring culpable corporations to justice. Firstly, given the UK DPA policy that fails to offer distinctive and predictable benefits for the independent element of corporate self-reporting, the program designed to incentivize whistleblowing is even more important for the successful detection of bribery cases.[223] Being critical of the money-for-information approach underlying the SEC's whistleblower program, the UK authorities choose to focus only on the protection of whistleblowers from retaliation.[224] Under the Public Interest Disclosure Act 1998, the most

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https://www.whitecase.com/publications/insight/bribery-act-changing-face-corporate-liability (accessed October 10, 2021) (calling the UKBA the "toughest anti-bribery legislation in the world").

[217] Brigid Breslin, Doron F. Ezickson and John C. Kocoras, "The Bribery Act 2010: Raising the Bar above the US Foreign Corrupt Practices Act," *McDermott Will & Emery*, September 10, 2010, https://www.lexology.com/library/detail.aspx?g=863d78ae-d244-4e58-81ee-c219a067e27d (accessed October 10, 2021).

[218] Bribery Act 2010, c. 23, Section 7, Failure of Commercial Organisations to Prevent Bribery.

[219] Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001), 84-106 (the corporate liability rule based on the identification theory that applies to non-regulatory fault-based offenses attributes to the corporation only the *actus reus* and *mens rea* of the top echelon senior officers of the company).

[220] Bribery Act 2010, c. 23, Section 8 (defining associated persons as those performing services for or on behalf of the corporation, regardless of their capacity, and may include the corporate employee, agent or subsidiary); Law Reform Commission of Ireland, *Regulatory Powers and Corporate Offences*, volume 2 (2018), 387-388 (noting that there is no need to prove organizational fault under section 7, but prosecutors shall nonetheless prove that the associate person commits bribery with the intention of obtaining or retaining corporate business or interests).

[221] Peter Alldridge, "The U.K. Bribery Act: 'The Caffeinated Younger Sibling of the FCPA'," *Ohio State Law Journal* 73, no. 5 (2010): 1199-1201 (noting that even after the passage of the UKBA, relying solely on the bribery offenses under sections 1 & 6 would not ensure the compliance with the OECD Convention, considering the standard English doctrine governing corporate criminal liability). The exception to this corporate liability rule based on the identification doctrine includes the offense of corporate manslaughter based on serious management failures resulting in a gross breach of a duty of care, and two offenses of failure to prevent bribery and failure to prevent the facilitation of tax evasion.

[222] C.M.V Clarkson, "Kicking Corporate Bodies and Damning Their Souls," *The Modern Law Review* 59, no. 4 (1996): 561 ("the doctrine ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions"); James J. Gobert, and Maurice Punch, *Rethinking Corporate Crime* (London: Butterworths/LexisNexis, 2003), 63 ("[t]he identification doctrine propounds a test of corporate liability that works best in cases where it is needed least (small businesses) and works worst in cases where it is needed most (big business)").

[223] OECD, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - United Kingdom*, 2017, para. 23 ("[p]roactive detection is even more important if the SFO pursues the policy of offering DPAs in the absence of self-reporting").

[224] Financial Conduct Authority and Bank of England Prudential Regulation Authority, "Financial Incentives for Whistleblowers: Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee," July 2014, at 1-7 (finding no empirical evidence proving that financial incentives to whistleblowers will improve the quality or quantity of tips; instead, the bounty regime may

important law for the protection of whistleblowers in the UK, whistleblowers suffering from unfair dismissal or detrimental treatment can claim unlimited compensation for the financial losses in the employment tribunal.[225] However, this approach has been under severe attack for the lack of proactive protection before the retaliation occurs and the burdensome procedure involving the employment tribunal.[226] Besides, the protection is generally not applicable to foreign-based expatriate workers of the UK companies, as illustrated in the *Foxley* case, chilling many whistleblowers from stepping forward with information about foreign bribery violations.[227] The lack of comprehensive anti-retaliation protection and the absence of financial incentives are blamed for discouraging employees with information about corrupt activities from approaching the authorities.[228] The defective whistleblower rules weaken the threats of detection for corporations and could further undermine their incentives to self-report.[229]

Secondly, the UK enforcement authorities are faced with considerable difficulties in prosecuting big companies, reducing the threats posed to big companies as well as their incentives to self-report. In justifying the DPAs awarded to Rolls-Royce and Airbus, the court relied especially on the potentially disproportionate consequences of corporate conviction and the following debarment worldwide, which could lead to a loss of revenue in hundreds of billions and the massive unemployment.[230] The authorities' anxiety about the adverse consequences of corporate conviction greatly restricts their capability to incentivize big corporations to self-report via the DPA regime.[231]

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undermine the effective internal whistleblowing mechanism); Department for Business, Innovation and Skills, "Whistleblowing Framework: Call for Evidence - Government Response," June 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/323399/bis-14-914-whistleblowing-framework-call-for-evidence-government-response.pdf (accessed October 15, 2020), at 19 (documenting the arguments against financial incentives, including that monetary incentives would undermine the moral stance of whistleblowers and encourage the exposure of wrongdoings at a later time to obtain a larger bounty).

[225] Public Interest Disclosure Act 1998, c. 23, Article 3.

[226] Blueprint for Free Speech, "Protecting Whistleblowers in the UK: A New Blueprint," May 2016, https://blueprintforfreespeech.net/wp-content/uploads/2016/05/Report-Protecting-Whistleblowers-In-The-UK.pdf (accessed April 17, 2020), at 3-12 (claiming that Public Interest Disclosure Act 1998 (PIDA) does not and cannot adequately protect whistleblowers, because, inter alia, PIDA relies on ex-post compensation rather than ex-ante protection, and the employment tribunal system does not present an informal, low-cost solution to resolve PIDA disputes); OECD, *Implementing the OECD Anti-bribery Convention Phase 4 Report - United Kingdom*, 2017, at 18-21 (noting that the PIDA was an advanced whistleblowers protection statute when it was introduced in the 1990s, but the decade-old statute needs re-evaluated and amended amidst criticisms).

[227] *Foxley v. GPT Project Management Ltd.,* Employment Tribunal, Case No. 2200879312011, at 20 (finding that the employment relationship at issue "was not such an exceptional case where the employment has a closer connection with Britain and British employment law than when with any other system of law", and the Claimant therefore did not enjoy protection from unfair dismissal or protection from detriment under the Employment Rights Act, which was later amended by the PIDA).

[228] Department for Business, Innovation and Skills, "Whistleblowing Framework: Call for Evidence - Government Response," June 2014, at 12 (acknowledging the reality of the fear of reprisal as a result of the cultural attitudes and long-holding behaviors); Miralem, "Comment, the SEC's Whistleblower Program and Its Effect on Internal Compliance Programs," 349 (noting that even though the majority of whistleblowers do initially report inside, companies are typically punishing the loyal employees instead of using the information to promote compliance through an effective internal compliance program).

[229] Alexander Dyck, Adair Morse and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" *The Journal of Finance* 65, no. 6 (2010): 2213-53 (the analysis of all reported fraud cases in large US corporations from 1996 to 2004 found that employees, media and industry regulator play a major role in fraud detection, and monetary incentives can best explain employee whistleblowing).

[230] *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, paras. 52-57 (considering particularly the negative impacts of prosecution, though acknowledging none is determinative, including conviction-triggered debarment that may account for 30% of the company's order, the loss of shareholder confidence and even viability of the company, repercussions to the interests of third party such as the UK defense industry, employees, pensioners and those in its supply chain); *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 82-86 (noting that the collateral consequences of a conviction will be huge, including losses of thousands of job opportunities and revenue of over €200 billion, a hit to GDP of €100 billion in each of the countries involved, and the creation of a monopolistic behemoth for Boeing).

[231] Transparency International UK, "A Failure of Nerve: The SFO's Settlement with Rolls Royce," January 19, 2017, https://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/ (accessed November 4, 2019) (criticizing that the adverse consequences as a result of criminal conviction were vastly overplayed in the DPA consideration).

In summary, the UK authorities lay great emphasis on the importance of corporate cooperation. The enforcement practices that restrict the application of DPAs to cases where corporations provide new information to the government in the form of voluntary disclosure or extraordinary cooperation help strengthen the government's capability to uncover corporate misconduct and save public enforcement costs. However, the UK DPA regime falls to a certain extent below the optimal standard. Prompt self-disclosure and ensuing full cooperation are not a guarantee of a way out of full-scale prosecution. Instead, they are among a list of public interest factors considered by the prosecutors in offering a DPA. In contrast, a corporation might obtain an access to a DPA with the maximum fine reduction even when they choose not to self-report but to wait for the initiation of the government's own investigation and then start to provide extraordinary cooperation. The lack of additional and predictable credits for corporations that have both self-reported and cooperated compared to those that have only cooperated is likely to discourage corporations from self-reporting at all. Furthermore, the defective whistleblower protection regime, which reduces the whistleblower's motives to report and the government's capability to uncover corporate misconduct, could worsen the corporate's disincentives to self-report. Regarding the threats, the UKBA, especially the "failure to prevent" model of corporate liability, presents a menacing stick to corporations implicated in bribery schemes. However, the undue anxiety about the collateral consequences of corporate conviction renders the UK authorities' hands tied when dealing with big corporations. It could thus undermine the attraction of DPAs for big corporations in terms of incentivizing corporate voluntary self-disclosure and full cooperation.[232]

Since the inception of the DPA regime in the UK in 2014, the SFO has only concluded 12 DPAs within the eight-year period.[233] The relatively low number of DPAs in the UK may be explained by the high threshold for an access to a DPA, which is perceived as a supplement to, rather than a substitute for, the criminal prosecution.[234] However, the mixed incentives provided by the DPA regime and complementary rules for corporations to self-report and cooperate possibly play an even more important role in explaining the low frequency of corporate resolutions and the relatively inactive foreign bribery enforcement in the UK.[235]

4.6 Conclusion

A cooperative approach involving both the public enforcement authorities and the business actors is critical to the effective enforcement of anti-bribery laws. This is probably the most important lesson that the corporate enforcement policies and practices in the U.S., UK and France can offer for China and other countries that are struggling with the endemic bribery problems despite frequent anti-bribery campaigns. Corporate self-reporting and the subsequent

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[232] Caroline Binham, "Call to Make Companies Liable for Failure to Prevent Fraud," *Financial Times*, June 5, 2013, https://www.ft.com/content/4900db34-cdf4-11e2-a13e-00144feab7d (accessed April 5, 2020) (David Green, the former director of the SFO, calls for the extension of the failure to prevent model to assist in the application of DPA, claiming that "if a corporate can't be prosecuted, why should it agree to a DPA?").

[233] For the links to the DPAs and relevant documents, see Deferred Prosecution Agreements, Current SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed February 20, 2023).

[234] SFO and CPS, DPA Code of Practice, Article 2.5 ("a prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution").

[235] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements outside the U.S.," 183-85 (blaming the excessively narrow corporate criminal liability rule and the lack of effective whistleblower laws for the low number of DPAs in the UK).

cooperation, which help reduce the costs and increase the efficiency of the public monitoring and enforcement efforts, are particularly valuable for the resource-constrained enforcement agencies and the whole society. The enforcement agencies can more effectively detect and sanction bribery by encouraging the business to collaborate with them in the form of voluntary self-disclosure and extensive cooperation. In order to obtain the social advantages of corporate self-reporting and cooperation, the change of the traditional mindset that combating bribery is the sole business of the public enforcement agencies is fundamental. It is important for the public enforcement agencies to appreciate more the potentials of corporate actors.

The second valuable lesson is that DPA and similar pre-trial resolution mechanisms present a particularly useful tool for the government to incentivize corporate self-reporting. The DPA mechanism benefits corporations involved in bribery offenses in both substantive and procedural terms, giving them the possibility to circumvent the court trial and to resolve the criminal matter quickly. Given the corporations' aversion to the protracted prosecution process and the destructive collateral consequences of criminal conviction, an access to a DPA or declination presents the greatest incentive for corporations to act in accordance with the government's expectation. The authorities can thus effectively incentivize corporate self-reporting and cooperation by making such corporate measures a precondition for an access to a DPA or declination and offering other incentives such as the significantly reduced financial penalties and an exemption from external monitorships. The prospect of obtaining a DPA or declination provides the main drive behind the corporate decisions to voluntarily approach the authorities with useful information regarding the wrongdoings and recalcitrant individuals.

For jurisdictions that have adopted or are contemplating the adoption of DPA or DPA-like mechanisms, another essential lesson is that the existence of a DPA mechanism does not necessarily lead to active voluntary self-disclosure from corporations. Corporations are unlikely to take the bait of DPA and engage in voluntary self-disclosure if they will be better off with the alternative approach of "wait and see". In order to effectively incentivize corporate self-reporting, the DPA regime should be designed with the purpose of rewarding corporate self-reporting and cooperation, and the benefits under DPAs must be clear and proportionate to the quality and extent of corporate self-policing measures. A clear and comprehensive guidance on the timing, procedure and benefits of self-reporting is helpful to limit the uncertainty in the self-reporting process and to facilitate the corporate decisions to self-report. Corporations that have both self-reported and fully cooperated should be confident of obtaining greater benefits than corporations that have merely cooperated. In addition, the authorities should refrain from demanding excessively broad cooperative measures in the application of DPAs to reduce the costs associated with corporate self-reporting.

Apart from making sure that a DPA mechanism is available and appropriately designed to encourage voluntary self-disclosure from corporations, the government should strive to enhance its own ability to detect and prosecute corporate bribery offenses. Corporations will only have sufficient incentives to self-report and cooperate for the sake of obtaining a DPA if they are otherwise faced with the real threats of being detected and convicted. In this sense, continual public efforts in terms of promoting an effective whistleblower incentive and protection program,

reforming the restrictive anti-bribery laws and corporate liability rules, and strengthening transnational cooperation in the fight against bribery, are essential. Such government efforts could greatly enhance the threats of prosecution for corporate offenders and are critical for the strategy of incentivizing corporate self-reporting via DPAs.

Chapter 5 Individual Liability for Corporate Bribery in the Context of Corporate DPAs

5.1 Introduction

A primary justification for the conclusion of corporate investigations through DPAs, which insulate the corporation from formal criminal prosecution and collateral consequences, is that the individual wrongdoers who actually committed the corporate crimes will be punished.[1] What is more, the DPA regime can be strategically designed to incentivize corporate cooperation with the government's investigations and trigger corporate disciplinary measures to hold culpable executives and officers accountable.[2] In accordance with such justifications, DPA policies in all the three jurisdictions place a particular emphasis on individual accountability and specify that the use of corporate DPAs does not eliminate the necessity of pursing individual liability.[3] Corporate cooperation is interpreted to include the collection and provision of information regarding both the wrongdoings and individual wrongdoers.[4] In addition, appropriate internal disciplinary measures against responsible employees are a key factor considered by the authorities when granting mitigating remediation credits to the corporations under the CEP.[5]

Three general arguments are implicit in the justifications for the corporate DPA regimes. Firstly, in addition to extracting the corporate acceptance of responsibility and corporate obligations under DPAs, it is necessary and socially valuable to hold individual wrongdoers accountable for the corporate wrongdoings.[6] As noted in Chapter 3, corporations are routinely required to pay

[1] "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law," September 17, 2014, https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law (accessed July 23, 2021) ("whenever we have resolved these cases – whether they were civil or criminal in nature – we have almost always reserved the right to continue our civil and criminal investigations into individual executives at the respective firms"); "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed July 23, 2021) ("regardless of whether we indict a company or agree to defer prosecution, individual wrongdoers can never secure immunity through the corporate resolution").

[2] Michael Yangming Xiao, "Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime," *Cornell Journal of Law and Public Policy* 23, no. 1 (2013): 243 (praising DPAs for fostering cooperative relationships between prosecutors and corporations, which increases the efficiency of justice); "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012 (noting DPAs can increase accountability as companies are required to "acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program").

[3] U.S. Justice Manual, 9-28.210 – Focus on Individual Wrongdoers ("regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals"); SFO and CPS, DPA Code of Practice, Article 2.9.1 (recognizing that corporations are incriminated by the actions of individuals and deeming that it will be ordinarily appropriate to investigate, and prosecute if appropriate, those individuals); 2023 CJIP Guidelines, at 25 ("the legal representatives of the company remain liable as individuals").

[4] U.S. Justice Manual, 9-28.700, The Value of Cooperation ("[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct"); SFO and CPS, DPA Code of Practice, Article 2.9.1 ("(a corporation) must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution"); 2023 CJIP Guidelines, at 20 ("it should be noted that the company's good faith in the CJIP negotiation is assessed in particular on the basis of its ability to conduct an internal investigation to identity the main individuals involved in the facts and to disclose them to the public prosecutor's office during the investigations and negotiations").

[5] U.S. Justice Manual, 9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[6] Lisa Kern Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," *New York University Law Review* 82, no. 2 (2007): 333 ("[t]he reasoning seems to be that if corporate misconduct occurs, but the corporation is not to be indicted, some individuals must be held responsible in its stead"); William S. Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," *Iowa Law Review* 87, no. 2 (2002): 649 (claiming that the strategy of inducing corporate cooperation against individual "plays off of the predisposition of prosecutors to see corporate crime as necessitating individual action and their predilection to assign blame").

monetary sanctions and implement drastic structural reforms under DPAs. Such corporate obligations force corporations to internalize the social costs of criminality and could translate into corporate internal disciplines against culpable individuals in the form of termination of employment, demotion, pay cut or reduction in bonuses.[7] Studies have shown that such internal disciplinary measures, though less severe than criminal conviction, can be more effective than the remote risk of criminal penalty in deterring employees' wrongdoings.[8] The individual liability enhancement justification for corporate DPAs presumes that the enforcement strategy of focusing on corporate resolutions and then relying only on corporations to monitor and sanction responsible individuals is not always sufficient to ensure individual accountability, or/and questionable in the case of justice.[9] Individual prosecution is still necessary when corporations have already been ordered to pay a large amount of fine and to implement comprehensive compliance reforms pursuant to DPAs.[10]

Secondly, corporate cooperation in the identification and prosecution of culpable employees could enhance the government's ability to prosecute individual wrongdoers and to reduce the enforcement costs in total.[11] This justification is based on the presumption that the corporation can identify and investigate individual wrongdoers in a more efficient way than the public investigators.[12] Otherwise, it would be more socially desirable for the public authorities to detect, investigate and penalize individual wrongdoers themselves.[13] The use of reduced corporate

[7] Mitchell Polinsky, and Steven Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" *International Review of Law and Economics* 13, no. 3 (1993): 240 ("[i]f firms are made strictly liable for their harms, they will design rewards and punishments for their employees that will lead employees to reduce the risk of causing harm, since firms will want to reduce their liability payments").

[8] Jennifer Arlen, and Refier Kraaman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *New York University Law Review* 72, no. 4 (1997): 692 (noting that entity liability can induce firms to sanction wrongdoers, and in some circumstances, such private sanctions imposed by the firm may be superior to state-imposed sanctions); John C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 399 (observing that in comparison with the criminal sanctions that occasionally and indirectly fall on the middle managers, the threat of dismissal for failing to meet the target is an imminent danger).

[9] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012 ("the strongest deterrent against corporate crime is the prospect of prison time for individual employees"); David M. Uhlmann, "The Pendulum Swings: Reconsidering Corporate Criminal Prosecution," *UC Davis Law Review* 49, (2016): 1279 (acknowledging some valid concerns about corporate-only prosecutions: the misuse of prosecutorial discretion that exchanges the individual immunity for corporate settlement, prosecutor's unwillingness to invest the time and efforts in individual prosecutions, leveraging corporation's reluctance to go to trial to build corporate cases based on weak evidence that are not sufficient to charge individuals).

[10] Kimberly D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly* 81, (2003): 510 ("little evidence exists at all concerning the effectiveness of internal compliance structures as a means to reduce socially harmful conduct.... The evidence that does exist is decidedly mixed, with many of the most methodologically sound studies indicating the lack of effectiveness of such structures"); Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?" *New York Review Books*, January 9 2014, http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions (accessed July 1, 2020) (claiming that individual prosecution would be more effective than "imposing internal compliance measures that are often little more than window-dressing").

[11] Sharon Oded, "Coughing Up Executives or Rolling the Dice? Individual Accountability for Corporate Corruption," *Yale Law & Policy Review* 35, no. 1 (2016): 70-72 (identifying the goal of anti-bribery enforcement, namely, reducing the sum of the social harms of bribery and the costs of enforcement; believing that corporate liability can achieve the goals by inducing corporate cooperation as corporations are better than enforcement authorities to control, monitor and investigate violations).

[12] Jennifer Arlen, and Samuel W. Buell, "The Global Expansion of Corporate Criminal Liability: Effective Enforcement across Legal Systems," *Southern California Law Review 93,* (2020): 753 ("the use of such an enforcement policy to induce corporate detection and investigation, while reducing corporate sanctions, generally enhances welfare only if companies are better able to detect or investigate than the government"); Wallace P. Mullin, and Christopher M Snyder, "Should Firms Be Allowed to Indemnify Their Employees for Sanctions?" *Journal of Law Economics & Organization* 26, no. 1 (2010): 40 ("targeting the firm is particularly effective if it can monitor the agent's actions better than can government authorities").

[13] Polinsky, and Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" 240 (claiming that direct agent liability is preferred if "the state can impose a financial penalty on an employee in excess of what a firm can impose").

sanctions and a pretrial diversion mechanism to incentivize corporate cooperation in the individual proceedings would thus be less justified.[14]

Thirdly, the individual accountability rationale only works if the DPA regime is designed and implemented in a way that effectively incentivizes corporate cooperation in the investigation and prosecution of individuals. In other words, the use of DPAs to settle criminal wrongdoings with corporations in the pre-trial stage would be less justified in the eyes of the public if the corporate executives and officers associated with the wrongdoings go unpunished.[15] To be realistic, the emphasis on individual accountability might actually increase the costs of corporate cooperation and expose corporations to additional reputational or even legal risks.[16] Rational corporations are unlikely to incur the prohibitively high expenses needed to assist in the individual prosecutions if the DPA regime does not offer clear benefits, or the government does not have the ability to detect and punish un-cooperative corporations.[17] Therefore, how to design the DPA mechanism to effectively incentivize corporate cooperation in the investigation and prosecution of individual wrongdoers to the extent of strengthening individual accountability is an essential question underlying the designing and implementation of corporate DPAs.

This Chapter aims to examine the validity of the individual accountability rationale for corporate DPAs, with a focus on the three arguments outlined above. It proceeds in the following steps. Following the Introduction, Section 5.2 introduces the individual liability for bribery violations under the anti-bribery laws in the U.S., UK, and France, as well as the enforcement policies and practices regarding individual accountability in the three jurisidictions. The following Section analyzes the desirability of the policy emphasizing individual targets alongside corporate DPAs. It is found that seeking individual liability for white-collar crimes promotes significant values of retribution, deterrence and fairness. Given the relative advantages and disadvantages of the state vis-à-vis corporations in the investigation and sanctioning of individual wrongdoers, it calls for both corporate internal discipline and public prosecutions to achieve the goal of individual accountability. Given the difficulties inherent in the individual prosecutions and the increased costs falling on cooperating firms, Section 5.4 addresses the question of how to leverage the DPA regime to incentivize corporate cooperation in the individual proceedings with the aim of enhancing the prosecutors' capability of holding individual wrongdoers accountable. Against the benchmark proposed in Section 5.4, Section 5.5 analyzes several prominent strategies adopted by the U.S., UK and French authorities aiming at ensuring the incentives and quality of corporate cooperation towards individual wrongdoers: the "all or nothing" approach, incentivized waiver

[14] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 646 (attributing the practices of using leniency to exchange corporate conciliatory post-offense behaviors to the "extremely limited resources, the complex nature of the corporate form, and the accompanying evidentiary challenges facing prosecutors"); Arlen, and Buell, "The Global Expansion of Corporate Criminal Liability: Effective Enforcement across Legal Systems," 754 (warning that the cooperative enforcement approach may undermine deterrence if the leniency awarded to corporation is not accompanied by increased detection and enforcement).

[15] Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1709 (criticizing the dearth of individual prosecutions accompanying corporate settlement for making corporation a scapegoat that receives the blame and punishment, while individual culprits go free).

[16] Arlen, and Kraaman, "Controlling Corporate Misconduct," 701-707 ("strict liability only encourages policing measures insofar as they reduce the incidence of misconduct, but it perversely discourages them insofar as they increase the firm's expected liability for undeterred misconduct").

[17] Oded, "Coughing Up Executives or Rolling the Dice?" 74 ("[w]hen corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability. Therefore, in the absence of other sources of motivation (e.g., a reduction of the severity of the fine due to self-reporting), one should not expect rational corporations to voluntarily self-report bribery and to cooperate with public investigations").

of legal privileges, and strengthened judicial oversight of corporate DPAs. Section 5.6 concludes with the lessons that the enforcement policies and practices in the three selected jurisdictions could offer for China in terms of upholding individual accountability and deterrence in the context of corporate DPAs.

5.2 Individual Accountability for Bribery Offenses in the U.S., UK, and France

Under the U.S., UK and French anti-bribery laws, both corporations and individuals may face criminal prosecution for bribery violations. This part provides an overview of the substantive criminal rules and corporate enforcement policies in the three selected jurisdictions regarding individual liability for bribery offenses.

5.2.1 Individual Liability under the Anti-bribery Laws

Similar to most other laws penalizing corporate crimes, the anti-bribery laws in the U.S. have a dual liability structure. Both corporations and individuals can be held criminally liable for bribery violations. The two prongs of the U.S. FCPA, the anti-bribery provisions and the books and accounting provisions, can both act as the basis for individual and corporate prosecutions.[18] The anti-bribery provisions apply to corporations falling into the scope of "issuers" and "domestic concerns", as well as foreign persons or non-issuer entities that engage in any act in furtherance of the foreign bribery payment in the U.S. territory.[19] Officers, directors, employees, agents or stockholders acting on behalf of such corporations, regardless of whether they are U.S. or non-U.S. nationals, are subject to criminal liability when they are directly involved in bribery, conspire to commit bribery, or aid or abet bribery.[20] Such individuals are subject to up to a criminal fine of $100,000 or/and 5-year imprisonment per violation, or according to the Alternative Fine Act, a criminal fine of $250,000 or twice the criminal proceeds or twice the gross pecuniary gain or loss from the violation.[21] In addition, criminal liability can also be imposed on companies and individuals who knowingly violate the books and accounting provisions or conspire to commit, or aid or abet, the violations.[22] Unlike the anti-bribery provisions that are restricted to certain types of persons, the accounting provisions have a much broader reach and can be applied to "any persons".[23] Individuals charged with violations of the books and accounting provisions may receive a maximal criminal fine of $5,000,000 and/or 20-year imprisonment per charge.[24]

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[18] Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, Article 5003(a), 102 Stat. 1415, 1415-19 (enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107).

[19] "Issuer" includes any US or Non-US company whose securities are listed on a national securities exchange in the U.S. or quoted in the over-the-counter market in the U.S. and required to file periodic reports with SEC; "domestic concern" includes any U.S. citizen, national, or resident, and any business entity that is organized under the laws of THE U.S. or its states or that has its principal place of business in the US. See DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 9-10.

[20] See DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 35 (claiming that aiding or abetting the FCPA violations will be as guilty as the direct commission of the offense; moreover, individuals or companies may also be liable for conspiring to violate the FCPA even if they are not, or could not be, independently charged with a substantive FCPA violation).

[21] 15 U.S.C. Articles 78dd-2(g)(2)(A); 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 USC Article 3571(d).

[22] See DOJ and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 45.

[23] *Ibid*, at 46.

[24] 15 U.S.C. Article 78ff(a).

The UKBA includes three principal bribery offenses that can be committed by individuals or organizations, including active bribery, passive bribery and bribery of foreign public officials, in addition to the pure organizational offense of failing to prevent bribery under Section 7 of the UKBA.[25] Under Section 14 of the UKBA, it is particularly provided that if the organizational liability for the principal bribery offenses is established, senior officers whose consent or connivance allowed the commission of the bribery schemes are guilty of the offenses and should be punished accordingly.[26] Individuals accused of the bribery violations may face up to 10 years in prison or/and a fine.[27]

Under the French statutes, individuals are faced with criminal liability for bribery and related offenses in two general circumstances. Firstly, the French Criminal Code covers a broad range of bribery offenses, including active and passive bribery involving public officials, judicial officials, private officers and foreign public officials.[28] Individuals charged with bribery of foreign public officials, for example, may be sentenced up to 10-year imprisonment and €1 million fine, which could be increased to twice the proceeds of the offense.[29] Secondly, France's newly promulgated anti-corruption law, which is commonly referred to as the *Sapin II* Act, can also be used to impose individual liability. The *Sapin II* Act makes it a general legal obligation for French companies over a certain size and annual turnover threshold, as well as their presidents, directors and managers and the companies controlled by them, to implement an anti-corruption compliance program in accordance with specific criteria.[30] Once violations of the obligation are detected, even without the proof of any actual bribery transactions, the French Anti-corruption Agency, AFA, may issue a warning or injunction requiring the company to improve the compliance program or file a criminal charge. Convicted companies may be sentenced to up to an administrative fine of one million euros, while culpable individuals may be sentenced to a maximum fine of €200,000.[31] In the case of actual bribery violations, the company may be required to implement or improve the compliance system under the supervision of the AFA at the company's expense, and the executives may be sentenced to up to two years in prison and a fine of €50,000 for failing to implement the anti-corruption compliance system.[32]

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[25] UK Bribery Act 2010, c. 23, Section 1 (active bribery), Section 2 (passive bribery), Section 6 (bribery of foreign public officials); Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010), 2011, at 23 (noting that section 1 and section 6 capture the same conduct, but section 6 does not require the proof of "improper performance" of a relevant function or activity or an intention to induce it that would trigger evidential challenges).

[26] UK Bribery Act 2010, c. 23, Section 14(2).

[27] UK Bribery Act 2010, c. 23, Section 11(1).

[28] Eric Lasry, et al, Baker McKenzie France, "Anti-Corruption in France," *Global Compliance News*, https://www.globalcompliancenews.com/anti-corruption/handbook/anti-corruption-in-france/ (accessed July 13, 2021); Ludovic Malgrain, et al, "Bribery & Corruption 2021| France," *Global Legal Insights,* https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/france (accessed July 13, 2021) (noting that the French bribery legal framework is notoriously complex, including 34 separate criminal offenses for bribery and influence peddling).

[29] Code penal, Article 435-3.

[30] LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (*Sapin* II), Article 17-I & II; OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 122 ("[t]he AFA estimates that approximately 3 000 entities in France – companies or groups (parent/subsidiary corporations) – could be subject to this compliance obligation").

[31] *Sapin* II Act, Article 17-V.

[32] *Ibid,* Article 18.

5.2.2 The Emphasis on Individual Accountability under the DPA Programs

In addition to the criminal laws that explicitly subject individuals to criminal liability for bribery violations, corporate enforcement policies further advocate the necessity of holding individuals directly liable for corporate wrongdoings. From the perspective of the DOJ, prosecuting culpable individuals in addition to the corporate wrongdoers has been its long-held enforcement policy in the white-collar criminal enforcement area.[33] As early as the late 1990s, the Holder Memo already stressed that corporate indictment is not a substitute for the prosecution of culpable individuals in terms of posing strong deterrence against future corporate wrongdoings.[34] A similar notion of individual accountability could constantly be found in the subsequent DOJ's memos, such as the Thompson Memo, and culminates in the Yates Memo.[35] In the post-Yates Memo period, prosecutors are explicitly prohibited from granting an amnesty to individuals when settling with corporations, except under extraordinary circumstances.[36] According to the current USJM, "[p]rovable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution".[37] The incumbent DOJ Deputy Attorney General Lisa Monaco describes individual prosecutions as "unambiguously this department's first priority in corporate criminal matters".[38]

The emphasis on individual accountability for settled corporate wrongdoings can also be found in the UK and French DPA policies. When designing their DPA regimes, both the UK and French authorities insist that DPAs should only be signed with organizations in order to prevent individual criminals from being exempted from criminal prosecutions.[39] In addition, the UK DPA Code of Practice recognizes that corporations can only be incriminated by the actions of individuals and claims that "it will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted".[40] Similarly, the French CJIP Guidelines also

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[33] Peter J. Henning, "Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct," *Vermont Law Review* 41, (2017): 506 ("prosecuting individuals has always been a priority, from the insider trading prosecutions in the 1980s of Ivan Boesky and Michael Milken, to the Savings and Loan Crisis in the early 1990s, to the accounting scandals that brought down companies like Enron and WorldCom in the early 2000s").

[34] Memorandum from Deputy Attorney General Eric Holder, Bringing Criminal Charges against Corporations, June 1999 (the "Holder Memo").

[35] Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (the Thompson Memo), January 20, 2003 ("[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas"); Memorandum from Deputy Attorney General Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (the "Yates Memo"), September 9, 2015, https://www.justice.gov/archives/dag/file/769036/download (accessed December 6, 2019); "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed December 6, 2019) ("while the requirement to provide all facts about individuals isn't new, what has changed is the consequence of not doing it").

[36] Garrett, "The Corporate Criminal as Scapegoat," 1828 (noting one DPA involving AmSouth Bancorp that explicitly provides amnesty for individuals involved in the underlying misconduct, while suspecting that more agreements may involve tacit agreements not to prosecute individual employees); The Yates Memo, September 9, 2015, at 5 ("[a]bsent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals", while the written approval from the relevant Assistant Attorney General or the U.S. Attorney is required for the release of individual liability in extraordinary circumstances).

[37] U.S. Justice Manual, 9-28.210 Focus on Individual Wrongdoers.

[38] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021).

[39] UK Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations, Response to Consultation* CP(R)18/2012, October 23, 2012, para. 47 (believing that DPAs should not be used as a means for individuals to avoid being prosecuted for their crimes, as criminal prosecution and different forms of sanctions including the imprisonment are effective in dealing with individuals engaged in economic crimes).

[40] SFO and CPS, DPA Code of Practice, Article 2.9.1.

emphasize that the use of a CJIP does not mean that the natural persons, especially the legal representatives and top executives of the legal persons, will be exempt from personal liability.[41]

5.2.3 Individual Prosecutions Accompanying Corporate Settlements in Reality

The DOJ's increased emphasis on individual accountability has led to more individuals being charged for FCPA violations, which remain the largest source of corporate settlements in the U.S.[42] As tracked by the FCPA Professor, the DOJ has prosecuted 278 individuals for the criminal violation of the FCPA from 1977 to 2022 in total.[43] Within the almost three decades since the promulgation of the FCPA (from 1977 to 2005), few individuals (59) had been put in the dock for relevant offenses.[44] Only after 2006 did more individual prosecutions (219) begin to be filed, constituting 78.8% of individual prosecutions for FCPA violations of all time.[45]

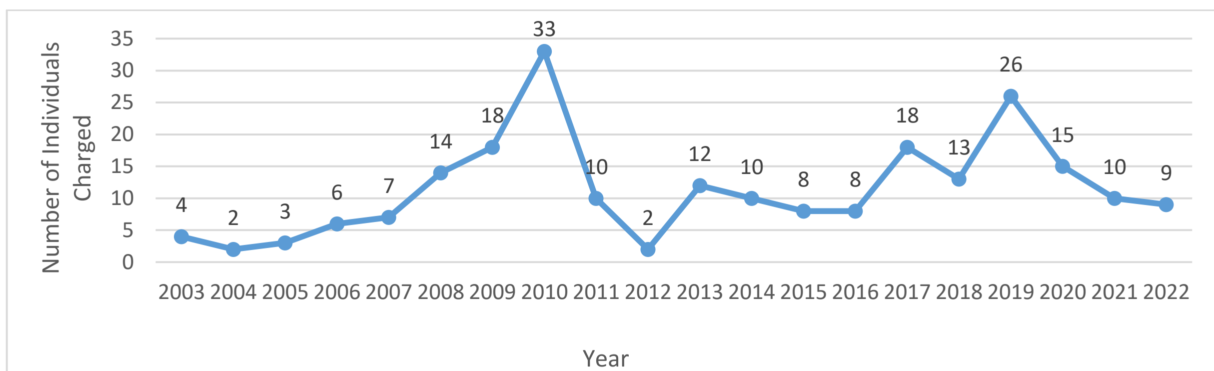

Figure 5 Individuals Criminally Charged by the DOJ for FCPA Violations: 2003-2022[46]

Despite the declared priority on individual accountability and the rising number of individuals indicted for the FCPA violations, individual prosecution is not seen in a surprisingly high percentage of corporate settlements. Out of 136 DOJ corporate enforcement actions in the FCPA area from 2006 to 2022, only 32 (or 23.5%) have resulted in charges against relevant individuals, though it is possible that more individual charges will be brought in the near future.[47] The introduction of declination with disgorgement, in addition to D/NPAs, for the resolution of

[41] PNF, 2023 CJIP Guidelines, at 25 ("the legal representatives of the company remain liable as individuals").
[42] Cindy R. Alexander, and Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea-agreements," *American Criminal Law Review* 52, no. 3 (2017): 563-73 (listing eight categories of offenses that have been settled by public companies and DOJ or federal prosecutors using N/DPAs as well as plea agreements, documenting 14 domestic bribery cases and 56 FCPA cases involving the use of D/NPAs out of 157 agreements from 1997 to 2011).
[43] "A Focus on DOJ Individual Actions," *FCPA Professor*, January 13, 2023, https://fcpaprofessor.com/focus-doj-individual-fcpa-enforcement-actions/ (accessed February 1, 2023).
[44] *Ibid*.
[45] *Ibid*; Gibson Dunn, *2019 Year-end Update on Corporate NPAs and DPAs*, 2 (depicting corporate DPAs and NPAs secured by the DOJ and the SEC from 2000 to 2019 while finding that the use of DPAs for corporate enforcement has increased exponentially since 2003); see Brandon L. Garrett, and Jon Ashley, *Corporate Prosecution Registry*, Duke University and University of Virginia School of Law, https://corporate-prosecution-registry.com/browse/ (accessed January 13, 2023) (the first D/NPA in the FCPA context was concluded with General Electric Company and InVision Te£hnologjes, Inc. in 2004).
[46] "A Focus on DOJ Individual Actions," *FCPA Professor*, January 12, 2023 (noting that the year of 2010 is an outlier as the prosecution of 22 individuals is related to the Africa Sting case, yet all charges were eventually dismissed). According to the varying standards used to define and track individual enforcement actions and other FCPA enforcement statistics, there might be some discrepancies among different sources as to the number of annual individuals charged for the FCPA violations. For relevant data from other sources, see, e.g., Sherman & Sterling, *Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practice Act*; Stanford Law School, Sullivan &Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse-Entity Groups and Individuals Charged, http://fcpa.stanford.edu/statistics-analytics.html (accessed February 2, 2023).
[47] "A Focus on DOJ Individual Actions," *FCPA Professor*, January 12, 2023.

corporate investigations worsens the concerns over the rarity of individual prosecutions in the context of corporate settlements. When announcing the FCPA pilot program, the precursor to the CEP, the then Deputy Attorney General Rod J. Rosenstein justified the new approach for "increase[ing] the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove".[48] Seventeen declination letters have been issued since then, while only one has resulted in the prosecution of relevant individuals.[49]

Studies beyond the FCPA context support the findings on the paucity of individual prosecutions for wrongdoings resolved via corporate settlements. Referring to the Corporate Prosecution Registry maintained by the Legal Data Lab at the University of Virginia School of Law and Duke University School of Law, Garrett analyzed 306 corporate DPAs and NPAs from 2001 to 2014 and discovered that only 34% are accompanied by individual prosecutions.[50] What is more perplexing is that prosecutors have experienced a high rate of defeat in the individual charges brought in connection with corporate DPAs, as 15% of such individual prosecutions resulted in dismissals or acquittals.[51] The relevant percentage of defeat for normal federal white-collar prosecutions is only 7%.[52]

As for the situation in the UK, though twelve corporate DPAs have been concluded involving blockbuster monetary sanctions and extensive compliance reforms, only one individual has been successfully prosecuted (resolved with a guilty plea) alongside the DPAs.[53] In some cases, such as the cases involving Rolls-Royce,[54] Airline Services[55] and Airbus,[56] the SFO decided not to pursue any charges against the relevant individual wrongdoers following the conclusion of corporate DPAs. In other cases, for example those implicating Tesco,[57] Sarclad,[58] Güralp Systems[59] and Serco,[60] the agency suffered major defeats in its attempts to secure individual convictions.

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[48] "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act," November 29, 2017, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign (accessed July 2, 2020).

[49] Brandon L. Garrett, "Declining Corporate Prosecutions," *American Criminal Law Review 57,* (2020): 118-22 (noting that the rate of individual prosecutions accompanying corporate settlements is even lower (28%) when the declination letters are taken into account).

[50] Garrett, "The Corporate Criminal as Scapegoat," 1802 (discovering that only 104 out of 306 DPAs entered by the U.S. federal prosecutors from 2001 to 2014 are accompanied by individual prosecutions).

[51] *Ibid*, 1808-09.

[52] *Ibid*.

[53] Ruby Hamid, et al, "The DPA challenge – the SFO's First DPA-related Conviction of an Individual Bucks the Trend," March 10, 2023, https://www.ashurst.com/en/news-and-insights/legal-updates/the-dpa-challenge---the-sfos-first-dpa-related-conviction/ (accessed April 22, 2023).

[54] "SFO Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals," February 22, 2019, https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ (accessed May 27, 2021).

[55] "SFO enters into Deferred Prosecution Agreement with Airline Services Limited," October 30, 2020, https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/ (accessed May 27, 2021) ("The DPA concludes the SFO's investigation into Airline Services Limited and this conduct").

[56] Kirstin Ridley, "UK prosecutor ends investigation into Airbus individuals – sources," May 4, 2021, https://www.reuters.com/business/aerospace-defense/uk-prosecutor-ends-investigation-into-airbus-individuals-sources-2021-05-04/ (accessed September 9, 2021).

[57] "Tesco Trial Failure is Another Setback for SFO," *Financial Times*, December 9, 2018, https://www.ft.com/content/9b39865c-fba8-11e8-ac00-57a2a826423e (accessed October 8, 2019) (noting the danger of the Tesco precedent that may discourage other companies from reaching DPAs if no real possibility of convictions exists).

[58] "SFO Suffers Further Blow as Sarclad Ltd DPA Revealed," Fulcrum, July 30, 2019, https://fulcrumchambers.com/sfo-suffers-further-blow-as-sarclad-ltd-dpa-revealed/ (accessed May 27, 2021).

[59] "Three Individuals Acquitted as SFO Confirms DPA with Güralp Systems Ltd," December 20, 2019, https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/ (accessed May 27, 2021).

Up to the end of 2022, the French prosecutor's offices have concluded 31 CJIPs, the French equivalent of DPAs to resolve bribery, tax fraud and environmental cases against corporations.[61] So far, no individuals have been convicted in relation to foreign bribery cases resolved via CJIPs.[62] As the CJIP Guidelines emphasizing individual accountability were only introduced in 2019, it remains to be seen whether individuals will be held criminally accountable for wrongdoings underlying the corporate CJIPs in the future.[63]

5.3 Values and Difficulties of Sanctioning Individuals for Corporate Wrongdoings

Following the discussion on the laws, policies and settlement practices in the U.S., UK, and France regarding the individual liability of the bribery violations, this Section moves on to identify the social benefits and costs of prosecuting individuals involved in or responsible for corporate bribery. The analysis of the desirability of seeking individual liability is critical to establishing the (perceived) legitimacy of the DPA mechanism, as a major justification for the corporate DPA system is that it enhances the government's ability to identify and prosecute individual wrongdoers. In addition to discussing the necessity of pursuing individual liability for corporate bribery, the Section also attempts to understand the practical difficulties confronting the enforcement agencies and corporations in doing so. The analysis of the advantages and shortcomings of the public enforcement agencies versus private corporations in adequately sanctioning individual wrongdoers is crucial to the designing of the DPA program, which could be used by the government to incentivize corporate cooperation with reduced liability.

5.3.1 The Values of Pursuing Individual Liability alongside Corporate DPAs

As correctly noted by Eric Holder, the former DOJ deputy attorney General, holding individuals, especially senior managers and board members, accountable for the settled corporate crimes, promotes significant values such as accountability, deterrence and fairness.[64]

Seeking individual liability helps assign the blame and enhance accountability. A corporation as an artificial person cannot commit criminal wrongdoings except through individual employees

[60] Jasper Jolly, "Trial of Former Serco Executives Collapses as SFO Fails to Disclose Evidence," April 26, 2021, https://www.theguardian.com/business/2021/apr/26/serco-trial-collapses-as-serious-office-fails-to-disclose-evidence (accessed September 9, 2021).

[61] For the existing CJIPs, see the website of AFA, https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public (accessed January 14, 2023), and the website of Ministère de la Justice, http://www.justice.gouv.fr/publications-10047/cjip-13002/ (accessed January 14, 2023).

[62] OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 111 (noting that no individuals have been convicted to date regarding the 5 CJIPs that have been concluded in relation to foreign bribery cases, either through trial or a CRPC, a French-version of guilty plea); Gibson Dunn, *2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, July* 22, 2021, https://www.gibsondunn.com/wp-content/uploads/2021/07/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf (accessed September 9, 2021), at 20 (discussing the ruling from Judicial Court of Paris that rejected the plea offered to three executives in relation to a corporate CJIP, and noting that "[t]his is the first time a French court has considered—let alone rejected—plea deals alongside a CJIP").

[63] A circular introduced by the French Ministry of Justice in January 2018 regarding the implementation of *Sapin* II also mentioned individual accountability alongside CJIPs by cross-referring to the DOJ's Yates Memo, but this circular is considered too abstract to provide any sufficient guidance and legal certainty. See Circular relating to the presentation and implementation of the penal provisions provided for by law n° 2016-1691 of December 9, 2016 relating to transparency, the fight against corruption and the modernization of economic life, JUSD1802971C, January 31, 2018, http://www.justice.gouv.fr/bo/2018/20180228/JUSD1802971C.pdf (accessed October 3, 2021), at 15.

[64] "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law," September 17, 2014.

and agents.[65] It may be the case that when the corporate knowledge is based on the collective knowledge of a group of employees, no specific individual can be identified as responsible for a particular corporate misconduct.[66] For most bribery cases, however, the finding of corporate liability necessarily means that individual liability or even managerial liability exists. It is thus not only natural but also important for the public to ask who went to jail when the corporate settlements are announced.[67]

On the other side of the coin, the dearth of successful individual prosecutions could undermine the basis of corporate DPAs and discourage future corporate cooperation. Corporate liability rules based on different doctrines, either the prevailing *respondeat superior* in the U.S. or the identification principle or the "failure to prevent" liability model in the UK, all hold that corporate criminal liability can only be incurred by the wrongdoings committed by individuals associated with the company.[68] The imposition of burdensome fines and compliance obligations on corporations through pre-trial resolutions, without prosecution of the individual wrongdoers, is thus less justified.[69] For example, in the DPA negotiated between the SFO and Tesco, three individuals were named for being "aware of and dishonestly perpetuat[ing] the misstatement", while the subsequent prosecutions against them all ended in an acquittal.[70] The SFO' failure to establish the culpability of relevant individuals triggered critical comments questioning whether Tesco was too haste in striking a deal with the SFO.[71] Being aware of the authorities' inability to pose credible threats of corporate conviction, companies are less likely to self-report and cooperate with the government's investigation with the aim of securing a DPA.[72]

Enforcement actions targeting culpable individuals, especially high-level managers, promote important values of deterrence and compliance. Senior managers do not personally pay corporate fines or the costs of compliance reforms required in the settlement agreements; the shareholders

[65] *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("the only way in which a corporation can act is through the individuals who act on its behalf").
[66] *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987) (discussing the "collective knowledge doctrine", which raises the possibility that a corporation is convicted of crimes for which no individual liability can be found).
[67] Christopher M. Matthews, "Senators Question FCPA Enforcement Policies in Hearing," *Global Investigation Review*, November 30, 2010, https://globalinvestigationsreview.com/article/jac/1019875/senators-question-fcpa-enforcement-policies-in-hearing (accessed July 24, 2020) ("'My question is, who's going to jail?' Sen. Arlen Specter said").
[68] According to the vicarious liability rule that is prevailing in the U.S. federal law, corporations are held strictly liable for criminal wrongdoings committed by employees within the scope of their employment and with the motive, at least in part, to benefit the corporations, see *New York Central & Hudson River Railroad Co. v. United States*, 212 US 494 (1909). Corporations commit an offense defined by Sections 1 and 6 of the UKBA, namely, bribing another person and bribing foreign public officials, by virtue of the common law 'identification' principle, according to which corporate liability arises only when the offense is committed by a natural person who is the "directing mind or will" of the corporation; Corporate liability under the offense of failure to prevent bribery proscribed by Section 7 of the UKBA will be triggered if the corporations have failed to "prevent conduct that would amount to the commission of an offence under sections 1 or 6", though it is irrelevant whether any person has been convicted of such an offense. See Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, 2011, paras. 13 & 14.
[69] Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?" *The New York Review*, January 9, 2014, http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions (accessed August 18, 2021) ("[i]t is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager?").
[70] Jane Croft, and Jonathan Eley, "Tesco Fraud Trial Collapse Puts Deferred Prosecution Deals in the Dock," *Financial Times*, January 23, 2019, https://www.ft.com/content/b6c2b688-1f29-11e9-b126-46fc3ad87c65 (accessed October 11, 2019) (criticizing that the postponed release of Tesco DPA after the acquittal of three pertinent individuals still named these individuals to be criminally responsible).
[71] *Ibid* (questioning if Tesco and its chief executive were too quick to conclude the investigation into the scandal and sign the DPA).
[72] "Tesco Trial Failure is Another Setback for SFO," *Financial Times*, December 9, 2018, https://www.ft.com/content/9b39865c-fba8-11e8-ac00-57a2a826423e (accessed October 8, 2019) (noting the danger of the Tesco precedent that may discourage other companies from reaching DPAs if no real possibility of convictions exists).

are the ultimate bearers of such costs.[73] Corporations may see their stock price rising in the wake of the resolution announcement, which is often positively viewed by the market that the corporation could finally wrap up the scandal and move on.[74] Instead of suffering from pay cuts or dismissals for the compliance or supervision failures, corporate executives might even be rewarded for managing to obtain a pre-trial settlement and lead the company out of the scandal quickly.[75] When their personal wealth and liberty are not at risk, high-ranking managers are likely to perceive the DPA-imposed corporate sanctions as merely the cost of doing business.[76] They tend to make bold business decisions, and indulge or even conceal bribery schemes to achieve business goals, regardless of the danger posed to the corporation, thus increasing the agency costs between the corporation and the management.[77] Conversely, managers having credible concerns about personal liability would have more incentives to oversee the development of effective compliance program in order to prevent corporate wrongdoings and to foster the corporate culture of compliance.[78]

Seeking individual liability for white-collar crimes enhances fairness and the public's trust in the justice system. The dearth of punishment against corporate executives for high-profile white-collar crimes ferments popular criticisms that the rich and the powerful are beyond the reach of law.[79] Holding those individual wrongdoers accountable in addition to reaching corporate settlements helps restore the public's confidence in the criminal justice.

In light of the crucial values of holding individuals accountable for corporate wrongdoings, the OECD explicitly calls for its member states to ensure that the resolution of foreign bribery cases

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[73] Albert W. Alschuler, "Two Ways to Think About the Punishment of Corporations," *American Criminal Law Review* 46, no. 4 (2009):1367 ("[t]his punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too"); Coffee, "'No Soul to Damn: no Body to Kick'," 401-02 ("[a]xiomatically, corporations do not bear the ultimate cost of the fine", and the costs of deterrence tend to spill over onto parties including stockholders, creditors, lower echelon employees and customers).

[74] Peggy Hollinger, and Catherine Belton, "Rolls-Royce Shares Climb on Back of Bribery Settlement," *Bloomberg*, January 17, 2017, https://www.ft.com/content/5740a276-dc17-11e6-9d7c-be108f1c1dce (accessed July 22, 2020) (noting that the Rolls-Royce shares were up almost 8% after the company announced the DPA involving £671 million to settle allegations of bribery and corruption, which had been the largest fine ever imposed by the British authority on a company for criminal conduct until the Airbus DPA).

[75] "IFMA's Compliance And Legal Society Annual Seminar Prepared Remarks of U.S. Attorney Preet Bharara," March 31, 2014, https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney (accessed July 22, 2020) ("[i]f a company fails to meet its revenue targets quarter after quarter, or if its stock price lags that of its peers month after month, the board will not hesitate to fire and replace the CEO. But if a company suffers compliance failure after compliance failure and faces one criminal investigation after another, the CEO might yet get a raise").

[76] Transparency International, *Lack of Individual Prosecutions in Rolls Royce Bribery Case: Justice Not Served*, February 22, 2019, https://www.transparency.org.uk/press-releases/lack-of-individual-prosecutions-rolls-royce-bribery-case/ (accessed October 8, 2019) (criticizing that this case may send a message to the corporate world that "DPAs are a soft option for those engaging in serious corruption and individuals breaking the law that, at the right price, can buy their way out of punishment").

[77] Oded, "Coughing Up Executives or Rolling the Dice?" 73-74 ("lack of individual accountability may increase the agency cost between corporations and their employees and encourage employees to engage in bribery to achieve their business targets and personal benefits while knowing that the corporation alone bears the risk of liability").

[78] "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," September 10, 2015, http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school (accessed August 11, 2021) ("[b]y holding individuals accountable, we can change corporate culture to appropriately recognize the full costs of wrongdoing"); Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010), 2011, 23 ("those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable").

[79] Edwin H. Sutherland, "White-Collar Criminality," *American Sociological Review* 5, no. 1 (1940): 1-12 (comparing white-collar crimes that are committed by respected business and professional team with crimes in the lower class composed of persons of low socioeconomic status; expressing the concern that business elites often escape adequate punishment for the social harms they caused).

with corporations does not prejudice the enforcement actions against the relevant natural persons in its 2021 Recommendation.[80]

5.3.2 The Difficulties of Identifying and Prosecuting Individuals for Corporate Bribery

There are two major ways to sanction individuals that have been involved in or responsible for corporate bribery: internal discipline within the corporation and external sanctions imposed or sought by the government. However, as will be demonstrated in this Section and the following Section 5.3.3, both approaches to individual liability have major obstacles standing in the way.

Prosecutors are plagued by significant practical challenges in the investigation and prosecution of individuals in relation to corporate bribery. It is believed that such challenges largely explain the rarity of individual prosecutions following corporate DPAs and the high rate of failure in the criminal charges brought against individual wrongdoers.[81] To begin with, the complex structure of modern corporations, characterized by decentralization and delegation of authority, makes it a daunting challenge for the enforcement authorities to disentangle who did what or to link senior managers who are often well insulated from day-to-day operations with a particular bribery scheme.[82] In addition, a growing body of research discovers that corporate deviance is "often related not only to the actions of top management but more generally to organizational processes, decisions, structures, hierarchy, and culture".[83] Employees are more likely to resort to bribery when they are faced with enormous pressure to meet the unrealistic performance goals or deadlines, or being immersed in the corporate culture that prioritizes financial performance over ethical values and compliance.[84] It is thus especially difficult for the public enforcement agencies to point the finger at any particular individual or senior manager as being responsible for the corporate wrongdoing.

The proof of criminal intent remains one of the most demanding tasks in the individual prosecutions.[85] White-collar criminals are often shrewd enough to avoid using emails or making explicit verbal instructions when conspiring to commit the bribery schemes. In other words, there

[80] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, adopted on November 26, 2009 and amended on November 26, 2021, at 10.

[81] Garrett, "The Corporate Criminal as Scapegoat," 1824 (claiming that a more possible explanation for the rarity of individual accountability for crimes which corporations had settled is the real obstacles to prosecuting individuals for corporate crimes); Henning, "Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct," 507 (claiming that by blaming the difficulties of individual prosecutions for the rarity of individual accountability, the DOJ "seems to be hedging its bets at the outset-and for good reason").

[82] *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1006 (9th Cir. 1973) ("[c]omplex business structures, characterized by decentralization and delegation of authority, commonly adopted by corporations for business purposes, make it difficult to identify the particular corporate agents responsible"); "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016 ("blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme").

[83] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 657 ("crime that occurs in a complex organization reflects more than an individual or group act-it is an organizational act"); Pamela H. Bucy, "Corporate Criminal Liability: When Does it Make Sense," *American Criminal Law Review* 46, no. 4 (2009): 1438 (noting that the corporations pose unique opportunities for unlawful behaviors to occur, as the "group dynamics can cause individuals to suspend their own judgment and disregard their usual sense of caution", and "the diffuse nature of organizations creates conditions where violations of the law can occur, and continue undetected").

[84] Seth Maxwell, "The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability," *UCLA Law Review* 29, no. 2 (1982): 454-56 (noting that the corporate context may lessen the individual's sense of personal responsibility for the criminal acts, and the corporate goal set for the employee often necessitate a criminal act on his part); Eugene Soltes, *Why They Do It: Inside the Mind of the White-Collar Criminal* (NY: Public Affairs, 2016), 134 (claiming that executives are often motivated by a desire to serve the "home team", especially with the corporate culture that prioritizes financial performance).

[85] DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 13 (noting that in order for an individual defendant to be criminally liable under the FCPA, he or she must act "willfully", while proof of willingness is not required to establish corporate criminal or civil liability).

is rarely a "smoking gun" about the *mens rea* of the individual offenders.[86] In terms of the high-ranking managers and officers, who are distanced from day-to-day corporate activities and protected by the advice-of-counsel defense, the task of establishing the criminal intent and proving their culpability is understandably more challenging.[87]

The availability of legal privileges and a generous defense budget for white-collar criminals present substantial barriers to public investigations and successful individual prosecutions. Corporate internal investigations nowadays are often led by in-house or external legal counsel, with the assistance of accountants, data analysts and forensic experts, etc.[88] Therefore, the majority of information and documents valuable for the government's investigation, such as the notes of employee interviews, the catalogue of key witnesses and documents, the questionnaires issued to the interviewees, are protected by the attorney-client privilege or work-product doctrine.[89] The corporation's assertion of legal privileges could thus block the government's access to almost all key internal communication and cause significant disruptions to the investigation.[90] In addition, white-collar defendants generally have more financial resources than street criminals to support an aggressive defense strategy, given the indemnification provision that is available to a large number of corporate directors and officers.[91] They are thus able to use the corporate resources to retain the most capable and highly priced lawyers to delay criminal investigation and rigorously question the prosecutor's theories of liability.[92]

The trans-national feature of foreign bribery violations poses special challenges for the enforcement agencies.[93] In response to the aggressive application of exterritorial laws by foreign

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[86] "Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law," September 17, 2014 ("[m]any financial criminals are savvy enough to avoid using email, which may leave a trail for investigators to follow. And intent may only be evidenced sometimes in the form of verbal instructions – evidence that can provide the sort of "smoking gun" that is needed to secure a conviction"); Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," *Yale Law Journal* 118, no. 1 (2008): 151 ("[w]hite-collar charges often involve the most complex factual predicates and nuanced understandings of guilt: quite literally, there is no 'smoking gun'").

[87] Coffee, Jr., "'No Soul to Damn: No Body to Kick'," 397-99 (noting that the decentralized corporate structure is often misused to insulate the headquarter responsibility, while putting pressure on middle-level managers who have to choose the operational tactics to meet profit quotas assigned by the headquarter); Garrett, "The Corporate Criminal as Scapegoat," 1825 ("individuals may have spoken to lawyers or accountants and received advice that their planned conduct was legal. Such evidence may not be an outright defense to a crime like fraud in which intent to defraud must be shown, but it may be strong evidence of 'good faith' conduct").

[88] Buell, "Criminal Procedure Within the Firm," 1669; Morgran Heavener, "New Frontiers in Compliance Due Diligence: Data Analytics and AI-based approaches," January 16, 2023, https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/03-new-frontiers-in-compliance-due-diligence-data-analytics-and-ai-based-approaches (accessed April 8, 2023).

[89] The attorney-client privilege is the U.S. equivalent of legal professional privileges and refers to "[a] client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney", according to Black's Law Dictionary, p. 1391 col. 2 (Bryan A. Garner 10th ed. 2014). The work-product doctrine applies in the U.S. and protects documents and tangible materials prepared in anticipation of litigation from discovery by opposing counsel or discovery to third parties, see *Hickman v. Taylor*, 329 U.S. 495 (1947).

[90] Buell, "Criminal Procedure Within the Firm," 1669 ("[g]iven that attorney involvement in transactional activity is now ubiquitous, a firm's attorney-client privilege could amount to a privilege protecting intraorganizational communications").

[91] Mullin, and Snyder, "Should Firms be Allowed to Indemnify Their Employees for Sanctions?" 30-31 (noting that "the incorporation laws of most US states allow firms to reimburse agents' legal costs and losses from settlements, judgments, and fines" and citing a Tillinghast-Towers Perrin study to show that "98% of US firms with over 500 shareholders had Director & Officer insurance").

[92] Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," *Yale Law Journal* 118, no. 1 (2008): 153 (noting that the indemnification agreements prevalent in the U.S. is crucial for white-collar criminals to sustain a vigorous defense and to combat, if not evade, criminal investigation and prosecution).

[93] "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," September 10, 2015 ("[t]here are often massive numbers of electronic documents and for corporations that operate worldwide, there are restrictive foreign data privacy laws and a limited ability to compel the testimony of witnesses abroad"); American Bar Association, "Should FCPA 'Territorial' Jurisdiction Reach Extraterritorial Proportions?" November 08, 2018, https://www.americanbar.org/groups/international_law/publications/international_law_news/2013/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions/ (accessed August 7, 2020) (claiming that the challenges of obtaining foreign evidence and extradition result from the authority's aggressive assertion of broad territorial jurisdiction over foreign entities and individuals for conducts that occurred outside the U.S.).

authorities, more and more jurisdictions have introduced blocking statutes to prohibit their nationals from complying with the cooperation requests based on foreign laws.[94] Therefore, the enforcement agencies may have to resort to the protracted and burdensome mutual legal assistance procedure in order to access overseas documents and interview anyone located in another jurisdiction as part of the bribery investigations.[95] Even when the individual wrongdoers are identified and all necessary evidence collected, it is still a difficult task to extradite individual wrongdoers for trial. For example, eight individuals, all non-U.S. citizens or residents, were accused of the FCPA violations for paying bribes to Argentinian officials on behalf of Siemens AG, regarding which and other bribery schemes the company agreed to pay a once record penalty of $800 million in 2008.[96] Apart from two individuals that have been extradited to the U.S. to face criminal trials, Eberhard Reichert in 2018 and Andres Truppel in 2015, all other individuals are still at large more than a decade following the corporate settlement.[97]

5.3.3 The Benefits and Limits of Relying on Corporate Sanctions to Target Individuals

Apart from directly prosecuting individual wrongdoers, the government can also use corporate liability to incentivize corporate internal disciplines on responsible individuals in order to promote individual accountability.[98] In the context of corporate settlements, corporations are generally required to pay hefty fines and adopt extensive compliance reforms. The imposition of corporate liability, as identified by law and economic literature, forces corporations to internalize the costs of criminality and to adopt proactive remedial measures in the form of internal disciplines on wayward employees to prevent corporate wrongdoings and future enforcement actions.[99] In addition, some corporate DPAs include specific requirements that the corporations discipline wayward employees in the form of redundancy, demotion, pay cut or reduction of bonuses.[100]

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[94] See the EU Blocking Statute, Council Regulation (EC), No 2271/96 of 22, November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01996R2271-20180807 (accessed April 8, 2023); see also, Antoine F. Kirry, et al, "French Blocking Statute: Small Changes, Big Expectations," Debevoise & Plimpton, March 21, 2022, https://www.debevoise.com/insights/publications/2022/03/french-blocking-statute (accessed April 8, 2023); see also, 中华人民共和国国际刑事司法协助法 (Law of the PRC on International Criminal Judicial Assistance), Order No. 13 of the President of the PRC, promulgated on October 26, 2018 and became effective as of the same day, unofficial English translation at https://www.chinajusticeobserver.com/law/x/international-criminal-judicial-assistance-law-20181026 (accessed August 13, 2022).

[95] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 21 ("[o]btaining MLA [mutual legal assistance] can sometimes take months, if not years before assistance is provided, thus creating a risk that the evidence may become less valuable over time or even, in certain jurisdictions, the case may become time-barred or otherwise less viable").

[96] Press Release, "Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme," December 13, 2011, https://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe (accessed August 7, 2020).

[97] Richard L. Cassin, "Former Siemens Executive Changes Plea to Guilty in Argentina Bribe Case," March 16, 2018, https://fcpablog.com/2018/03/16/former-siemens-executive-changes-plea-to-guilty-in-argentina/ (accessed August 7, 2020).

[98] Lewis Kornhauser, "An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents," *California Law Review* 70 (1982): 1357-61 (noting that in some circumstances, the assignment of liability between the entity and individuals does not matter as both forms of liability will produce equivalent level of care selected by the agent).

[99] Kathleen Segerson, and Tom Tietenberg, "The Structure of Penalties in Environmental Enforcement: An Economic Analysis," *Journal of Environmental Economics and Management* 23, no. 2 (1992): 179-200 (considering the principal-agent framework under which the principal chooses the firm's compensation and promotion structure, and the agent, observing this choice, selects the level of care to take to prevent actions that may criminally implicate the firm).

[100] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (enumerating corporate measures that may win the company full credit for timely and appropriate remediation, including "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred").

Corporate investigation into individual wrongdoers and internal disciplines are valuable for the enforcement authorities in the following aspects. Firstly, corporations can identify individual wrongdoers and collect supporting evidence in a more cost-effective manner, without the same level of due process restriction that applies to public investigators.[101] With a better understanding of the division of authority and the high-risk areas flagged by the internal audit and whistleblowing tips, corporations are generally more capable of identifying individuals with information and locating relevant documents.[102] They enjoy considerable leverage, including employees' loyalty and the threat of termination, to pressure individuals to cooperate without fear of violating the individuals' right against compulsory self-incrimination.[103] The special knowledge possessed by the corporate investigators regarding the corporate structure, industry practices and terminology makes them more likely than public investigators to disentangle the criminal misconduct and establish the link between high-ranking executives and specific misconduct.[104] In addition, corporations can more easily transcend the national borders by delegating local subsidiaries to investigate the potential wrongdoings and share the results and evidence with the headquarters, without resorting to the cumbersome mutual legal assistance procedure.[105] Secondly, studies have shown that the internal disciplinary measures imposed by corporations can be more effective than the criminal penalty in terms of deterring employees' wrongdoings.[106] Though criminal sanctions are more severe and may even restrict a person's liberty, corporate disciplinary measures enjoy a higher probability of application and pose more imminent dangers for employees.[107] Thirdly, corporations could complement public enforcement resources by investigating and disciplining individual wrongdoers.[108] As corporations will bear the costs of detecting and investigating individual wrongdoers, enforcement agencies can utilize their scarce resources to launch more corporate enforcement actions.[109]

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[101] Coffee, Jr., "'No Soul to Damn: No Body to Kick'," 408 ("(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards"); John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," *Michigan Law Review* 80, no. 7 (1982): 1481 ("[i]nternal discipline is in many ways more potent than government prosecution because internal enforcers do not have to surmount the hurdle of proof beyond reasonable doubt, and do not have to cut through a conspiracy of diffused accountability within the organization").

[102] Braithwaite, "Enforced Self-Regulation," 1468 ("corporate compliance personnel are more likely than government inspectors to know where 'the bodies were buried,' and to be able to detect cover-ups").

[103] *Ibid,* 1469 (noting that corporate inspectors often tell the employees that "we are part of the same family, and, unlike the government, we are working for the same final objectives"); *Gilman v. Marsh & McLennan Cos*., 826 F.3d 69 (2d Cir. 2016) (noting that corporations interacting with employees as part of the internal investigation are generally not government actors under the U.S. constitutional law, even when the investigation is aimed for future cooperation with the government, and affirming employers' right to terminate an employee who refused to cooperate in an internal investigation).

[104] Brent Fisse, and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1983), 184 ("participants in the haggling will be persons who spend their lives participating in the symbolic world of the corporation concerned, who speak the same language of responsibility, who understand the extent to which the organisation chart really means something").

[105] However, this investigative edge enjoyed by the corporations seems to be shrinking with the global trends of tightening data privacy and security laws in relation to cross-border transfer of data, see *supra* note 159.

[106] Coffee, Jr., "'No Soul to Damn: No Body to Kick'," 410 ("internal sanctions are far less severe than is a felony conviction (even without a prison term), but the probability of their application is much higher").

[107] Arlen, and Kraaman, "Controlling Corporate Misconduct," *New York University Law Review* 72, no. 4 (1997): 692, ft 18 (noting that firm sanctions are superior to public sanctions "when the firm can determine guilt more accurately, or has lower administrative and sanctioning costs, and is not more restricted than the state in the sanction it can impose").

[108] John T. Scholz, "Voluntary Compliance and Regulatory Enforcement," *Law & Policy* 6, no. 4 (1984): 385-86 (claiming that the cooperation between agency and firm reduces both the enforcement costs and compliance costs); Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75, no. 101 (2000): 663 (acknowledging the role of private actors in the enforcement area by shouldering the agency's enforcement burden, which is greatly valuable to the understaffed and overburdened regulators).

[109] John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law and Society Review* (1984): 184 ("agencies can shift scarce monitoring and prosecutorial resources from cooperative firms to bad firms, thereby increasing, through deterrence, the level of compliance among bad firms").

On the other hand, the strategy of prioritizing corporate enforcement and then relying on the corporations to sanction individuals suffers major drawbacks. The smooth-functioning of such strategy depends on the corporations' incentives and capability to adequately penalize culpable individuals.[110] In many circumstances, however, neither elements can be guaranteed.[111] First of all, the government may find it impossible or unwise to impose sufficiently large corporate sanctions, owing to the judgement proof problem,[112] the government's concerns over the spill-over effect of the corporate sanctions on the innocent third-parties, and the necessity to tap reduced liability to incentivize corporate cooperation.[113] Inadequate corporate sanctions are unable to force corporations to internalize the full social costs of bribery, and thus unlikely to catalyze adequate internal disciplinary measures.[114] Even when a sufficiently large corporate fine is imposed, it may still fail to cause real impacts on the corporate managers.[115] The corporate fine ultimately falls on the shareholders rather than the individual executives themselves.[116] Instead of suffering from pay cuts or replacement for compliance failures, corporate executives may even be rewarded for striking a deal with the government and "navigat[ing] a difficult time for the company".[117]

Even if corporations are sufficiently incentivized to take disciplinary measures, they have limited capability to adequately sanction individual wrongdoers. Polinsky and Shavell's seminal study considers the insufficiency of corporate internal sanctions in light of the availability of alternative job opportunities, and the limited individuals' assets at stake.[118] Corporate disciplinary measures are restricted to termination, demotion, the reduction or withdrawal of payments including salary, bonuses and fringe benefits. When dealing with judgement-proof employees, unlike the state, corporations don't have the option of inflicting the criminal stigma,

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[110] Nuno Garoupa, "Corporate Criminal Law and Organization Incentives: A Managerial Perspective," *Managerial and Decision Economics* 21, (2000): 244 (claiming that when resorting to corporate liability, "the government must make sure the firm has the appropriate incentives to monitor and penalize its employees").

[111] Braithwaite, "Enforced Self-Regulation," 1470 (noting that the biggest weakness of corporate voluntary self-regulation is that corporations may be not willing to regulate their business activities effectively).

[112] Steven Shavell, "The Judgement Proof Problem," *International Review of Law and Economics, no. 6* (1986): 45 (noting that "[p]arties who cause harm to others may sometimes turn out to be 'judgment proof,' that is, unable to pay fully the amount for which they have been found legally liable").

[113] Vikramaditya S. Khanna, and Timothy L. Dickinson, "The Corporate Monitor: The New Corporate Czar," *Michigan Law Review* 105, no. 8 (2007): 1729 (noting that "the deterrent effect of cash fines might be exhausted for a number of reasons, including that the corporation has no more assets that can be attached or that the sanction desired for deterrence purposes is so high that it is politically or morally unacceptable and hence cannot be imposed"); Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1398-1401 (noting the ineffectiveness of using higher fine to trigger more invest in internal-control mechanisms from Too Big To Jail companies, once the noncooperative fine has reached its upper limit).

[114] Jennifer Arlen, "Corporate Criminal Liability: Theory and Evidence," in A. Harel & K. Hylton ed. *Research Handbook on the Economics of Criminal Law* (Northampton, MA: Edward Elgar, 2012): 170 ("[c]orporate liability will not induce firms to impose optimal sanctions on individual wrongdoers when firms do not bear the full social cost of crime because the optimal sanction exceeds the firm's ability to pay").

[115] Coffee, Jr., "'No Soul to Damn: no Body to Kick'," 408-09 (introducing several rebuttals of the view that sufficient corporate liability will trigger adequate internal corrective action: the deterrence-trap problem; the externality question; the corporate's reluctance to sanction senior managers; the stockholder's inadequate ability to control corporate managers).

[116] See *supra* note 73.

[117] "SIFMA's Compliance And Legal Society Annual Seminar Prepared Remarks of U.S. Attorney Preet Bharara," March 31, 2014, https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney (accessed July 19, 2021) ("[i]f a company fails to meet its revenue targets quarter after quarter, or if its stock price lags that of its peers month after month, the board will not hesitate to fire and replace the CEO. But if a company suffers compliance failure after compliance failure and faces one criminal investigation after another, the CEO might yet get a raise").

[118] Polinsky, and Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" 240 ("the effect of dismissal is limited by the presence of alternative opportunities for employees, and the threat of suit by the firm against its employees is limited by the assets that the employees have at stake").

sending them to jail or imposing an industry-wide ban to provide additional deterrents.[119] Moreover, the mere reliance on corporate disciplinary measures might also lead to the scapegoating problem. With no threat of state interference, corporations may discipline only low-level employees with peripheral connections to the wrongdoing as a scapegoat for senior executives that are deemed too valuable for the corporate business.[120]

In a word, corporate enforcement actions involving severe corporate sanctions could catalyze corporate internal disciplinary measures, which can be more cost-effective in deterring individual wrongdoings than the remote risk of criminal sanctions. Nonetheless, the strategy of relying solely on corporations to sanction recalcitrant employees through disciplinary measures is not enough to ensure individual accountability given the lack of sufficient corporate incentives and capability to adequately sanction individual wrongdoers in certain circumstances.

5.4 Employing Corporate DPAs to Enhance Individual Accountability

The previous Section identified the key benefits that can be achieved by holding individual wrongdoers accountable for corporate bribery. The two potential approaches to individual accountability, the government-pursued prosecutions and the corporation-imposed disciplinary measures, both have their own advantages and shortcomings. The government is faced with significant difficulties in identifying and investigating individual wrongdoers owing to the blurred lines of authority, the ubiquity of legal privileges, and the transnational elements of foreign bribery. In comparison, corporations are relatively superior in investigating and disciplining individual wrongdoers based on their better knowledge of the organization and lower due process restrictions. However, the incentives and capability of corporations to adequately sanction individual wrongdoers are insufficient in many circumstances. Given that both the government-only and corporate-only enforcement approaches have their own advantages and limitations, this Section proposes to utilize the DPA regime to foster a mixed enforcement strategy involving both the public agencies and corporate actors to enhance individual accountability.

5.4.1 Ensuring Corporate Incentives to Sanction Individual Wrongdoers through DPAs

As discussed in Section 5.3.3, the corporation-imposed sanctions can provide powerful deterrents to individual wrongdoers given the high probability of application. Corporate internal disciplinary measures are relatively more cost-effective than criminal prosecutions of individual wrongdoers and could thus reduce the enforcement costs in general.[121] On the other hand, corporations may have inadequate incentives to discipline individual wrongdoers when they

[119] Arlen, and Kraakman, "Controlling Corporate Misconduct," *New York University Law Review* 72, no. 4 (1997): 695-96 (however, noting that the state's use of imprisonment to compliment monetary sanctions is restricted by the high costs of imprisonment, marginal deterrence concerns, and normative considerations other than efficiency).

[120] Fisse, and Braithwaite, *Corporations, Crime and Accountability*, 182-83 ("[c]orporations, if left to their own devices, will try to deflect responsibility to a select group of sacrificial personnel, often at a lower level than the actual source of skullduggery"); Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 655 ("[t]he fear is that, to some organizations, subordinate employees who have a peripheral connection to corporate deviance will be seen as expendable, particularly when serious negotiations over criminal liability begins").

[121] See *supra* notes 101-109.

don't bear the full costs of the individual's wrongdoings as a result of the low corporate fine or/and the effect of corporate settlements on public relations.[122]

In order to ensure that corporations have sufficient incentives to discipline individual wrongdoers, the enforcement authorities may employ both indirect and direct strategies. In terms of the indirect approach, the government should impose sufficiently large sanctions on the corporations to force corporations to internalize the full social costs of the bribery. In particular, when setting the corporate monetary sanctions under DPAs, prosecutors need to ensure that the corporation does not benefit from the criminal misconduct, taking into account the financial and reputational benefits received by the corporation from the settlement.[123] Only in this way will the corporation be prompted to adequately sanction wayward employees in order to deter the would-be wrongdoers and protect itself from future enforcement actions. However, as recognized in Section 5.3.3, this indirect approach has major shortcomings as a sufficiently high corporate fine may not be imposed in reality, due to the practical reasons and the existence of the scapegoating problem.

When corporations cannot be trusted to adequately sanction individual wrongdoers, it is necessary for prosecutors to get involved to monitor the internal disciplinary proceeding.[124] This approach is evident in the U.S. corporate enforcement policies and practices. Corporate remediation in the form of replacing the management and disciplining individual wrongdoers is a main factor considered by the prosecutors in making charging decisions and negotiating settlements.[125] In addition, DPAs negotiated with the DOJ increasingly include provisions explicitly demanding corporations to timely and appropriately discipline individuals who participated in the misconduct or failed in their oversight.[126] Inadequate internal sanctioning or blaming low-level employees for the faults of senior executives may constitute a violation of DPAs, subjecting corporations to an extended deferral period, severer sanctions or blunt criminal indictment.[127] Furthermore, the DOJ introduced Compensation Incentives and the Clawbacks Pilot Program in March 2023, aiming to "shift the burden of corporate wrongdoing away from shareholders, who frequently play no role in misconduct, onto those directly responsible".[128] The

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[122] See *supra* notes 113-117.

[123] Joseph W. Yocket, "Choosing Governance in the FCPA Reform Debate," *The Journal of Corporation Law 38*, no. 2 (2013): 346 ("[r]eputational costs further need to be offset by other considerations, including any corresponding public relations benefits that follow from settlement").

[124] Jennifer Arlen, and Marcel Kahan, "Corporate Governance Regulation through Non-prosecution," *University of Chicago Law Review* 84, no. 1 (2017): 357 (advocating for the intervening of authorities if the firm is plagued by significant policing agency costs, because of which the mere reliance on corporate sanctions is inadequate to induce optimal policing).

[125] USJM, 9-28.1000 – Restitution and Remediation.

[126] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (enumerating corporate measures that may win the company full credit for timely and appropriate remediation, including "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred").

[127] Press Release, "Secretary Ross Announces $1.4 Billion ZTE Settlement; ZTE Board, Management Changes and Strictest BIS Compliance Requirements Ever," June 7, 2018, https://www.commerce.gov/news/press-releases/2018/06/secretary-ross-announces-14-billion-zte-settlement-zte-board-management (accessed December 28, 2019) (based on the accusations of failing to punish responsible individuals as agreed and misrepresenting disciplinary actions to the U.S. agencies, ZTE was instructed to pay $ 1.4 billion in fine and escrow payment, retain a team of special compliance coordinators to monitor the company's compliance with the U.S. export control laws for a period of 10 years, and replace the entire board and senior leadership under a second guilty plea).

[128] DOJ, *The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks,* March 3, 2023, https://www.justice.gov/opa/speech/file/1571906/download (accessed April 9, 2023); "Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime," March 2, 2023 https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national (accessed April 9, 2023).

Pilot Program demands that corporate resolution should include the requirement for corporations to implement compliance-related criteria in their corporate compensation and bonus system. In addition, the corporation at issue must demonstrate earnest efforts to recoup the compensation from culpable employees or executives, which will be rewarded with reductions to the corporate fine that are equal to the attempted claw-back amount.[129] The prosecutors' attempts to directly supervise the corporate disciplining actions mitigates the public concerns over the insufficient corporate incentives to adequately discipline individual wrongdoers and the scapegoating problem.[130]

Another drawback to the strategy of relying on corporations to discipline individuals, as identified in Section 5.3.3, is that the corporate disciplinary measures are incomparable to the criminal sanctions in terms of the severity of criminal sanctions and the types of sanctions available, considering the lack of criminal stigma or the option of imprisonment.[131] They are often too weak to deal with individuals that have limited wealth or could offset corporate disciplinary measures by taking job opportunities elsewhere. In cases where the internal discipline is insufficient to ensure individual accountability, a criminal prosecution of culpable individuals is necessary.[132]

5.4.2 Incentivizing Corporate Cooperation in the Individual Prosecutions through DPAs

As observed in Section 5.3, the government is faced with a series of impediments to successful investigations and prosecutions of individuals responsible for corporate bribery. Meanwhile, it was identified that the corporations enjoy considerable advantages in terms of identifying individual wrongdoers and gaining access to witnesses and tangible evidence without the restraints of criminal procedure rules. Given that corporations are generally armed with better inside information and subject to less burdensome procedural rules, the government could reinforce its capability, and save the public enforcement resources, in seeking individual liability by inducing corporations to detect and investigate recalcitrant employees on its behalf.[133] Though the extradition problem is unlikely to be solved with the mere assistance from corporations, corporate cooperation is valuable for the state to overcome the barriers of organizational complexity and legal privileges. With the information provided by the corporations regarding individual wrongdoers and their role in the bribery schemes, the enforcement agencies are spared from the time-consuming and labor-intensive tasks of collecting

[129] Kevin J. Harnisch, "US DOJ Implements First-ever Incentive Program to Clawback Employee Compensation," March 2023, https://www.nortonrosefulbright.com/en/knowledge/publications/fe18301c/us-doj-implements-first-ever-incentive-program-to-clawback-employee-compensation (accessed April 9, 2023).

[130] Fisse, and Braithwaite, *Corporations, Crime and Accountability*, 182-87 (proposing to address the scapegoating problem by (1) sufficiently high sanctions against scapegoating; (2) scrutiny of corporate disciplinary actions; (3) granting employees the right to complain; (4) maintaining minimum procedural protections of individuals subject to internal disciplinary proceedings; (5) legal recognition of the private systems of justice).

[131] See *supra* notes 119-120.

[132] Arlen, and Kraaman, "Controlling Corporate Misconduct," 692 (specifying the conditions for the preferred use of private sanctions against individuals: "when the firm can determine guilt more accurately, or has lower administrative and sanctioning costs, and is not more restricted than the state in the sanction it can impose"); Reinier Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls," *Yale Law Journal* 93, (1984): 867-68 (noting three circumstances for the imposition of liability on corporate participants in addition to corporations, namely, asset insufficiency, sanction insufficiency, and enforcement insufficiency).

[133] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 646 ("[g]iven extremely limited resources, the complex nature of the corporate form, and the accompanying evidentiary challenges facing prosecutors, it is little wonder that the government often exchanges leniency for conciliatory post-offense behavior"); Scholz, "Voluntary Compliance and Regulatory Enforcement," 385-86 (claiming that the cooperation between the public agencies and the firm reduces both the enforcement costs and compliance costs); Oded, "Coughing Up Executives or Rolling the Dice?" 74 ("[c]orporate self-reporting and cooperation can be crucial to the success of an investigation. Without this cooperation, the likelihood of detection is limited, and so are the odds of securing sufficient evidence to reach a conviction").

evidence, interviewing the witnesses and analyzing the documents.[134] In addition, corporations that agree to waive legal privileges boost the government's access to the otherwise privileged information, which is useful for the enforcement authorities to identify individual wrongdoers and also assess the genuineness of corporate cooperation.[135] More individual prosecutions and convictions can thus be obtained without expanding the public enforcement resources.

The cooperative enforcement strategy between the state and corporations has been actively fostered by the DPA programs in U.S., UK and France.[136] Prosecutors are tapping the cooperation credits and the threats of criminal prosecution to incentivize corporate cooperation in the investigation and prosecution of individual wrongdoers.[137] Corporations aiming to obtain a DPA with favorable settlement terms or declination are expected to conduct extensive internal investigations to not only uncover corporate wrongdoings, but also identify and investigate individual wrongdoers.[138] They are required to identify individuals responsible for or involved in the wrongdoings, locate potential witnesses and make them available for interview by the authorities, and proffer supporting evidence including e-mails, bank-records, contracts and other relevant documents in relation to the individual wrongdoers.[139] More controversially, corporations are sometimes induced to waive legal professional privileges with respect to the communication between employees and corporate counsel and to disclose the privileged information to the authorities.[140] The corporate choice of waiver was once perceived by the DOJ, and still is by the UK SFO and arguably also by the French PNF, as a core factor demonstrating the corporate willingness to cooperate.[141] Failing to promptly and fully cooperate in the

[134] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 52-57 (noting that Airbus's internal investigation covered more than 1,750 entities across the world and generated over 30.5 million documents).

[135] Julie R. O'Sullivan, "Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary 'No'," *American Criminal Law Review* 45, (2008): 1266-67 ("prosecutors are able to make more accurate, as well as more expeditious, decisions regarding the appropriate allocation of individual blame or responsibility when they have the benefits of counsel's informational and positioning advantages"); David M. Uhlmann, "Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability," *Maryland Law Review* 72, no. 4 (2013): 1329-30 (claiming that "corporations can and should be expected to provide any information in their possession about criminal activity, if they intend to cooperate with a government investigation and receive credit in any agreement with the government").

[136] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 643-47 (tracing the government-corporation partnership to the passage of U.S. Sentencing Guidelines for Organizations, based on the theories of cooperative regulation, co-regulation, enforced self-regulation, and negotiated compliance); Oded, "Coughing Up Executives or Rolling the Dice?" 55- 59 (outlining the cooperative enforcement model developed by the DOJ ever since the release of Holder Memo in 1999).

[137] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 644 (claiming that the partnership between corporations and government regulators is "achieved through the old carrot and stick trope").

[138] U.S. Justice Manual, 9-28.700, The Value of Cooperation ("[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct"); SFO and CPS, DPA Code of Practice, Article 2.9.1 ("(a corporation) must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals. To do so would be a strong factor in favour of prosecution"); 2023 CJIP Guidelines, at 20 ("it should be noted that the company's good faith in the CJIP negotiation is assessed in particular on the basis of its ability to conduct an internal investigation to identity the main individuals involved in the facts and to disclose them to the public prosecutor's office during the investigations and negotiations").

[139] U.S. Justice Manual, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy; SFO, *Corporate Co-operation Guidance*; The CJIP Guidelines, at 9-10.

[140] *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, para. 121 (noting the Rolls-Royce's voluntary disclosure of internal investigations, with limited waiver as cooperating factor).

[141] For the evolution of DOJ guidelines in this aspect, see Cindy A. Schipani, "The Future of the Attorney-Client Privilege in Corporate Criminal Investigations," *Delaware Journal of Corporate Law* 34, no. 3, (2009): 944-954; SFO, *Corporate Co-operation Guidance*, Witness Accounts and Waiving Privilege, ft. 5 (citing the case of SFO v. ENRC ([2018] EWCA Civ 2006 at [117]) and suggesting that the court may consider the effect of an organisation's non-waiver over witness accounts when it determines whether a proposed DPA is in the interests of justice); Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," February 6, 2023, https://www.skadden.com/insights/publications/2023/02/france-further-aligns-corporate-crime-guidance (accessed April 9, 2023) (noting that the previous CJIP guidelines warned that the refusal to provide privileged materials may affect the company's perceived cooperation level. Though

individual proceedings, corporations risk losing a large part or all cooperation credits, missing the opportunity to settle the case with a pretrial diversion agreement and being subject to criminal convictions and harsher sanctions.[142]

5.4.3 How to Effectively Incentivize Corporate Cooperation in Individual Proceedings

Realistically speaking, corporations are not necessarily willing to fully cooperate in the individual proceedings considering the relevant costs and benefits. It is true that active cooperative measures enable the corporation to alienate itself from the few bad apples within the organization, demonstrate to the government and the public its law-abiding character and zero tolerance for bribery.[143] Moreover, extensive cooperation with the government in identifying and investigating individual wrongdoers could help the corporations to secure a DPA with reduced sanctions or even a declination. However, corporations have to bear considerable costs arising from the cooperative efforts in the individual proceedings.[144] Such costs could be so high that the financial and reputational benefits obtained from the corporate settlements are overshadowed, thus discouraging corporations from cooperating with the government at all. This Section aims to better understand the factors that impact the corporate decision-making process about whether to cooperate. It will first identify the potential costs borne by the corporations in cooperation with the state in the individual investigations and prosecutions. After that, it will address the question of how to effectively incentivize corporate cooperation with the government to seek individual liability, followed with the proposal of the standard for corporate enforcement policy that is effective to incentivize corporate cooperation and strengthen individual accountability.

5.4.3.1 Corporate Costs in Relation to Cooperation in Individual Proceedings

Prosecutors benefit from extensive corporate cooperation in the individual proceedings to the extent of overcoming the practical difficulties in the identification and prosecution of individuals and reducing enforcement costs.[145] However, as will be shown later, the interpretation of corporate cooperation to include cooperation in the individual proceedings could increase the costs for cooperative corporations and ultimately dampen their incentives to cooperate. First of all, against the background of increased emphasis on individual accountability, internal investigations could become more costly for the corporations due to the necessity of expanding the scope of investigations, as well as the employees' reduced motives to cooperate with corporate investigators. From the perspective of corporations, they have to spend more time and

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the updated Guidelines deletes the relevant part, but the expectations that corporations should share interview summaries, documents and attorney notes remain the same).

[142] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, on *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*, October 28, 2021, https://www.justice.gov/dag/page/file/1445106/download (accessed November 1, 2021) ("[t]o receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct"); Christopher Bolyai, et al, Skadden, Arps, Slate, Meagher & Flom LLP "Transatlantic Approach on Corporate Cooperation: How Newly Issued French and UK Guidance Compare to US Practices," *JD Supra*, October 30, 2019, https://www.jdsupra.com/legalnews/transatlantic-approach-on-corporate-34659/#topftn9 (accessed June 16, 2021) (noting that both the French and UK guidance "emphasize the importance of identifying individuals suspected of wrongdoing" to constitute cooperation).

[143] Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 333 ("[c]orporations, moreover, can use deferred prosecution combined with individual culpability as a public relations tool to distance the corporation itself from the employee offenders").

[144] Eversheds Sutherland, "Beneath the Surface: The Business Response to Bribery and Corruption," May 11, 2016, https://www.fiduciaryregulatory.com/portalresource/BeneaththeSurface_BusinessResponsetoBriberyandCorruption.pdf (accessed June 8, 2020), 29 ("[t]he prospect of settling the legal liability of the company while being unable to resolve the reputational, administrative and financial liabilities of having individual employees or officers prosecuted will be an unattractive one").

[145] See *supra* Section 5.4.2.

resources in the internal investigations to identify not only the wrongdoings but also the wrongdoers.[146] From the perspective of individuals, knowing that the corporation is partnering with the government and may eventually "throw them under the bus", individuals with concerns over the exposure of personal liability would rationally be more reluctant to cooperate in the internal investigations.[147] The antagonistic strategies adopted by such individuals, such as taking more creative detection avoidance measures, refusing to answer questions from corporate investigators, demanding an early separate legal representation or invoking the right of personal privacy, would significantly increase the difficulties and costs for corporations in detecting corporate wrongdoings and conducting internal investigations.[148]

Next, though prosecutors are unlikely to explicitly demand a waiver of legal professional privileges, corporations may feel the pressure to waive in order to be perceived as cooperative.[149] What is worse, a corporation might unintentionally lose privileges in the process of delivering full cooperation. Corporations are incentivized to waive legal privileges, as can be explicitly seen in the UK enforcement policies, if they want to demonstrate their willingness to fully cooperate.[150] Even waiver ceases to be a factor considered by the U.S. prosecutors in assessing corporate cooperation, corporations constantly feel the need to waive given the prosecutors' broad discretion in crediting corporate cooperation.[151] In addition, the SFO Cooperation Guidance requires cooperative companies to provide witness accounts accompanied by any recording, notes and/or transcripts of the interview, which increases the probability of inadvertent loss of the litigation privileges.[152] The loss of legal privileges can be a disaster for the corporations. The otherwise privileged information would provide ammunition to civil litigators and foreign authorities, subjecting the company to additional risks of civil suits and parallel foreign investigations.[153]

Last but not least, individual prosecutions following the corporate settlement may implicate the corporations in prolonged legal proceedings and expose the corporations to recurring negative publicity. For example, charges against former Alstom employees were still being brought in 2020, six years after Alstom resolved the FCPA charges by paying a blockbuster penalty of $772

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[146] Oded, "Coughing Up Executives or Rolling the Dice?" 76 (noting that "self-reporting and cooperation with investigations were focused on sharing information about the wrongdoing, rather than the wrongdoers" in the pre-Yates Memo world).

[147] Lonnie T. Brown, Jr., "Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox," *Hofstra Law Review* 34, (2006): 900-01 ("corporate executives and employees will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed"); Oded, "Coughing Up Executives or Rolling the Dice?" 77 ("the more that employees perceive corporate investigations as conducted on behalf of or for the benefit of the DOJ, the greater the likelihood that employees may decline to cooperate and complicate or challenge corporate investigations in order to defend themselves and minimize their liability exposure").

[148] Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 333 (claiming that inducing corporations to target individuals has unintended consequences, such as more detection avoidance activities from managers, decreased role played by the corporate counsel, and disloyalty within the organizations).

[149] Schipani, "The Future of the Attorney-Client Privilege in Corporate Criminal Investigations," 951-52 ("circumstantial coercion defines the culture of waiver more so than does explicit requests by prosecutors").

[150] SFO, *Corporate Co-operation Guidance*, Witness Accounts and Waiving Privilege, ft. 5 (citing the case of SFO v. ENRC ([2018] EWCA Civ 2006 at [117]) and suggesting that the court may consider the effect of an organization's non-waiver over witness accounts when it determines whether a proposed DPA is in the interests of justice).

[151] USJM, 9-47.120, Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy ("eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection"); Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 351 (claiming that prosecutors rarely need to request waivers when "they are empowered to make the bottom-line assessment of whether corporations qualify as 'cooperative'").

[152] SFO, *Corporate Co-operation Guidance*, Witness Accounts and Waiving Privilege.

[153] Brown, "Reconsidering the Corporate Attorney-Client Privilege," 947 (noting that the "the most serious over-arching concern with regard to compelled-voluntary waiver is the reality that corporate acquiescence thereto will result in waiver of the privilege as to third parties, most notably, potential plaintiffs and their counsel").

million.[154] As the main drive behind corporate cooperation is to minimize the reputational damages through a quick settlement, the recurring negative exposure accompanied by the prolonged individual prosecutions could offset the corporate benefits received from cooperating with the government and undermine the corporate motives to cooperate.[155]

5.4.3.2 Incentivizing Corporate Cooperation: The Hallmarks of Optimal Policy

Faced with the possibility of obtaining a pre-trial settlement and the potentially high costs associated with cooperating with the government, corporations may have mixed incentives to fully cooperate. In order to effectively incentivize corporations to invest adequate resources in the identification and investigation of recalcitrant individuals, the stick and carrot approach proposed in the previous Chapter for encouraging corporate self-reporting is still applicable. In terms of the carrot, the cooperation credits should be proportionate to the scope and value of corporate cooperation. Unlike the binary decision of self-reporting, corporate cooperation varies in breadth and thoroughness, impacting the distribution of enforcement costs between the state and the corporation.[156] In order to encourage corporations to conduct thorough internal investigations and deliver full cooperation regarding individual wrongdoers, corporations that have fully cooperated should be offered more benefits than those that provide only partial cooperation.[157] For corporations engaged in incomplete cooperation, certain leniency should still be provided for the cooperative measures that had been taken, so that corporations will not stop cooperating in other aspects when failing to collect sufficient information regarding a specific individual wrongdoer.[158]

On the other hand, corporations are unlikely to incur the costs of full cooperation if the government does not have the capacity to verify the genuineness of corporate cooperation and to penalize uncooperative corporations.[159] Though prosecutors may significantly reduce the enforcement costs by depending only on corporate internal investigations to make their cases, they risk losing control over the investigation agenda and rewarding unreliable information proffered by the corporation.[160] Therefore, apart from incentivizing corporate cooperation through cooperation credits, the authorities should continue to invest in its own independent

[154] Press Release, "Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials," Feb. 18, 2020, https://www.justice.gov/opa/pr/former-alstom-executives-and-marubeni-executive-charged-bribing-indonesian-officials (accessed June 9, 2020).
[155] Oded, "Coughing Up Executives or Rolling the Dice?" 79-80 ("the threat of adverse publicity that continues to follow a corporation years after reaching a settlement erodes the benefits that corporations receive from cooperating with the DOJ").
[156] Arlen, and Kraaman, "Controlling Corporate Misconduct," *New York University Law Review* 72, no. 4 (1997): 725 ("unlike reporting, investigation is not a binary-an either/or activity. Rather, a firm's investigatory expenditures can vary widely").
[157] Arlen, "Corporate Criminal Liability: Theory and Evidence," 177 ("[t]he state needs to ensure that, at each stage in the policing process, the firm is better off responding optimally (even if it failed to respond optimally in the prior period)").
[158] *Ibid* (citing the example of publicly-held firms, which may be prevented from acting optimally in the beginning owing to the agency costs, but later the detection of the crime might trigger a change in management and an optimal response).
[159] Keith Hawkins, "Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation," *Law & Policy* 5, no. 1 (1983): 68 (noting that the widespread practice of cooperative-enforcement in the form of bargaining, threatening and bluffing is effective because of the backdrop of criminal sanctions).
[160] Freeman, "The Private Role in Public Governance," 662 ("by relying on third-party enforcement, an agency spreads the cost of ensuring compliance, but it also risks surrendering control over its enforcement agenda"); Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 648-49 (observing that some firms may use cooperation to displace individuals for crimes that the firms themselves are complicit and criminally culpable through consensual and non-consensual "scapegoating").

investigation and monitoring efforts to strengthen its capability to assess the authenticity and quality of corporate cooperation.[161]

Proportionate rewards for cooperative corporations and credible threats for uncooperative ones are necessary but not sufficient to optimally incentivize corporate cooperation against individual targets. If the costs of cooperation are extremely high, the rewards for cooperation should be set so high that the remaining sanctions imposed on the delinquent corporations are not enough to induce adequate corporate preventive measures.[162] It is thus necessary for the authorities to strive to control the costs of corporate cooperation. As identified above in Section 5.4.3.1, a major source of the fueling cooperation costs is the expanded scope of corporate internal investigations as a result of the need to identify and investigate relevant individuals. Given the blurred lines of authority in the bribery scheme and the broad prosecutorial discretion, it is nearly impossible for corporate investigators to predict exactly which individuals should be disciplined or prosecuted.[163] In order to avoid the loss of cooperation credits, corporations might even end up "boiling the ocean" and investigating all individuals that are in any way connected with the wrongdoing.[164] The ambiguity in the desired scope of corporate cooperation may explain the phenomenon that corporate investigations in the FCPA context are becoming increasingly expensive and many have generated bills of hundreds of millions of dollars.[165] A clear and flexible approach, which allows corporations to obtain full, or the majority of, cooperation credits by identifying individuals that are at the core of the bribery schemes, is needed to balance the corporate cooperation costs and the public enforcement goals of pursuing individual accountability.[166]

The practices of negotiating DPAs with corporations without successful individual prosecutions are subject to considerable criticism, as was discussed in Section 5.3.1. Yet the reverse situation is similarly controversial. The prosecutorial strategy of inducing or coercing, as claimed by the critics, corporations to collect information about individual wrongdoers and deliver the findings to the authorities may have unintended consequences, such complicating the corporate internal

[161] U.S. Justice Manual, 9-28.700 – The Value of Cooperation (emphasizing that even with the requirement for corporate cooperation against individual wrongdoers, prosecutors "should be proactively investigating individuals at every step of the process—before, during, and after any corporate cooperation"); Katrice Bridges Copeland, "The Yates Memo: Looking for 'Individual Accountability' in All the Wrong Places," *Iowa Law Review* 102, (2017): 1924-25 (advocating for the government's own investigation to achieve individual accountability, considering the scapegoating problem and the superficial or partial cooperation resulting from the government's over-reliance on corporate internal investigations).

[162] Arlen, "Corporate Criminal Liability: Theory and Evidence," 185-89 (claiming "the state needs to subject firms that engage in optimal policing to significant civil residual liability designed to provide firms with optimal incentives to prevent wrongdoing and to induce optimal activity levels").

[163] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021) (claiming that the DOJ "is often better situated than company counsel to determine the relevance and culpability of individuals involved in misconduct").

[164] "Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement," April 17, 2015, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law (accessed August 8, 2020) ("[a]ll too often, criticism is leveled against the Justice Department for purportedly causing companies to spend years, and many millions of dollars, investigating potential violations. This is particularly true in the FCPA context where the need for international evidence can add to the expense and burden of an investigation").

[165] Weishi Jia, Laura K. Rickett, Deborah L. Smith, "Uncovering the Costs of Bribery," *Strategic Finance Magazine*, June 1, 2021, https://sfmagazine.com/post-entry/june-2021-uncovering-the-costs-of-bribery/ (accessed August 15, 2021); Dylan Tokar, "Walmart's Spend-and-Tell Strategy Paid Off in Bribery Settlement," *The Wall Street Journal*, June 26, 2019, https://www.wsj.com/articles/analysis-walmarts-spend-and-tell-strategy-paid-off-in-bribery-settlement-11561585841 (accessed August 15, 2021).

[166] Engelen, "Criminal Behavior: A Real Option Approach with an Application to Restricting Illegal Insider Trading," 341-42 (believing that the corporate enforcement policy should be clear and consistently applied in order to decrease the uncertainty of the return of crimes, which affects the criminal decisions on whether and when to commit crimes according to the criminal option theory).

investigations and eroding the individuals' personal rights.[167] With the intent of proffering the communication to the authorities, corporate investigators interviewing employees under the threat of termination are deemed by some U.S. courts and scholars to be the *de-facto* federal agents within the meaning of the Fifth Amendment.[168] In addition, the government's close involvement in the corporate internal investigations may shatter the fiduciary employment relationship, and force individuals to take confrontation strategies against corporate investigators and subvert the corporation's informational advantages.[169] In order to prevent the application of burdensome criminal procedural rules to corporate internal investigations and preserve the corporate advantages in conducting internal investigations, it is necessary to maintain appropriate distance between public enforcers and corporate investigators and ensure the relative independence of corporate internal investigations.[170] Prosecutors should not make direct and specific instructions as to how corporations should conduct their internal investigations nor direct them to interview specific individuals.[171]

5.5 Analysis of Several Strategies to Ensure Corporate Cooperation against Individual Wrongdoers

The necessity and significant values of holding individuals directly accountable for corporate bribery and the difficulty of doing so, as identified in the previous Sections, have inspired various innovative enforcement strategies to strengthen individual accountability. The authorities can enhance their capability to achieve individual accountability by tapping corporate resources to assist in the identification and investigation of relevant individuals. Specific policies have been introduced in line with the cooperative enforcement strategy, including prominently the "all-or-nothing" approach under the DOJ's Yates Memo, and the controversial policy

[167] David M. Zornow, and Keith D. Krakaur, "On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations," *American Criminal Law Review* 37, no. 2 (2000): 147-162 (claiming that "the government effectively is deputizing 'Corporate America' as an arm of law enforcement at the expense of principles that lie at the core of our adversarial system of justice", referring to the client's rights of confidentiality and freedom from self-incrimination); Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 333-37 (noting that deputizing corporate insiders has unintended consequences contrary to shareholders' best interests, including inducing causing disloyalty within the corporation).

[168] *United States v. Connolly*, 16 Cr. 370 (CM), Memorandum Decision and Order Denying Defendant Gavin Black's Motion for Kastigar Relief, ECF Document 432, slip op. at 19, 29 (May 2, 2019) (indicating that outsourcing criminal investigation to private counsels and then interviewing employees under threat of termination violates employee's Fifth Amendment rights); Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 365 ("when the actions of private employers induce employees to provide incriminating evidence against themselves-in order to comply with an existing DPA or to position the corporation in ongoing negotiations for a DPA-their actions may be 'fairly attributable' to the government within the meaning of the Fifth Amendment"); Bruce A. Green, and Ellen S. Podgor, "Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents," Boston College Law Review 54, no. 1 (2013): 352 ("[i]n light of the government's control over internal investigators under the current paradigm of corporate criminal procedure, the constitutional safeguards that apply when public officials question targets should extend to the context of employee interviews").

[169] Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," 336-38.

[170] *Ibid*, 352 ("In light of the government's control over internal investigators under the current paradigm of corporate criminal procedure, the constitutional safeguards that apply when public officials question targets should extend to the context of employee interviews").

[171] David B. Massey, et al, "U.S. v. Connolly: "Outsourcing" a Government Investigation — And How to Avoid It," Compliance & Enforcement, May 7, 2019, https://wp.nyu.edu/compliance_enforcement/2019/05/07/u-s-v-connolly-outsourcing-a-government-investigation-and-how-to-avoid-it/ (accessed November 8, 2021) (suggesting that "the government should refrain from directing counsel to interview particular witnesses and directing how to interview them" to maintain the basic elements of corporate internal investigations and corporate cooperation in the post-Connolly enforcement actions); "Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement," April 17, 2015, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law (accessed August 8, 2020) ("Let me be clear, however, the Criminal Division does not dictate how a company should conduct an investigation …Although we can provide guideposts, the manner in which an internal investigation is conducted is an internal corporate decision").

encouraging the waiver of attorney-client privileges.[172] Believing that the weak record of individual prosecution results from the prosecutorial preference for the high-profile corporate resolution to the time-consuming individual prosecutions,[173] others have proposed to place meaningful judicial scrutiny of the DPA procedure to ensure the quality of corporate settlements.[174] This Section assesses these policies and proposals with a focus on their effectiveness in strengthening corporate cooperation and promoting individual accountability.

5.5.1 "All or nothing" Approach in the Use of Cooperation Credits

As identified in the previous Section, an important way to incentivize corporate cooperative efforts in the individual proceedings is to reward such efforts with an access to a DPA and favorable settlement terms. The Memo released by Sally Quillian Yates, the former DOJ Deputy Attorney General, regarding *Individual Accountability for Corporate Wrongdoing* (also known as the "Yates Memo") in 2015 continues the long-held DOJ policy of encouraging corporations to provide information regarding individual wrongdoers with cooperation credits.[175] What is unique about the Yates Memo is that it requires the corporation to provide *all* relevant facts about "*all* individuals involved in, or responsible for, the wrongdoing at issue, regardless of their position, status or seniority" in order to obtain *any* cooperation credits at all.[176] In other words, the failure to provide any facts about any individual wrongdoer would cost the corporation all the cooperation credits despite other cooperative actions that have been taken by the corporations to assist in the government's investigations.[177]

The "all or nothing" policy was later softened in 2018 under the Trump Administration by then Deputy Attorney General of DOJ, Rod J. Rosenstein.[178] According to the revised policy, only individuals *substantially* involved in the misconduct are required to be identified by corporations that wish to qualify for cooperation credits.[179] It was admitted that the "all or nothing" policy under the Yates Memo was not strictly enforced as taking actions against all individual

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[172] Memorandum from Deputy Attorney General Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations,* January 20, 2003 (instructing prosecutors to consider a corporation's waiver of attorney-client and work-product protections as a factor in making criminal charging decisions); The Yates Memo, September 9, 2015.

[173] Richard Cullen, and George J. Terwilliger III, "Unpacking the Yates Memo: What the 'New' DOJ Policy Really Means," *McGuireWoods*, September 11, 2015, https://www.mcguirewoods.com/client-resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy (accessed July 12, 2020) ("cases against individuals do not provide 'as robust a monetary return on the Department's investment' as corporate enforcement actions"); Gideon Mark, "The Yates Memorandum," *UC Davis Law Review* 51 (2018): 1607 (noting the revolving door as one reason for the DOJ's historical failure to prosecute individuals in corporate crime cases).

[174] Garrett, "The Corporate Criminal as Scapegoat," 1843-44 (calling for the revision of the Speedy Trial Act to allow the judge to scrutinize the corporate cooperation concerning individual wrongdoers when approving DPAs); Nick Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review," *The Yale Law Journal* 128, no. 1 (2020): 1417-21 (advocating the use of legislative means to provide the legal footing for a mandatory judicial overview of corporate DPAs).

[175] Oded, "Coughing Up Executives or Rolling the Dice?" 52 ("[h]olding individuals accountable for wrongdoing committed within the scope of their employment has long been a priority for the DOJ in FCPA enforcement matters").

[176] The Yates Memo, September 9, 2015, at 3 ("to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct"); Mark, "The Yates Memorandum," 1593 ("the DOJ had not previously used an all or nothing approach in assessing cooperation - instead, it had used a sliding scale").

[177] "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference", May 10, 2016 ("while the requirement to provide all facts about individuals isn't new, what has changed is the consequence of not doing it").

[178] "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act," November 29, 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 (accessed April 12, 2020).

[179] *Ibid.*

wrongdoers, including those peripheral to the misconduct, is a waste of the already stretched enforcement resources and could further delay corporate resolutions.[180]

However, the incumbent DOJ Deputy Attorney General Lisa Monaco re-embraced the "all or nothing" policy in October 2021.[181] The arguments provided for such policy reversion include (i) prosecutors are better positioned than corporate investigators to determine the level of individuals' involvement in the corporate misconduct; and (ii) individuals with peripheral connection to the misconduct could also provide valuable information to the prosecutors.[182]

Though designed to maximize the corporate incentives to assist in the investigation and prosecution of individual wrongdoers, the "all or nothing" policy could discourage corporate cooperation by fueling the costs of corporate internal investigations.[183] Due to the increased number of individual wrongdoers to be investigated and the requirement that *all* facts regarding all relevant individuals should be provided, corporate internal investigations are expected to become more expansive, lengthy and costly.[184] As all relevant individuals should be identified and investigated if the corporation wishes to obtain any cooperation credits, individuals that are marginally related to the misconduct would have fewer incentives to raise concerns or to cooperate in the corporate internal investigations.[185] As a consequence, the corporation's superiority in detecting and investigating employees' misconducts compared with the public investigators, which underlies the cooperative enforcement strategy fostered by the DPA regime, is likely to be eroded.[186]

Moreover, the "all or nothing" approach is inconsistent with the above-proposed optimal enforcement policy of rewarding the varying scopes of corporate cooperation with proportional credits. In addition to identifying specific individual wrongdoers, other aspects of cooperative efforts, such as sharing information about corporate misconduct with the prosecutors, making witnesses available for the prosecutors' interview, terminating questionable business transactions and reforming the corporate compliance program, are no less significant or valuable for the enforcement authorities.[187] Under the "all or nothing" policy, however, the failure to provide any relevant facts about any individual wrongdoer could deprive the corporation of all cooperation credits. As a result, the benefits of cooperating with the enforcement authorities become less certain from the perspective of the corporations. If the corporations realize that the incriminating

[180] *Ibid*.
[181] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021; Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, on *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*, October 28, 2021, https://www.justice.gov/dag/page/file/1445106/download (accessed November 1, 2021).
[182] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021.
[183] "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," September 10, 2015 (when announcing the all or nothing policy, Sally Yates already realized that the new policy may discourage corporate's incentives about settlement or the individual's willingness to plead guilty).
[184] Oded, "Coughing Up Executives or Rolling the Dice?" 79 (noting that "corporate internal investigations may need to increase in scope and in granularity" owing to the strict yet uncertain requirement over corporate cooperation in the individual proceedings).
[185] Copeland, "The Yates Memo: Looking for 'Individual Accountability' in All the Wrong Places," 1921 ("the Yates Memo jeopardizes the corporation's ability to conduct effective internal investigations into corporate wrongdoing because it threatens both the corporate attorney-client privilege and the relationship between employers and employees").
[186] See *supra* notes 11-14.
[187] Oded, "Coughing Up Executives or Rolling the Dice?" 83-84 (listing a number of cooperative measures taken by Ralph Lauren in seeking a DPA, finding that such measures are "undoubtedly socially valuable, even in the absence of a complete report regarding the involvement of employees").

information against certain individual wrongdoers could not be realistically obtained due to pragmatic or legal reasons, they could hardly be motivated to provide other forms of cooperative measures.[188]

In other words, the strategy of enlisting corporate cooperation in the individual proceedings helps mitigate the practical challenges confronting the prosecutors in identifying individual targets and establishing their role in the corporate bribery schemes.[189] However, the "all or nothing" policy exemplified in the Yates Memo and the recent Monaco Memo goes too far in raising the threshold of cooperation credits and pressuring the corporations to identify and investigate even individuals that are marginally related to the corporate wrongdoing at issue. Such a policy could significantly increase the scope and costs of corporate internal investigations and thus dampen the corporate incentives to cooperate with the government.[190]

5.5.2 Encouraging Corporations to Waive Legal Professional Privileges

A common way to assess the genuineness of corporate cooperation is through the corporations' waiver of attorney-client privileges. The seminal case of *Upjohn Co. v. United States* in 1981 established the enshrined status of the attorney-client privilege in the corporate context, which enables "full and frank communication between attorneys and their clients" and facilitates corporate compliance.[191] In terms of the attorney-client privilege in the corporate setting, the U.S. Supreme Court made it clear that the corporation, rather than employees that talk directly with the corporate counsel, is the owner of the attorney-client privilege and reserves the right to waive the privilege.[192] The ruling became a key part of the famous Upjohn warning, an equivalent of the Miranda warning issued by the corporate investigators before interviewing employees.[193] As was identified in Section 5.3.2, a major barrier to successful individual prosecutions is the ubiquity of legal privileges in the corporate context. From the perspective of the public enforcement authorities, the corporations' decision to waive facilitates their access to the employees' communication with corporate counsel and the investigation reports prepared by the counsel, mitigates the public enforcement costs and enables a better assessment of the quality of corporate cooperation.[194] On the other hand, excessive legal privileges complicate the authorities' investigation into corporate offenses and individual wrongdoers, and may even make the authorities more suspicious of the sincerity of cooperation from corporations that assert the legal privileges.[195]

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[188] James W. Cooper, et al, "All or Nothing: Highlights and Areas of Concern from DOJ's New Guidance on Individual Culpability in Civil and Criminal Investigations," September 16, 2015, https://www.arnoldporter.com/en/perspectives/publications/2015/09/all-or-nothing-highlights-and-areas-of-concern-f (accessed November 11, 2021) ("[r]ead broadly, the Yates Memo could discourage such alternative forms of cooperation because a company will not receive any credit for these efforts unless it also discloses culpable individuals").

[189] See *supra* Section 5.4.2.

[190] Oded, "Coughing Up Executives or Rolling the Dice?" 79.

[191] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[192] *Ibid, at 394-96.*

[193] ABA WCCC Working Group, *UpJohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, July 17, 2009, https://www.crowell.com/pdf/abaupjohntaskforcereport.pdf, at 23-31.

[194] The Thompson Memo, January 20, 2003, at 7 ("[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation").

[195] Louis Kaplow, and Stephen Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," *Harvard Law Review* 102, no. 3 (1989): 565-615 (examining the effects and social desirability of legal service provided in the course of litigation, concluding that legal advice provided when acts are contemplated tends to channel behavior in a more socially desirable manner than legal advice given during litigation).

Prosecutors may obtain the corporation's waiver by either making a direct request or using their leverage in negotiation to pressure the corporation to waive. The explicit request of waiver is rare in reality as it could provoke a strong backlash from the defense bar and the business community.[196] Regarding the use of cooperation credits to incentivize corporations to waive voluntarily, the U.S., UK and French authorities have adopted distinct policies on whether the corporate voluntary waiver would be viewed positively and whether the assertion of privileges would be penalized. The corporate incentives to waive are prominent in the UK, where waiver is explicitly perceived as an important way through which corporations could demonstrate cooperation.[197] Though under the UK Corporate Cooperation Guidelines, withholding privileged information will not be penalized, the prospect of losing cooperation credits is often enough to persuade corporations not to assert privileges.[198] The former CJIP Guidelines explicitly warned that the corporation's refusal to forward documents on account of professional confidentiality might have a negative impact on the level of cooperation perceived by the prosecutors if the prosecutors believe such a refusal is unjustified.[199] The latest 2023 CJIP Guidelines deleted the relevant content, yet it was believed by the practitioners that corporations are still expected to share with the prosecutors the interview reports and attorney notes.[200] Even in the U.S. where waiver ceases to be a factor weighed by the prosecutors in making charging decisions, corporations often feel obliged to waive given the broad discretion enjoyed by prosecutors in evaluating and crediting corporate cooperation.[201] The "all or nothing" policy that raises the stake of incomplete cooperation further increases the pressure for corporations to waive.[202]

Even the enforcement policy that incentivizes rather than demands corporations to waive is faced with severe criticisms. One persistent criticism focuses on its potential negative impacts on the efficiency of corporate internal investigations and the cooperative enforcement strategy. It is

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[196] Brandon L. Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014), 92 (observing that 19% of D/NPAs (49 of 255) required a waiver, though acknowledging that companies may turn over otherwise privileged information without agreeing to a formal waiver of privilege); ABA Task Force on Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, August 8, 2005, https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf (accessed June 4, 2021), at 18-21 (criticizing the governmental practices of inducing corporate waiver for undermining the role of lawyers in corporate compliance and negatively affecting the corporate ability to self-regulate).

[197] SFO, *Corporate Co-operation Guidance*, Witness Accounts and Waiving Privilege, ft. 5 (citing the case of SFO v. ENRC ([2018] EWCA Civ 2006 at [117]) and suggesting that the court may consider the effect of an organisation's non-waiver over witness accounts when it determines whether a proposed DPA is in the interests of justice); *SFO v. Rolls Royce PLC, Rolls Royce Energy Systems Inc*, Southwark Crown Court, Case No: U20170036, January 17, 2017, para. 121 (noting the Rolls-Royce's voluntary disclosure of the findings of internal investigations, with limited waiver of privilege over internal investigation memoranda and certain defense aerospace and civil aerospace materials as cooperating factor); CJIP Guidelines, at 10 ("[s]hould the company refuse to forward certain documents, it is for the prosecutors to determine if this refusal appears justified in the light of rules applicable to this confidentiality. Where there is a disagreement, prosecutors assess if the failure to pass on the documents concerned has an unfavorable effect on the level of cooperation of the company").

[198] SFO, *Corporate Co-operation Guidance,* Witness Accounts and Waiving Privilege ("[a]n organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code but will not be penalised by the SFO"); Schipani, "The Future of the Attorney-Client Privilege in Corporate Criminal Investigations," 951 ("it is difficult to envision an environment where waiver is viewed positively, yet refusal would have no effect on a prosecutor's propensity for leniency").

[199] PNF and AFA, Guidelines on the Implementation of the Convention Judiciaire D'Interet (Judicial Public Interest Agreement), June 26, 2019, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf, at 10.

[200] Maria Cruz Melendez, et al, "France Further Aligns Corporate Crime Guidance with US and UK Approaches to Sentencing and Leniency," (noting that the previous CJIP guidelines warned that the refusal to provide privileged materials may affect the company's perceived cooperation level. Though the updated Guidelines deletes the relevant part, but the expectations that corporations should share interview summaries, documents and attorney notes remain the same).

[201] See *supra* note 151.

[202] Gideon Mark, "The Yates Memorandum," *UC Davis Law Review* 51, (2018): 1610-11 ("the all or nothing nature of cooperation credit under the Yates Memorandum raises the ante for corporations to waive the privilege"); Copeland, "The Yates Memo: Looking for 'Individual Accountability' in All the Wrong Places," 1911 ("[b]y specifically requiring that corporations turn over information about culpable employees before receiving any consideration for cooperation credit, the Yates memo magnifies the problem of waiver present in the previous policies").

claimed that employees would stop speaking with corporate investigators if they know that any information they give to the corporate investigators might later be hand-delivered to the authorities.[203] Given that corporate internal investigations largely benefit from the employees' loyalty to the company and their tendency to cooperate, the corporations' informational advantages that underlie the cooperative enforcement strategy fostered by the DPA regime would be undermined.[204] Taking into account the broader context of the employment relationship, however, it is not difficult to find that the negative impacts of induced corporate waiver are actually overstated. In the U.S., corporate counsel is obliged to give the Upjohn warning before interviewing the employees that she represents the corporation only and that the corporation reserves the right to claim or waive the privilege.[205] An informed employee should be well aware that the legal privileges offer them no incentives to talk to the corporate investigators.[206] The most powerful weapon at the disposal of the corporations to ensure the employees' willingness to talk is "not the specious carrot of a corporate-wide privilege, but rather, the blunt stick of employee-termination".[207] Though inducing corporate waiver would increase the conflict of interests between corporations and employees, it does not fundamentally change the superiority of corporations to the state in conducting investigations nor undermine the cooperative enforcement strategy.

Though the opponents' claim regarding the negative impacts of corporate waiver on the employee's willingness to cooperate may be exaggerated, the prospect of losing privileges to the third parties by disclosing the otherwise privileged materials to the government is a real concern for the corporations. Unlike the application of legal professional privilege in the UK, the U.S. federal courts generally do not acknowledge the doctrine of selective waiver.[208] The waiver of privileges to the DOJ may cause the company to lose privileges to the third parties, including

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[203] Brown, "Reconsidering the Corporate Attorney-Client Privilege," 900-01 ("corporate executives and employees will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed, and corporate counsel will understandably be more skeptical of the accuracy or completeness of the information communicated to them").

[204] Daniel Richman, "Decisions about Coercion: The Corporate Attorney-Client Privilege Waiver Problem," *DePaul Law Review* 57, no. 2 (2008): 307 ("a waiver regime would result in less productive investigations, because officers and employees worry about providing statements that will thereafter be turned over to the government").

[205] O'Sullivan, "Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary 'No'," 1290 (noting that the Upjohn Warning essentially includes: (1) the legal counsel represents the company-not the employee- and is interviewing the employee to gather information in order to provide legal advice to the company; (2) the interview is confidential and covered by the attorney-client privilege; (3) the privilege belongs to, and is controlled by, the company; (4) because the company-not the employee-owns the privilege, the company may elect in future to waive any privilege).

[206] Miriam H. Baer, "When the Corporation Investigates Itself," in Jennifer Arlen (ed.), *Research Handbook on Corporate Crime and Financial Misdealing* (Northampton, MA: Edward Elgar Publishing, 2018), 319 ("if the Upjohn corporate privilege enhances internal information flows within the firm, it does so either because individual employees misunderstand the privilege, or are supremely confident in the belief that their employer will vigorously defend its entity-level privilege rights"); William H. Simon, "After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer," *Fordham Law Review* 75, no. 3 (2006): 1468 ("[g]iven [the] long-standing limits on the privilege, it has always been irrational for a manager to make disclosures to the corporation's counsel that she would not have been willing to make in the absence of any confidentiality safeguards").

[207] Green, and Podgor, "Unregulated Internal Investigations," 99 ("an alliance with its employees is not essential to the corporation's ability to obtain their cooperation. Corporations can fire individuals who fail to cooperate with an internal investigation"); O'Sullivan, "Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary 'No'," 1289 ("employees faced with the threat of employment consequences for a lack of cooperation have a strong incentive to be helpful").

[208] See, e.g., In re Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (finding that a party may not selectively waive attorney-client privilege, and therefore the documents shared with the U.S. attorney are not privileged against civil plaintiffs); *Gruss v. Zwirn,* 09-CV-6441 (S.D.N.Y., Nov. 20, 2013) (ruling that even with a confidentiality agreement between the company and government in place, the disclosure of privileged communication to the government can still be treated as a waiver of the privilege); Brown, "Reconsidering the Corporate Attorney-Client Privilege," 947-49 (discussing two theories against selective waiver, the first theory is that "an authorized disclosure of a privileged communication to any non-privileged person destroys the required 'confidential' nature of that communication, thereby rendering it no longer privileged for all purposes"; the second theory is that "one should not be able to use the privilege in order to gain what amounts to a tactical advantage").

private plaintiffs, regulators and foreign authorities.[209] Considering the potentially huge costs associated with waiver, the authorities would be more successful in encouraging voluntary corporate waiver by allowing the companies to retain the legal professional privilege against third parties.[210]

In light of the essential values of attorney-client privilege in the adversarial judicial system and the fact that the U.S. judiciary shows no interest in the theory of selective waiver, the DOJ defines corporate cooperation in a way that excludes the disclosure of privileged communication. As a fundamental rule, the USJM makes it clear that prosecutors should neither demand the disclosure of privileged materials nor predicate the grant of cooperation credits on the waiver.[211] Prosecutors could only require corporations seeking cooperation credits to disclose the facts relevant to the misconducts at issue.[212] In order to identify and prosecute individual wrongdoers, what the prosecutors need is not the privileged communication, but the facts underlying such communication about the alleged misconducts and responsible individuals.[213] As the attorney-client privilege protects the communication rather than the facts, the requirement for the disclosure of the facts only enables prosecutors to benefit from corporate cooperative efforts with minimal implications for the legal privileges.[214]

In summary, the prosecutors' strategy of incentivizing the waiver of attorney-client privilege is appropriate as long as waiver is a voluntary corporate decision. Corporate waiver of legal privileges reduces the public enforcement burdens in investigating individual targets and facilitates the prosecutors' assessment of corporate cooperation. In order to reduce the corporate costs associated with waiver, the authorities could opt to endorse selective waiver or focus on the disclosure of facts instead of privileged communication when defining corporate cooperation.

5.5.3 Strengthening Judicial Oversight of DPAs to Enhance Individual Accountability

Another approach to individual accountability, as claimed by many scholars, is to ensure prosecutorial commitments to individual prosecutions and the quality of corporate cooperation through meaningful judicial oversight of the DPA process.[215] It is believed that the urge of both prosecutors and corporations to settle, coupled with the lack of meaningful judicial oversight, lead to the insufficient corporate cooperation in the identification and investigation of relevant

[209] Brown, "Reconsidering the Corporate Attorney-Client Privilege," 947 (noting that the "the most serious over-arching concern with regard to compelled-voluntary waiver is the reality that corporate acquiescence thereto will result in waiver of the privilege as to third parties, most notably, potential plaintiffs and their counsel").

[210] In re Columbia/HCA, 293 F.3d at 312-13 (in the dissenting opinion, Judge Boggs believes that selective waiver would render corporations more forthcoming and enable the government to uncover corporate wrongdoings more effectively and efficiently).

[211] US Justice Manual, 9-28.720 – Cooperation: Disclosing the Relevant Facts ("[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection").

[212] *Ibid* ("if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation").

[213] U.S. Justice Manual, 9-28.710 – Attorney-Client and Work Product Protections ("[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review").

[214] *City of Philadelphia v. Westinghou se Elec. Corp.*, 205 F. Supp. 830, 831 (ruling that the protection of the privilege extends only to communication and not to facts); However, some have voiced concerns that it would be difficult to separate pure facts from privileged communications, see Gideon Mark, "The Yates Memorandum," *UC Davis Law Review* 51, (2018): 1610.

[215] Garrett, "The Corporate Criminal as Scapegoat," 1843-44 (calling for the revision of the Speedy Trial Act to allow the judge to scrutinize the corporate cooperation concerning individual wrongdoers when approving DPAs); Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1417-21 (advocating the use of legislative means to provide the legal footing for a mandatory judicial overview of corporate DPAs).

individuals.[216] From the perspective of prosecutors, it is more cost-effective to move quickly to the next high-profile corporate case after securing a corporate DPA than sticking to the time-consuming and resource-intensive individual proceedings. [217] From the perspective of corporations, an early and quick resolution provides a great opportunity for them to wrap up the scandal and minimize the litigation costs and reputational damages. [218] In view of the prosecutorial and corporate preference to settle as quickly as possible, the corporate resolutions may be reached before the prosecutors collect sufficient incriminating evidence to establish the criminal facts or the culpability of any specific individuals without adequate external overview.[219] In response, substantive judicial scrutiny of the DPA process is proposed to force prosecutors to extract adequate and on-going corporate cooperation and to collect sufficient evidence to support the factual allegations against individual wrongdoers before signing the corporate DPAs.[220]

As a matter of fact, judges reviewing corporate resolution agreements have occasionally expressed dissatisfaction over the low level of corporate cooperation concerning individual wrongdoers, and rejected outright the plea agreements that offer immunity to culpable individuals.[221] As a neutral arbiter, the court's review of DPAs in the open forum is likely to force prosecutors to exercise their discretion in a more accountable manner when striking corporate deals.[222] With increased transparency and external oversight, prosecutors have more motives to collect incriminating evidence before reaching settlement and to ensure continual corporate cooperation to support the prosecution of individual wrongdoers. [223] Individual accountability will thus be enhanced and the use of DPAs to resolve corporate criminal matters is more likely to be in conformity with the public interests.

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[216] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1414 ("[t]he availability of virtually unreviewable settlements provides the government and TBTJ defendants with a way to terminate an investigation on mutually beneficial terms before uncovering sufficient evidence of individual guilt").

[217] Richard Cullen, and George J. Terwilliger III, "Unpacking the Yates Memo: What the 'New' DOJ Policy Really Means," *McGuireWoods*, September 11, 2015, https://www.mcguirewoods.com/client-resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy (accessed July 12, 2020) ("cases against individuals do not provide 'as robust a monetary return on the Department's investment' as corporate enforcement actions"); Larry E. Ribstein, "Agents Prosecuting Agents," *Journal of Law, Economics & Policy* 7, no. 4 (2011): 623 ("like corporate executives, prosecutors are agents in the sense that they exercise their power to execute the criminal laws on the government's behalf rather than their own").

[218] Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1886-87 (noting that the adverse publicity is so widely feared by the corporation that it has even been proposed as a penalty in and of itself, and the prosecutorial practices of filing an indictment and a DPA at the same time offer corporate offenders reduced stigma and save such corporations from potential paralysis associated with prosecution and conviction).

[219] Peter Spivack, and Sujit Raman, "Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements," *American Criminal Law Review* 45, no. 2 (2008): 188 ("[w]e have heard from colleagues in the defense bar of prosecutors who, in their haste to compel the company's cooperation in pursuit of individuals, have pressed the entity to enter into a diversion agreement before any particular individual's guilt could definitively be established").

[220] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1417-18 (proposing that in determining whether to approve corporate DPAs, the court should make sure that the government put forward sufficient evidence to support its claims, and identify at least one culpable individual prior to the imposition of corporate sanctions).

[221] *United States v. Fokker Servs. B.V.*, No. 14-cr-121 (RJL), 2015 WL 729291, at *5 (D.D.C. Feb. 5, 2015) (noting that not only were "no individuals . . . being prosecuted for their conduct at issue here," but also "a number of the employees who were directly involved in the transactions are being allowed to remain with the company"); Garrett, "The Corporate Criminal as Scapegoat," 1844 ("[j]udges have in rare cases also rejected as contrary to the public interest corporate plea agreements that involved immunity or non-prosecution of the relevant corporate officers or employees").

[222] Uhlmann, "Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability," 1328-29 ("[t]he involvement of a neutral arbiter in a public forum would help ensure the fairness of the agreements and provide the accountability the public deserves").

[223] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1418 ("[j]udicial review should induce prosecutors to amass sufficient evidence to prosecute culpable individuals alongside corporations").

However, the judicial review approach faces several major issues in practice. Individual and corporate proceedings are relatively independent in terms of the incriminating criteria, the procedure and the outcome.[224] It is burdensome and sometimes even impossible for the court to evaluate the adequacy of company-proffered evidence in sustaining individual prosecutions when approving the corporate DPAs.[225] Owing to the multiple barriers to successful individual prosecutions, such as the difficulties in collecting overseas documents or extraditing individual offenders, the absence of individual prosecution does not necessarily indicate weak corporate cooperation or the abuse of prosecutorial discretion.[226] Therefore, it is unwise to retrospectively belittle the quality of corporate cooperation even when no individuals are prosecuted and convicted following the corporate settlements.

In jurisdictions where judicial oversight of DPAs is emphasized, such as the UK and France, the judicial involvement has not yet led to enhanced individual accountability.[227] Though a large number of DPAs and CJIPs have been concluded by the UK and French prosecutors, few individuals have so far been successfully prosecuted in connection with such corporate settlements.[228] Instead, the judicial scrutiny of corporate DPAs has caused additional problems. In the UK, the fact that specific individuals were named in the court-approved DPAs for being responsible for the misconduct at question but were later acquitted by the court has generated intense controversies.[229] In response, the judgement approving the DPA involving Amec Foster Wheeler Energy includes a specific disclaimer that the court made no findings of the fact against any individual, nor assessed the culpability of any individual.[230] In France, as individuals are not eligible for CJIPs, the prosecutors normally negotiate CRPC (a guilty plea) with relevant

[224] DOJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (Second Edition)*, 2020, at 13 (noting that in order for an individual defendant to be criminally liable under the FCPA, he or she must act "willfully", while proof of willingness is not required to establish corporate criminal or civil liability); Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010), 2011, para. 13 ("[i]n order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence").

[225] Greenblum, "What Happens to a Prosecution Deferred?" 1902 (noting that the judiciary may face information deficiencies in terms of implementing the terms of DPA and assessing the extent of corporate cooperation).

[226] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1412 (acknowledging several justified reasons for the prosecutor's decision not to prosecute individuals, such as the lack of sufficient admissible evidence, the difficulties of extradition when individuals are not in U.S., the possibility of scapegoating, as well as the costs of trial); Henning, "Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct," 521 (claiming that the dearth of individual accountability is the result of the overpromising on, and multiple hurdles to, the pursuit of individuals).

[227] Transparency International, "Strengthening the UK's Deferred Prosecution Agreement Regime," February 13, 2020, https://www.transparency.org.uk/sites/default/files/pdf/publications/Strengthening-the-UK%E2%80%99s-Deferred-Prosecution-Agreement-regime-Joint-letter-to-SFO-Director-Lisa-Osofsky_0.pdfW (accessed August 17, 2021) (expressing concerns about the final DPA approval process by the UK courts, which could be seen as a 'rubber-stamping' exercise, while urging the UK to ensure that a judges' scrutiny of the DPA is itself subject to public scrutiny and open justice principles).

[228] Ruby Hamid, et al, "The DPA challenge – the SFO's First DPA-related Conviction of an Individual Bucks the Trend," March 10, 2023, https://www.ashurst.com/en/news-and-insights/legal-updates/the-dpa-challenge---the-sfos-first-dpa-related-conviction/ (accessed April 22, 2023); Gibson Dunn, *2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements, July* 22, 2021, https://www.gibsondunn.com/wp-content/uploads/2021/07/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf (accessed September 9, 2021), at 20 (discussing the ruling from the Judicial Court of Paris that rejected the plea offered to three executives in relation to a corporate CJIP, and noting that "[t]his is the first time a French court has considered—let alone rejected—plea deals alongside a CJIP").

[229] Jane Croft, and Jonathan Eley, "Tesco Fraud Trial Collapse Puts Deferred Prosecution Deals in the Dock," *Financial Times*, January 23, 2019, https://www.ft.com/content/b6c2b688-1f29-11e9-b126-46fc3ad87c65 (accessed October 11, 2019) (criticizing that the postponed release of Tesco DPA after the acquittal of three pertinent individuals still named these individuals as criminally responsible for the misconduct).

[230] Director of the Serious Fraud Office versus Amec Foster Wheeler Energy, in the Crown Court at Southwark, July 1, 2021, https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/ (accessed August 17, 2021); Karolos Seeger, et al, "UK, US, and Brazil Reach Bribery-Related Settlements with Amec Foster Wheeler Energy," Debevoise & Plimpton FCPA Update, July 2021, at 2-3 (noting that "[t]his statement is likely due to the SFO's failure to secure the convictions of any individuals who have been prosecuted in connection with previous DPAs, and is therefore intended to avoid prejudicing the position of those who may be prosecuted following the AFWEL DPA").

individuals alongside the corporate negotiation.[231] However, the decisions of the Paris criminal court to approve the CJIPs negotiated, separately, with Bolloré SE and LVMH but to reject the CRPC reached with the relevant individuals, have put the prosecutors' trustworthiness in question.[232] Such cases highlight the authorities' predicament in negotiating and scrutinizing corporate DPAs implicating relevant individuals.

In a word, substantive judicial oversight of DPAs could theoretically promote individual accountability by increasing the quality of corporate settlements. When the corporate DPAs are based on extensive corporate cooperation and sufficient incriminating evidence, it is more likely that the relevant individual wrongdoers can be held accountable. However, this judicial oversight approach is beset with practical issues, and the problems inherent in the attempts to link corporate settlements with individual culpability remain challenging for the authorities.

5.6 Conclusion

One of the most common and well-founded concerns over the use of DPAs to resolve corporate crimes is that the corporate executives and officers responsible for the crimes are rarely held accountable. As claimed by the critics, the dearth of successful individual prosecutions in the context of corporate DPAs renders the DPA mechanism a soft approach to dealing with corporate crimes, undermining the deterrence for the would-be individual wrongdoers. The conclusion of corporate DPAs involving huge corporate fines and extensive compliance obligations does not diminish the necessity of seeking individual liability for corporate bribery. As prosecutors often use DPAs with reduced fine to reward corporate self-reporting and cooperation, the DPA-imposed corporate penalty is generally below the optimal level for the purpose of forcing corporations to internalize the full social costs of criminality and optimally deterring future wrongdoings. It is thus more important than ever to hold culpable individuals liable in the context of corporate DPAs in order to strengthen deterrence and accountability. For other jurisdictions that are considering the adoption of DPA or DPA-like corporate settlement mechanisms, holding individuals accountable for the misconduct addressed by corporate DPAs should be a key aim in the designing and implementation of such mechanisms.

How to hold individuals accountable for the corporate bribery remains a big challenge for the enforcement authorities, owing to, among other problems, the blurred lines of authority in modern corporations, the ubiquity of legal privileges, and the transnational elements of foreign bribery. As was discussed previously, corporations are generally more capable of identifying individual wrongdoers in the complicated bribery schemes and gaining access to crucial

[231] Ludovic Malgrain, Jean-Pierre Picca and Grégoire Durand, "Compliance in France in 2022," *Global Investigation Review*, May 27, 2022 https://globalinvestigationsreview.com/review/the-european-middle-eastern-and-african-investigations-review/2022/article/compliance-in-france-in-2022#footnote-014-backlink (accessed July 31, 2022); PNF, 2023 CJIP Guidelines, at 27 ("[t]he issues and procedures relating to individuals and a company are distinct, but a simultaneous and joint settlement of their situations is preferred whenever the evidentiary file and the facts concerned allow it").

[232] James Thomas, "Paris Court Approves Corruption DPA with Transport Company but Rejects Plea Bargains with Execs," Global Investigations Review, February 26, 2021, https://globalinvestigationsreview.com/anti-corruption/paris-court-approves-corruption-dpa-transport-company-rejects-plea-bargains-execs (accessed September 9, 2021); Oliver Adey, "Squarcini case: the ex-boss of the Parisian PJ is denied a 'guilty plea'," *Get to Next*, January 14 2022 https://gettotext.com/squarcini-case-the-ex-boss-of-the-parisian-pj-is-denied-a-guilty-plea/ (accessed July 31, 2022); Malgrain, Picca and Durand, "Compliance in France in 2022," ("[t]hese very public refusal decisions raised an issue practitioners had long been worried about: are faster negotiated proceedings such as CJIPs any use if directors, officers and employees always remain at risk of being sent to lengthy and taxing criminal trial proceedings?").

witnesses and evidence than the public investigators without the same level of procedural restraints. In addition, corporate internal disciplinary measures can be more effective than the remote threat of criminal sanctions in deterring employees' wrongdoings. Nonetheless, the corporate-only sanctioning approach is insufficient to ensure individual accountability due to the inadequate corporate motives and capability to adequately discipline individual wrongdoers in many circumstances, and the possibility of lower-level employees being scapegoated for the fault of top managers. Considering the relative advantages and disadvantages of the government versus corporations in investigating and sanctioning individual wrongdoers, this Chapter proposes to utilize the DPA regime to foster a mixed enforcement approach involving both the public and corporate actors to seeking individual liability. The state-corporation partnership in investigating and sanctioning individual wrongdoers is desirable in terms of economizing on the enforcement resources and reducing the scapegoating problem.

In order to effectively tap corporate resources to sanction individual wrongdoers, prosecutors may demand corporations to discipline relevant individuals internally, or/and to cooperate with the individual prosecutions as a precondition for an access to a DPA or as an explicit requirement of a DPA. Notably, rational corporations are unlikely to incur the costs of full cooperation if additional cooperative efforts do not bring greater benefits, or the government is unable to assess the genuineness of corporate cooperation and sanction uncooperative corporations. In order to incentivize corporations to fully cooperate in the individual proceedings, the state should provide a sliding scale of rewards for the varying scope of corporate cooperation, while continuing to invest in its own investigations to strengthen its capability of distinguishing genuine corporate cooperation from superficial cooperation. In addition, prosecutors should refrain from interfering in the specific measures and steps of corporate internal investigations to the extent of turning corporate investigators into the *de facto* state agents. It might trigger the application of burdensome criminal procedural rules to corporate internal investigations and undermine the corporations' general superiority in the investigation of individual wrongdoers.

After identifying the best practices in incentivizing corporate cooperation in theory, this Chapter also analyzes several strategies that have been adopted in the U.S., UK and France for the purpose of ensuring adequate corporate cooperation against individual targets. As for the "all or nothing" policy exemplified in the DOJ's Yates Memo and the new Monaco Memo, the policy significantly increases the scope and costs of corporate internal investigations and may weaken the corporate incentives to provide other forms of cooperation aside from identifying and investigating all individual wrongdoers. Regarding the policy that induces corporations to voluntarily waive the legal privileges, it is found that the policy is desirable in terms of facilitating the prosecutors' access to critical information for the prosecution of individual wrongdoers. Meanwhile, the concerns over its negative impact on the employees' willingness to cooperate with corporate investigators are often overstated. In order to limit the corporate risks of losing the privileges against the third parties, the authorities could opt to endorse selective waiver or focus on the disclosure of the facts instead of privileged communication when defining corporate cooperation. In terms of the proposal to strengthen the judicial scrutiny of DPAs, it is believed that judicial scrutiny enhances external oversight and transparency in the corporate settlement practices and forces prosecutors to pay more attention to individual liability in the

context of corporate settlements. Nonetheless, such an approach is not free from problems as the attempts to establish the link between corporate settlements and individual culpability are beset with practical challenges.

The analysis in this Chapter shows that the task of strengthening individual accountability in the context of corporate DPAs remains complicated and challenging. The cooperative enforcement strategy concerns more than the prosecutors and the corporate defendants. The correlated relationship between the enforcement authorities, corporations and relevant individuals should be seriously considered and examined. In order to incentivize corporate cooperation in the individual proceedings, the authorities should consider not only the appropriate rewards for cooperating corporations, but also the relevant individuals' personal rights and interests in the process, which could in turn affect the corporate incentives and ability to cooperate with the authorities.

Chapter 6 Compliance Obligations and Monitorships in the Context of Corporate DPAs

6.1 Introduction

It has been discussed in the previous Chapters that prosecutors use DPAs to incentivize corporate voluntary self-disclosure and cooperation, including the disclosure of information regarding individual wrongdoers. In addition to corporate monetary and cooperative obligations, corporations are also required under the majority of DPAs to implement compliance changes and accept continuous reporting requirements following the resolution. An empirical study analyzing all publicly available U.S. DPAs from 1993 to 2013 found that 74.9% of them contained provisions demanding a new, updated or expanded compliance program.[1] Other relevant studies of corporate D/NPAs support this finding as well.[2] In the FCPA context, almost all corporate settlements include an "Attachment C", a comprehensive list of the minimum standards for a compliance program that the corporation is obligated to implement.[3] Even more, independent compliance monitors are sometimes brought in to assist and oversee the implementation of the DPA-imposed compliance obligations within the corporation.[4] Through the imposition of compliance obligations and monitorships, prosecutors aim to rehabilitate the troubled company and change its way of doing business by overhauling the corporate governance and compliance program and, more broadly, fostering the corporate culture of compliance and ethics.[5] It is acknowledged by Professor Garrett that "the big story of the twenty-first century is not corporate fines or convictions but prosecutors changing the ways that corporations are managed".[6]

Beyond the U.S., the UK's SFO is also actively seeking corporate compliance enhancements through the DPA program. As a matter of practice, the SFO demands improved compliance programs in all the DPAs they have secured.[7] Compared with the U.S. DPAs that dedicate a separate Attachment C of several pages to delineate the desired corporate compliance measures, compliance obligations imposed under the UK DPAs are relatively abstract and limited in scope. In addition, the UK authorities are more judicious than their U.S. counterpart in resorting to external monitorships. In light of the fact that the scope of monitorships imposed via the UK

[1] Wulf A. Kaal, and Timothy A. Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013," *The Business Lawyer* 70, no. 1 (2014-2015): 104-105.

[2] Brandon L. Garrett, "Structural Reform Prosecution," *Virginia Law Review* 93, no. 4 (2007): 894 (finding that 69% (24 out of 35) of D/NPAs from January 2003 to January 2007 included provisions relating to compliance programs); Jennifer Arlen, and Marcel Kahan, "Corporate Governance Regulation through Non-prosecution," *University of Chicago Law Review* 84, no. 1 (2017): 343-346 (documenting D/NPAs entered into by the US Attorneys' Offices or DOJ's Criminal Division from 2008 to 2014, excluding Antitrust and Environment Divisions that applied separate policies, and finding that 82% of D/NPAs include provisions relating to compliance programs).

[3] Debevoise & Plimpton, *FCPA Update: A Global Anti-Corruption Newsletter* 12, no. 2 (2020): 5-7 (noting that "[e]very DOJ settlement in an FCPA matter requires the company to sign on to what is called 'Attachment C', a list of what DOJ states are the 'minimum elements' for a corporate compliance program").

[4] See infra-Section 6.2.2.2.

[5] Todd Haugh, "The Criminalization of Compliance," *Notre Dame Law Review* 92, no. 3 (2017): 1238-39 ("[m]ost prosecutors use these agreements because they genuinely believe they are having an impact—that they are changing corporate culture for the better"); Garrett, "Structural Reform Prosecution," 861 ("[p]rosecutors … increasingly attempt to reform institutions themselves rather than impose punitive fines and imprisonment upon individual offenders").

[6] Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014): 6-7.

[7] For the links to the existing DPAs and relevant documents, see Deferred Prosecution Agreements, Current SFO Deferred Prosecution Agreements, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed August 7, 2022).

DPAs is more targeted than what is commonly found under the U.S. DPAs, practitioners point out that "the monitorship components of settlements agreed to date … could more accurately be described as quasi-monitorships".[8]

As for the situation in France, it is stipulated under the French laws that firms being offered a CJIP should generally be required to implement or improve their compliance program to prevent and detect corruption.[9] Regarding the identity of compliance monitor, the French practice departs from the monitorships found in the U.S. and UK DPA regimes, which rely on independent professionals or firms to supervise and assess the compliance progress. For bribery and corruption cases resolved via French CJIPs, a specific government agency, French Anti-Corruption Agency ("AFA"), will be appointed to supervise the company's implementation of compliance obligations.[10]

Though the scope and forms of compliance obligations vary across jurisdictions, the emphasis on corporate integrity and rehabilitation has become a global trend in the corporate enforcement area.[11] Against this background, it is worth asking the question: what are the values of compliance obligations and monitorships, given the availability of corporate fines and individual liability? In the context of corporate bribery, resolutions involving a financial penalty of hundreds of millions of dollars or even billions of dollars are becoming the norm in recent years.[12] Compared with fines that involve merely the transfer of payments, the imposition of compliance obligations and monitorships calls for much higher assessment and supervisory costs, and the enforcement authorities' interference in the corporate compliance development is likely to disrupt normal business operation.[13] In addition, in the case where a corporate fine is insufficient to catalyze the desired level of deterrence and accountability, prosecutors could also target individual wrongdoers with extracted corporate cooperation.[14] In theory, credible threats of a sufficiently large corporate fine and serious individual liability could induce similar, and possibly even more effective, corporate changes, such as voluntary compliance reforms and hiring of compliance consultants, to prevent corporate wrongdoings and preclude future public

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[8] Judith Seddon, et al, "Monitorships in the United Kingdom," in *The Guide to Monitorships - Third Edition,* by GIR, April 25, 2022, https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/united-kingdom-ordered-monitorships (accessed August 9, 2022).

[9] The French Code of Criminal Procedure, Article 41-1-2 I 2°, para. 2.

[10] For the mission of the agency, see the AFA website, at https://www.agence-francaise-anticorruption.gouv.fr/fr/missions (accessed August 9, 2022); see also the infra-Section 6.2.1.3.

[11] Judith Seddon, et al, "Monitorships in the United Kingdom," ("[i]t should not be assumed that monitorships in the United Kingdom will become as prevalent as they are in the United States, or that, where they are used, they will be as extensive in scope as their US counterparts"); The World Bank Group is also promoting corporate compliance and integrity under its Sanction regime by conditioning the lifting of debarment on the development of a satisfactory integrity compliance program in the corporation, see World Bank, "Summary of World Bank Group Integrity Compliance Guidelines," January 2, 2011, http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf (accessed December 2, 2020).

[12] See Harry Cassin, "Wall Street Bank Earns Top Spot on FCPA Blog Top Ten List," *FCPA Blog*, October 26, 2020, https://fcpablog.com/2020/10/26/wall-street-bank-earns-top-spot-on-fcpa-blog-top-ten-list/ (accessed December 11, 2020) ("[f]ive FCPA settlements have now reached a billion dollars or more, and it takes at least $585 million to even appear in the current top ten").

[13] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 193 ("probation and institutionalization use up social resources, and fines do not, since the latter are basically just transfer payments, while the former use resources in the form of guards, supervisory personnel, probation officers, and the offenders' own time"); Jeffrey S. Parker, "Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties," *American Criminal Law Review* 26, no. 3 (1989): 572 ("the application of nonmonetary sanctions would be a system of regulation without specific legislative mandate, administrative expertise, or clear jurisdictional boundaries, and would employ an approach of government standard-setting that is likely to be inappropriate and ineffectual in dealing with the problem of organizational crime").

[14] See infra notes 92-95.

enforcement actions.[15] Therefore, it is necessary to inquire into the rationales and justifications for the use of compliance obligations and monitorships in addition to corporate fines and individual liability.

If the imposition of compliance obligations and monitorships is necessary, how to ensure that the required compliance measures are effective in promoting corporate compliance and how to reduce the associated costs and ramifications merit serious query. Such questions address the utility, or the lack of it, of DPA-imposed compliance obligations, and may even affect the perceived legitimacy of the DPA mechanism and the desired frequency and scope of the application of compliance obligations in practice. Notably, a corporate compliance program can be merely window-dressing in nature and contributes little to the ethical corporate culture even if it satisfies all the technical elements of an effective compliance program.[16] What makes things worse is that prosecutors rarely have the resources and expertise to engage in the on-going monitoring of corporate compliance progress for years, and distinguish between a window-dressing corporate compliance program and a real one.[17] As a result, the cosmetic and ineffective compliance program may be credited, allowing the corporation to escape criminal prosecution and conviction easily and unfairly.[18] On the other hand, compliance obligations and monitorships can be very costly to the corporation, and cause great disruption to the normal business operation.[19] The aggressive enforcement practices of pushing for excessive compliance measures and monitorships are likely to put prosecutors under harsh criticisms.[20] It is thus essential to strike a balance between the efficacy and the costs of compliance obligations and monitorships in the use of DPAs.

This Chapter proceeds in six Sections. Following the Introduction in Section 6.1, Section 6.2 introduces the policies and enforcement practices in the U.S., UK and France as to the promotion of corporate compliance programs and the monitoring of the company's implementation of

[15] Garrett, "Structural Reform Prosecution," 876 ("[i]f punitive fines were imposed, organizations could then rationally decide what socially efficient compliance measures to pay for"); Lawrence A. Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform," *Florida Law Review* 66, no. 1 (2014): 59 (calling for prosecutors to recognize the superiority of corporate board and management in terms of the expertise and knowledge of corporate governance in general and how specific governance measures might work at their company, and thus prosecutors shall proceed with a degree of deference).

[16] David Hess, Robert S McWhorter, and Timothy L Fort, "The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics," *Fordham Journal of Corporate & Financial Law* 11, no. 4 (2006): 734-36 (noting that the existence of a compliance program that was consistent with the 1991 Sentencing Guidelines in Enron did not prevent the high-profile financial fraud scandal or improve the corporate culture that prioritized financial performance over laws and rules).

[17] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 349 ("prosecutors often lack the resources or incentives to provide ongoing assessments of the policing measures they impose"); David Hess, and Cristie L. Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem," *Cornell International Law Journal* 41, no. 2 (2008): 310-11 ("[p]rosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of largescale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies").

[18] K. D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly* 81 (2003): 491 (noting that "the favorable treatment of companies with internal compliance structures may result in an under-deterrence of prohibited corporate misconduct"); Sean J. Griffith, "Corporate Governance in an Era of Compliance," *William & Mary Law Review* 57, no. 6 (2016): 2128 ("[t]he inability to demonstrate the effectiveness of compliance raises two difficult questions. First, why should prosecutors give firms any credit for employing compliance mechanisms whose effectiveness has not been proven? …").

[19] Haugh, "The Criminalization of Compliance," 1243 ("[i]n addition to the significant monetary costs of employing a monitor, the monitor's staff may be attending business meetings, interviewing board members and senior managers, reporting on the actions of C-suite executives, and engaging in hands-on development of corporate compliance initiatives… All this takes time, energy, and focus away from what employees see as their real responsibilities").

[20] Cristie Ford, and David Hess, "Can Corporate Monitorships Improve Corporate Compliance?" *Journal of Corporation Law* 34, no. 3 (2009): 729 ("prosecutor wants to close his file in a way that is reasonably calculated to ensure that the subject corporation has at least decent, industry-standard compliance processes in place (at least on paper), and then move on to the next case. … mindful of criticisms about monitors running amok, the prosecutor does not want to … incur costs that are more burdensome than they have to be").

mandated compliance changes under the DPA/CJIP regimes. Section 6.3 and Section 6.4 respectively examine the values of corporate compliance obligations, as well as the concerns over the compliance mandate. It is found that the imposition of compliance obligations helps further the corporate enforcement goals of deterrence and rehabilitation, whereas a corporate fine and individual liability may be flawed or insufficient. On the other hand, prosecutors' use of DPAs to jump into the realm of corporate governance has incurred heavy criticisms over the potential costs and impacts of corporate compliance mandates. Section 6.5 analyzes some measures that have been adopted in the U.S., UK and France in terms of their effects on promoting corporate compliance and reducing the undesired costs to the corporate target. Section 6.6 concludes with the lessons learned from the designing and implementation of the DPA programs in the three selected jurisdictions in terms of effectively promoting corporate compliance.

6.2 Compliance Obligations and Compliance Monitorship under DPAs

In addition to holding corporations accountable for the past misconduct and seeking a hefty corporate fine, prosecutors may also leverage DPAs to shape corporate behavior in the future by mandating compliance reforms. Ideally, compliance obligations force companies to develop an effective corporate compliance program to prevent and detect future misconduct in facilitation of deterrence and rehabilitation. However, prosecutors are faced with serious challenges in imposing targeted and proportionate compliance obligations, and exercising on-going oversight to ensure the company's genuine implementation of the compliance terms of DPAs. In order to address such practical challenges, independent external monitors are sometimes employed to supervise and assess the corporate compliance progress. This Section will introduce the policies and enforcement actions in the U.S., UK and France as to leveraging DPAs to incentivize corporate compliance improvements and to impose independent compliance monitorships.

6.2.1 Promoting Corporate Compliance through Criminal Proceedings in the U.S., UK and France

The existence and effectiveness of corporate compliance programs are relevant in multiple stages of the criminal proceedings against corporate organizations. They are also major factors influencing the prosecutor's decisions on whether to prosecute the corporation, whether a DPA is desired to settle the corporate charges, and if so, how to determine the severity and scope of corporate monetary and compliance obligations imposed through DPAs. Moreover, an adequate corporate compliance program offers the corporation an affirmative defense to the charge of failing to prevent bribery in the UK, while the absence of an effective anti-corruption compliance program itself is a statutory violation for corporations over a certain size in France. In the sentencing stage, the type and scope of proactive corporate compliance measures might also affect the final penalty received by the corporation.

6.2.1.1 U.S.: Corporate Compliance as Sentencing and Prosecuting Consideration and Obligation

In the U.S., the attempts to reform corporate organizations started even before the prevalence of DPAs.[21] Following several decades of compliance development amid high-profile corporate sandals and regulatory enforcement actions, the passage of Federal Organizational Sentencing Guidelines in 1991 is regarded as "a watershed change in compliance regulation".[22] The Organizational Sentencing Guidelines employs the old "stick and carrot" approach to incentivize corporations to develop and improve their compliance program. On the one hand, the proactive development of effective corporate compliance and ethics program to prevent and detect criminal misconduct will be rewarded with significantly reduced sanctions when the corporation is later held criminally liable for individuals' misconduct it failed to prevent.[23] On the other hand, following a criminal conviction or guilty plea, the court may require companies to undergo a certain period of probation for the development of an effective compliance and ethics program.[24] The Organizational Sentencing Guidelines explicitly lists seven minimum elements for an effective compliance and ethics program: (i) standards and procedures in place to prevent and detect criminal conduct; (ii) involvement of corporate leadership in the implementation and oversight of the compliance and ethics program; (iii) exclusion of individuals with unethical records from substantial authority; (iv) training and communication of standards and procedures to corporate management and employees; (v) continual monitoring and auditing systems, including effective internal reporting mechanisms with anti-retaliation rules; (vi) appropriate incentives and disciplinary measures in place for enforcement of the compliance program; and (vii) appropriate remedial measures following the detection of misconduct, including necessary modifications to the compliance and ethics program.[25]

Though seeking judicial orders in the sentencing stage presents a useful option for prosecutors to force corporate compliance reforms, this option carries significant limitations and consequences, including the serious collateral consequences of corporate indictment and conviction.[26] Utilizing their broad charging discretion, U.S. prosecutors began to pursue the reform of corporate organizations through DPAs when the mechanism was added into their arsenal. Just as the dual approaches adopted in the Organizational Sentencing Guidelines, the DOJ policy promotes corporate compliance by means of both *ex-ante* incentives and *ex-post* enforcement tactics.[27] Regarding the ex-ante incentives, the company's proactive measures to develop an effective compliance program, and their timely remedial measures to strengthen the compliance program following the detection of misconduct would be rewarded in the prosecution and resolution

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[21] Haugh, "The Criminalization of Compliance," 1224-33 (discussing the evolution of corporate compliance in the U.S. since the 1960s).

[22] Robert C Bird, and Stephen Kim Park, "The Domains of Corporate Counsel in an Era of Compliance," *American Business Law Journal* 53, no. 2 (2016): 212.

[23] Federal Sentencing Guidelines Manual, Article 8C 2.5 (f) (1) (2016) (the existence of an effective program to prevent and detect violations of law could help the corporation to subtract the culpability score by 3 points).

[24] Federal Sentencing Guidelines Manual, Article 8D 1.1 (3) (2016) (mandating corporate probation when, among others, the company has more than 50 employees, is otherwise required under law to have an effective compliance and ethics program, and does not have an effective compliance program in place).

[25] Federal Sentencing Guidelines Manual, Article 8B 2.1 (b) (2016).

[26] Garrett, "Structural Reform Prosecution," 902-13 (noting several stages of the criminal procedure where the pursuit of structural reform is possible, including the prevention stage, the charging stage, the plea-bargaining stage, and the sentencing stage, and claiming that seeking organizational structural reform at the charging stage gives the prosecutors broader discretion and mitigates the dire consequences of organizational indictment).

[27] Griffith, "Corporate Governance in an Era of Compliance," 2086-92 (noting that the prosecuting agency could impose compliance mandate "by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts").

stage.[28] Companies having an effective compliance program in place at the time of misconduct are more likely to be offered a DPA or even a declination, although they are not entitled to an amnesty.[29] The corporate efforts to implement a new, or to update its existing, compliance program after the exposure of misconduct and before the resolution, can be considered as voluntary remediation that eliminates the need for governmental intervention and external monitorships.[30] Regarding the enforcement tactics, prosecutors tend to seek extensive compliance obligations and monitorships when negotiating DPAs with companies that did not have an adequate compliance program at the time of wrongdoing and had not effectively tested the effectiveness of its compliance program at the time of resolution.[31] The violation of compliance obligations could trigger the default clause of DPAs, subjecting the company to extended deferral period or even resumed prosecution.

6.2.1.2 UK: Corporate Compliance as Prosecuting Consideration and Affirmative Defense

The UK prosecutors are directed to assess the effectiveness of a company's compliance program for the purpose of determining whether criminal prosecution or a DPA is appropriate to conclude corporate criminal investigations and, if a DPA is preferred, what conditions should be included in the DPA.[32] The existence of a "genuinely proactive and effective" compliance program is a key factor that favors a DPA over prosecution.[33] However, the lack of a fully effective corporate compliance program will not necessarily preclude a DPA "as the DPA can impose further improvements" to the compliance program.[34] Apart from impacting the charging decisions, what is special in the UK regime is that "adequate procedures" constitute an affirmative defense for corporations against the charge of failure to prevent bribery or the facilitation of tax evasion.[35] Even when the compliance program is insufficient to protect the company from criminal

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[28] U.S. Justice Manual, 9-28.800 – Corporate Compliance Programs; 9-28.1000 – Restitution and Remediation (specifying that "a prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases").

[29] U.S. Justice Manual, 9-28.800 – Corporate Compliance Programs (noting that "the existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*", while claiming "[the fact that] the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation").

[30] U.S. Justice Manual, 9-28.1000 – Restitution and Remediation ("[a] prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases").

[31] Memorandum from Brian A. Benczkowski, Assistant Attorney General, on *Selection of Monitors in Criminal Division Matters* (Benczkowski Memorandum), October 11, 2018, https://www.justice.gov/opa/speech/file/1100531/download (accessed November 17, 2020), at 2 (listing the factors that would impact the evaluation of the potential benefits of retaining a monitor).

[32] SFO, Evaluating a Compliance Programme, in *SFO Operational Handbook*, January 2020, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/#_ftn2 (accessed November 3, 2020) (noting that the purpose of the assessment of the effectiveness of corporate compliance program is "to inform decisions on the case, including: a) Is a prosecution in the public interest? b) Should the organisation be invited into DPA negotiations and, if so, what conditions should the DPA include?...").

[33] SFO and CPS, Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013 (DPA Code of Practice), Article 2.8.2 (iii), https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (accessed November 3, 2020) (listing the existence of a proactive compliance program at the time of offending and at the time of reporting as an important factor against prosecution).

[34] SFO, Evaluating a Compliance Programme ("[a] DPA may still be appropriate, even where an organisation does not yet have a fully effective compliance programme, as the DPA can impose further improvements"); Amanda N. Raad, et al, "UK Serious Fraud Office Clarifies Its Approach to Compliance Programmes," Ropes & Gray, January 30, 2020, https://www.ropesgray.com/en/newsroom/alerts/2020/01/UK-Serious-Fraud-Office-Clarifies-Its-Approach-to-Compliance-Programmes (accessed November 3, 2020) (noting that the evaluation policy "elaborates on the indication in the DPA Code").

[35] Bribery Act 2010, c. 23, s. 7; Criminal Finances Act 2017, c. 22, s. 45 & 46.

prosecution or earn the company a DPA, it may demonstrate the company's reduced culpability and incur a mitigated penalty in the sentencing stage.[36]

6.2.1.3 France: Corporate Compliance as Prosecuting Consideration and Legal Obligation

The French anti-bribery law takes a unique approach to the promotion of corporate compliance. The *Sapin* II Law makes it a legal obligation for large French companies over a certain size and turnover threshold to implement a compliance program to prevent and detect corruption, while enumerating eight key elements of the anti-corruption compliance program.[37] In the case of failure to implement the compliance program, even if no real acts of bribery occurred, the AFA could impose a financial penalty of up to € 200,000 on individuals such as the corporate presidents, directors and managers, and one million euros on the corporation.[38] For corporations that are obligated under the *Sapin* II Law to implement the anti-corruption compliance program, if they are later prosecuted for bribery violations, the lack or deficiency of the compliance program would be negatively considered by prosecutors when deciding whether to proceed with prosecution or to offer a CJIP, and the amount of financial penalty imposed under the CJIP.[39] Furthermore, corporations accepting a CJIP are typically required to implement or improve its anti-corruption compliance program as delineated in the *Sapin* II Law.[40]

6.2.2 Monitoring the Corporations' Implementation of Compliance Obligations

One of the biggest challenges confronting prosecutors that aim to shape corporate culture through DPAs is how to make sure that the compliance terms of DPAs are genuinely followed by the corporations. It may take a long time to identify compliance risks, overhaul the compliance program and test the effectiveness of the updated compliance program in practice. Prosecutors hardly have sufficient resources or incentives to provide ongoing monitoring of corporate compliance efforts by, for example, stationing in the target company for years.[41] Besides, due to the prosecutors' limited expertise in the corporate compliance area, they often depend on proxy measures, "relationships of credibility and trust" or even intuition to evaluate the effectiveness of a company's compliance program.[42] When prosecutors are unable to effectively monitor and evaluate corporate compliance reforms as demanded by DPAs, a cosmetic and ineffective

[36] Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline*, effective from October 1, 2014, https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf (accessed October 19, 2020), at 49.
[37] *Sapin* II, Article 17, I & II.
[38] *Sapin* II, Article 17, V.
[39] 2023 CJIP Guidelines, at 10 ("[f]ailure of the company to implement a compliance program that meets the provisions of article 17 of the Law of December 9, 2016 [Spain II Law], as well we the absence of corrective measures following the observation of breaches, may be considered as obstacles preventing from signing a CJIP"); at 16 (deficiencies of the company program may increase the public interest fine by 20% in CJIP).
[40] *Ibid*, at 17 ("the CJIP may require to be submitted, for a maximum period of three years, and under the supervision of the AFA, to a compliance program designed to ensure the existence and implementation within the company of the measures and procedures listed in II of article 13-29-2 of the criminal code").
[41] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 349 ("prosecutors often lack the resources or incentives to provide ongoing assessments of the policing measures they impose"); Hess, and Ford, "Corporate Corruption and Reform Undertakings," 310-11 ("[p]rosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of largescale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies").
[42] Nick Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review," *The Yale Law Journal* 128, no. 1 (2020): 1402 (noting that prosecutors often evaluate corporate compliance program "only by proxy measures and through relationships of credibility and trust"); Eugene Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms," *New York University Journal of Law and Business* 14, no. 3 (2018): 1010 (noting that "the compliance field continues to rely more heavily on intuition than empirical measurement to evaluate whether and how effectively programs are working").

compliance program may be inappropriately credited.[43] In order to enhance their capability to monitor and assess corporate compliance programs, prosecutors in all the three selected jurisdictions are actively employing monitoring mechanisms of different types and scope to oversee the corporate compliance measures imposed under DPAs.

6.2.2.1 Self-monitoring and Post-resolution Self-Reporting

Instead of directly intervening in the monitoring of corporate compliance, prosecutors could rely on the corporation itself to continually monitor and self-report its compliance efforts for the whole or partial duration of DPAs.[44] The corporation promises to report to prosecutors or other designated agencies on the implementation of the compliance steps and measures described in the DPAs.[45] The frequency of reporting, as well as the form and content of compliance reports are generally agreed beforehand between the prosecutor and the target corporation in the DPAs.[46] In certain cases resolved by the SFO, aside from the company as the signatory to the DPA, the parent company is required to provide a binding undertaking and commit to the supervision of its subsidiary's ongoing compliance or reinforce the group-wide compliance program.[47]

The post-resolution self-reporting requirement is only desirable when prosecutors have reasonable trust in the genuine nature of the corporate commitments to compliance enhancements.[48] From the perspective of the target corporation, self-monitoring accompanied by periodic reporting to the authority is a less burdensome way of compliance monitoring than external compliance monitorship. Corporations are spared from the external monitor's intrusion in the business operation and the typically high costs associated with external monitorships.[49] Compared with direct monitoring from prosecutors, the corporate board and management are likely to have better knowledge than prosecutors pertaining to the designing and implementation of compliance policies and procedures.[50] The requirement for continual reporting also provides certain degrees of external oversight to the extent of increasing the corporate incentives to take genuine and meaningful compliance measures.

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[43] K. D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly* 81 (2003): 491 (noting that "the favorable treatment of companies with internal compliance structures may result in an under-deterrence of prohibited corporate misconduct"); Griffith, "Corporate Governance in an Era of Compliance," 2128 ("[t]he inability to demonstrate the effectiveness of compliance raises two difficult questions. First, why should prosecutors give firms any credit for employing compliance mechanisms whose effectiveness has not been proven? …").

[44] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 337 ("[m]ost PDAs with mandates also require firms to regularly report to prosecutors and other federal authorities on the firm's compliance activities").

[45] The DPAs negotiated by the SFO with Scarlad and Güralp require the corporate compliance officer, rather than an external monitor, to review and report on the company's anti-bribery and corruption system, possibly considering the small size of the companies.

[46] For a typical DPA that imposes self-reporting obligation, see *United States v. Herbalife Nutrition Ltd.*, Deferred Prosecution Agreement, 20 Cr-00443-GHW, (S.D.N.Y Aug. 24, 2020), https://www.justice.gov/criminal-fraud/file/1312361/download (accessed August 9, 2022), at 11 ("[t]he Company agrees that it will report to the United States annually during the Term regarding remediation and implementation of the compliance measures described in Attachment C. These reports will be prepared in accordance with Attachment D").

[47] The parent's compliance undertaking could be found alongside the DPAs negotiated by SFO with Serco Geografix Ltd, G4S Care & Justice Services and Amec Foster Wheeler Energy; see also Chris Stott, et al, "Eighth Deferred Prosecution Agreement Approved in the UK," Ropes & Gray LLP, https://www.lexology.com/library/detail.aspx?g=5b135d5d-a8d9-40b8-b089-28488584827a (accessed November 3, 2020).

[48] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021) ("[s]tepping back, any resolution with a company involves a significant amount of trust on the part of the government. Trust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities. But where the basis for that trust is limited or called into question, we have other options. Independent monitors have long been a tool to encourage and verify compliance").

[49] See infra-Section 6.4.2.

[50] Cunningham, "Deferred Prosecutions and Corporate Governance," 59 (calling for the prosecutors to proceed with a degree of deference as "a target board and management likely have greater expertise and knowledge" than themselves concerning corporate governance generally and how they might work at their company).

However, it is unwise to exaggerate the effect of corporate self-monitoring. As will be discussed in detail later, corporate compliance reform is not free from costs but can be very expensive.[51] In addition, prosecutors generally lack the adequate incentives and expertise to assess the effectiveness of a corporate compliance program, or to distinguish between a cosmetic compliance program and the one that makes a meaningful impact on corporate culture.[52] As a result, companies may have both the motives and opportunities to adopt merely a window-dressing compliance program without fundamentally changing business practices or promoting ethical corporate culture.[53]

6.2.2.2 Independent Compliance Monitorships

In addition to the self-reporting requirements, prosecutors may go even further and require the company to retain at its own expenses an independent compliance monitor. DPAs concluded by the U.S. prosecutors involving the use of external monitorships generally specify the minimal qualifications for the monitor candidates, the scope of monitors' remit and the length of monitorships. The minimal qualifications generally include the expertise, experience and resources with respect to the relevant legal and compliance area, as well as independence from the company. [54] There is no open bidding process for the monitorship contract.[55] Instead, the company is allowed to propose a pool of three qualified candidates, in accordance with the qualifications specified in the DPAs, for the prosecutor's office to choose.[56] Though monitors are retained and paid by the company, they are supposed to conduct the work independently. They owe no fiduciary duty to the company, nor should they be considered as public agents.[57]

The primary responsibility of monitors is to assess and monitor the company's compliance with relevant laws and the terms of DPAs, especially the minimal elements of the corporate compliance program defined in the DPAs.[58] Monitors are generally expected to (i) assess the corporate compliance risks; (ii) evaluate the corporate compliance program and make recommendations on the designing and implementation of the compliance program; (iii) prepare periodic and final reports for the prosecutors; and (iv) certify whether the compliance program is

[51] See infra notes 102-106.
[52] Sean J. Griffith, et al, "The Changing Face of Corporate Compliance and Corporate Governance," *Fordham Journal of Corporate and Financial Law* 21, no. 1: (2016): 5 (citing that published speech by the General Council of the New York Federal Reserve Bank: "[w]e simply do not have a tool that will give us an accurate and reliable measure of program effectiveness").
[53] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 383 ("[p]rosecutors receiving nothing more than an annual report prepared by the firm are often unlikely to provide effective oversight over compliance because they do not have sufficient industry expertise, time, or incentives to determine whether the firm has in fact adopted and is implementing an effective policing regime").
[54] Benczkowski Memorandum, at 3, C. Terms of Criminal Division Monitorship Agreements (requiring corporate resolution agreements providing monitorships to include "1. A description of the monitor's required qualifications; 2. A description of the monitor selection process; 3. A description of the process for replacing the monitor during the term of the monitorship, should it be necessary; 4. A statement that the parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of the underlying agreement; 5. An explanation of the responsibilities of the monitor and the monitorship's scope; and 6. The length of the monitorship").
[55] *Accountability in Deferred Prosecution Act of 2008*, H.R. 6492, 110th Cong. § 5 (2008) (requiring the Attorney General to establish a national list of potential monitors and establish rules for the selection of independent monitors for the sake of "an open, public, and competitive process for the selection of such monitors").
[56] Benczkowski Memorandum, at 4, E. The Selection Process.
[57] Memorandum from Craig S. Morford, Acting Deputy Attorney General, on *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Morford Memorandum), March 7, 2008, at 5 ("a monitor is independent both from the corporation and the Government").
[58] *Ibid,* Introduction ("[a] monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct"); Benczkowski Memorandum, at 1 ("[m]onitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution").

reasonably designed and implemented to prevent and detect violations of relevant laws at the end of the monitorships.[59] Monitors' reports will form an important basis for the prosecutor's assessment of the company's fulfillment of the DPA-imposed compliance obligations for the purpose of deciding whether to extend the monitorship or/and duration of the DPA, and whether to dismiss the charge or to reinstate the indictment.[60]

DOJ monitorships typically last for 1.5 to 3 years in order to make sure that the compliance program is not only reasonably designed and implemented, but also effective in preventing and detecting violations.[61] Most monitorships last throughout the duration of DPAs. However, some DPAs may permit an early termination of monitorships provided that certain conditions are met. Other DPAs may adopt a hybrid regime that requires the company to retain an external monitor for part of the post-resolution period, followed by self-reporting for the rest of the period.[62]

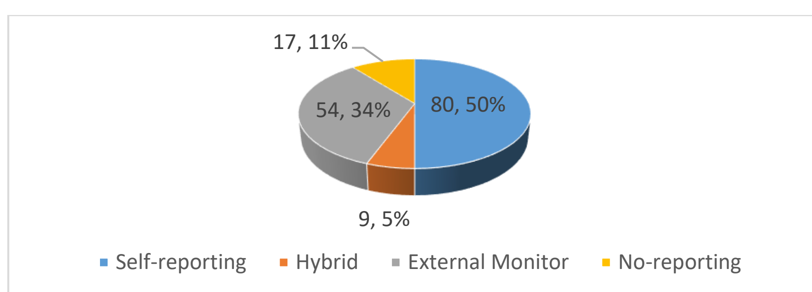

Figure 6 Types of Reporting Obligations in the FCPA Cases: 2004-2022[63]

Independent monitor or "independent ombudsman" was seen in the very first DPA negotiated between the U.S. Attorney for the Southern District of New York with Prudential Securities Inc. in 1994.[64] The frequency of the use of monitorships varies across time and regulatory areas. From 2010 to 2020, the DOJ and SEC concluded resolutions with 219 legal persons, out of which 48 (22%) were awarded monitorships either individually or as part of a business group.[65]

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[59] Jessica Nwokocha, and Adria Perez, Kilpatrick Townsend & Stockton LLP, "Ending the Decade on a High: U.S. Government's 2019 FCPA Enforcement Highlights," April 10, 2020, https://www.jdsupra.com/legalnews/ending-the-decade-on-a-high-u-s-54997/ (accessed October 17, 2020) (noting that in the four 2019 monitorship agreements involving MTS, Fresenius, and Ericsson, "the majority of the terms are substantially the same and reflect the standard language used for such agreements", while the Walmart agreement pertains to key risky areas and specific countries).

[60] *United States v. Bilfinger SE*, Deferred Prosecution Agreement, 4:13-er-00745 (T.X.S.D, Sep. 23, 2019), at 3-4, https://www.justice.gov/criminal-fraud/file/971416/download (accessed October 28, 2020) (citing "the monitor's inability to certify compliance with the compliance obligations in the 2013 Agreement after 18 months of monitorship" as the consideration for the extension of DPA).

[61] Vikramaditya Khanna, "Reforming the Corporate Monitor?" in Anthony S. Barkow & Rachel E. Barkow eds., *Prosecutors in The Boardroom: Using Criminal Law to Regulate Corporate Conduct* (NY: New York University Press, 2011), 229 (noting that the duration of the monitoring assignments varies between one and three years, while some may reach up to five years).

[62] Gibson Dunn, *2014 Year-End FCPA Update*, January 5, 2015, https://www.gibsondunn.com/2014-year-end-fcpa-update/ (accessed September 14, 2021).

[63] Stanford Law School, Sullivan & Cromwell LLP, Foreign Corrupt Practices Act Clearinghouse, Charts & Graphics-Compliance-Types of Reporting Obligations, http://fcpa.stanford.edu/statistics-analytics.html?tab=3 (accessed February 6, 2023).

[64] *United States v. Prudential Securities Inc.*, Deferred Prosecution Agreement, (S.D.N.Y Oct. 27, 1994), at 3, https://corporate-prosecution-registry.s3.amazonaws.com/media/agreement/prudential.pdf (accessed October 25, 2020) ("[i]t is further understood that [Prudential] shall: … (b) comply with all the terms and conditions of the SEC agreement and retain a mutually acceptable outside counsel within 30 days of the filing of this agreement to review [Prudential]'s policies and procedures in order to ensure that [Prudential] has adopted all the compliance-related directives set forth in the SEC agreement"); Vikramaditya Khanna, and Timothy L. Dickinson, "The Corporate Monitor: The New Corporate Czar?" *Michigan Law Review* 105, no. 8 (2007): 1717-39 (sketching the evolution of monitorship and noticing that in the Prudential Securities case, "the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the company as per a DPA").

[65] OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention: Phase 4 Report - United States*, November 2020, para 318.

Moreover, monitorships are more frequently found in the FCPA context, as can be seen in the Figure below, though monitorship is not seen in any of the FCPA resolutions in 2020 and 2021.[66]

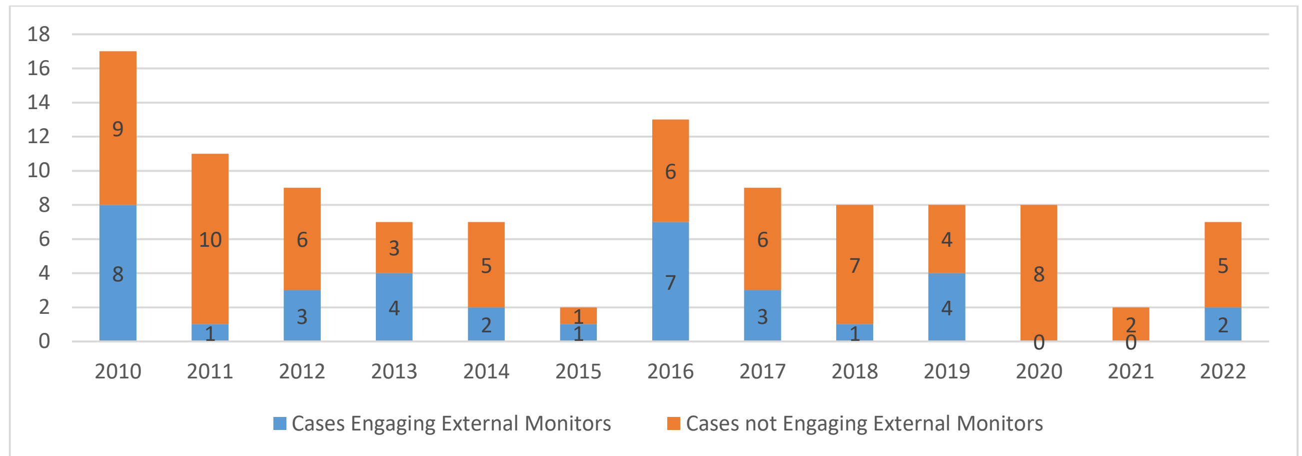

Figure 7 Monitorships in the DOJ FCPA Corporate Enforcement Actions: 2010-2022

Under the UK DPA regime, the monitor's responsibility and the selection process are similar to those employed by the DOJ.[67] Compared with the U.S. practice, compliance monitorships are demanded by the SFO in a more restricted manner in terms of both the scope and the frequency of monitorships.[68] Out of all the ten publicly-available DPAs concluded by the SFO so far, most DPAs allow the corporations themselves to review the corporate compliance efforts and to self-report to the SFO.[69] Apart from the Airbus DPA that acknowledges the monitorship demanded by a simultaneous CJIP agreed with the French authority, four out of the ten DPAs require the company to commission a specified legal or natural person to review its compliance program and prepare the compliance reports.[70] However, such persons are not selected through the process reserved for independent monitors, nor are they responsible for monitoring the company's implementation of DPA-imposed compliance duties independently and reporting directly to SFO. Legal practitioners have pointed out that "the monitorship components of settlements agreed to date could more accurately be described as quasi-monitorships".[71]

It is speculated that the SFO may be moving towards a more routine use of monitorships given the agency's growing emphasis on corporate compliance and the past experience of the SFO's new director, Lisa Osofsky, as a U.S. federal prosecutor and monitor in the private sector.[72] The

[66] "DOJ FCPA Enforcement – 2022 Year in Review," *FCPA Professor*, January 11, 2023, https://fcpaprofessor.com/doj-fcpa-enforcement-2022-year-review/ (accessed February 7, 2023) (noting the DOJ decided that a formal monitor was unnecessary in certain cases because the company already had monitoring requirements imposed upon it as a result of a related foreign law enforcement action).
[67] SFO and CPS, *DPA Code of Practice*, Articles 7.15-7.17.
[68] Judith Seddon, et al, "Monitorships in the United Kingdom," ("[m]onitors appointed under UK DPAs have been, and are likely to continue to be, deployed in a more targeted manner than has been the case under US DPAs to date").
[69] Stott, et al, "Eighth Deferred Prosecution Agreement Approved in the UK," ("[t]his represents a departure from earlier UK DPAs, which have allowed corporates to report their progress to the SFO, rather than being subject to active monitoring").
[70] The four DPAs requiring external monitoring were negotiated by the SFO with, respectively, *Standard Bank*, *Rolls-Royce Plc, Tesco and G4S Care & Justice Services. See* Judith Seddon, et al, "Monitorships in the United Kingdom".
[71] *Ibid*.
[72] *Ibid* (noting that "there are some indications that the SFO may be moving towards a more routine use of monitorships in cases when DPAs mandate improvements to corporate organisations' compliance arrangements"); Stott, et al, "Eighth Deferred Prosecution Agreement Approved in the UK," ("[m]any commentators expected the use of monitors to increase under Lisa Osofsky's directorship given her background as a US federal prosecutor and a monitor in private practice").

DPA with G4S C&J seems to confirm this speculation. Under the eighth DPA secured by the SFO, G4S was required to hire an external "reviewer", an independent monitor in essence, for a period of three years.[73] The reviewer's responsibility, which is significantly more extensive than that found in previous DPAs, involves the periodic review, assessment and reporting of internal controls, policies and procedures in both the target company and its parent company.[74] It is believed to be the first time that the SFO formally employed the independent compliance monitorship that is comparable to the monitorship commonly demanded by U.S. prosecutors.[75]

6.2.2.3 Compliance Monitorships involving Government Agency

Compliance monitor can be not only a private individual or firm, but also a governmental agency.[76] Unlike the independent compliance monitorships found in the U.S. and UK DPA programs, the French CJIP regime relies on AFA, an administrative agency created under the *Sapin* II law, to supervise the company's efforts to implement or improve anti-corruption compliance program mandated under the CJIPs.[77] Before the conclusion of a CJIP, prosecutors may request AFA to advise on the potential compliance remediation measures.[78] If compliance obligations are imposed under the terms of CJIP and corporate self-monitoring alone is insufficient, AFA would be involved to validate the company's action plan, conduct initial and follow-up audits of the compliance program, and submit annual and concluding reports to the prosecutors for a period of no more than three years.[79] The company's failure to fulfill such compliance obligations may lead to the resumption of prosecution. For the purpose of carrying out the CJIP-imposed monitorships, the AFA is authorized to seek assistance from experts or other authorities for the legal, financial, fiscal and accounting analysis.[80] The costs incurred by the AFA, including the fees of professionals employed by the AFA, in connection with the monitorship will be borne by the company, with an upper limit estimated by the AFA.[81]

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[73] *SFO v G4S Care &Justice Services (UK) Limited*, Deferred Prosecution Agreement, July 14, 2020, para. 35.

[74] *SFO v. G4S Care &Justice Services (UK) Limited*, Crown Court at Southwark, Case No: U20201392, July 17, 2020, para. 43 ("[t]he intensity of the external scrutiny as set out in the DPA is greater than in any previous DPA").

[75] "DPA No. 8 – G4S Group plc: the case for independent compliance monitors," August 24, 2020, https://www.mayerbrown.com/en/perspectives-events/publications/2020/08/dpa-no-8-g4s-group-plc--the-case-for-independent-compliance-monitors (accessed November 3, 2020) ("[t]his is the first time an independent compliance monitor has been formally mandated, but not specified, in the context of a DPA").

[76] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 131 (noting that compliance monitor may be an independent individual, legal entity or a government agency); Laurent Cohen-Tanugi, "French Anti-corruption Compliance Monitoring: Differences from US Corporate Monitorships and Implications for Multijurisdictional Settlements," *International Bar Association*, April 25, 2022, https://www.ibanet.org/french-anti-corruption-compliance-monitoring-differences-from-us (accessed August 8, 2022).

[77] Notably, in the environmental cases resolved via CJIP under Article 41-1-3 of the Code of Criminal Procedure, the competent departments of the Ministry responsible for the environment or the services of the French Biodiversity Office may be appointed to supervise the corporate compliance efforts.

[78] 2023 CJIP Guidelines, at 18 (clarifying that when deciding whether the inclusion of compliance obligations in the CJIP is appropriate, the PNF would work in coordination with AFA. The AFA carries out a preliminary examination and analysis of the corporate anti-corruption compliance program).

[79] 2023 CJIP Guidelines, at 18 ("[t]he agreement may provide for a period of three years with a clause reducing the period to two years… The AFA submits a report at the end of the implementation period to the PNF and must inform it of any implementation difficulties").

[80] *Ibid*, at 19.

[81] *Ibid*, at 19 ("the AFA estimates the maximum costs incurred by its use of experts or qualified persons based on information received from the company").

6.3 Social Values of Compliance Obligations: Deterrence and Rehabilitation

Apart from the compliance obligations, prosecutors also use corporate DPAs to impose monetary obligations and demand continual corporate cooperation to pursue relevant individual wrongdoers.[82] The imposition of corporate fine is likely to trigger voluntary corporate measures aimed at preventing and detecting corporate wrongdoings. Compared with a corporate fine, the use of compliance obligations and monitorships are generally more expensive for both the corporations and the prosecutors, given the disruptive effects caused to business operation and the high assessment and monitoring costs. In addition, the previous Chapter also discussed the pursuit of individual liability as a useful option in situations where the deterrence effect of a corporate fine is exhausted. Given the availability of corporate fine and the emphasis on individual accountability, the question of whether it is still necessary to seek coerced compliance reforms is worth serious consideration. This Section aims to examine the necessity and social values of seeking compliance reforms through DPAs.

In the Principles of Federal Prosecution of Business Organizations, the DOJ specifies that the general purposes of the criminal law, i.e., retribution, deterrence, rehabilitation, and restitution, apply in the criminal enforcement actions against both individuals and corporations.[83] As a popular form of resolving corporate offenses, DPAs are applied by prosecutors with similar aims in mind.[84] Retribution is arguably not a major goal in the corporate enforcement context. The DOJ Morford Memo makes it clear that a compliance monitor's responsibility is "not to further punitive goals", but to assess and monitor the company's compliance with the DPA and to reduce the risk of recurrence of corporate misconduct.[85] Accordingly, this Section analyzes the social values of compliance obligations from the perspective of deterrence and rehabilitation.

6.3.1 Corporate Deterrence

6.3.1.1 Are Corporate Fines and Individual Prosecutions Sufficient?

Compared with a corporate fine that involves merely the transfer of payments, corporate probation or monitorship is traditionally not favored by law and economics scholars.[86] Non-monetary sanctions are believed to be less cost-effective in view of the higher assessment and supervisory costs, the attenuated connection with the corporate incentives for profits, and the inefficient governmental interference in the business operation.[87] In theory, credible threats of a

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[82] Kaal, and Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance," 107-109 ("[o]f the publicly available N/DPAs from 1993-2013, 97.41 percent contained provisions that mandated substantive governance improvements"); Garrett, "Structural Reform Prosecution," 861 ("[p]rosecutors … increasingly attempt to reform institutions themselves rather than impose punitive fines and imprisonment upon individual offenders").

[83] US Justice Manual, 9-28.200 – General Considerations of Corporate Liability.

[84] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed November 16, 2020) ("[o]ne of the reasons why deferred prosecution agreements are such a powerful tool is that, in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea").

[85] Morford Memo, at 2; Veronica Root, "The Monitor- 'Client' Relationship," *Virginia Law Review* 100, (2014): 535 (claiming that "the goal of monitorship is that the corporation, monitor, and government work together to ensure that the corporation does not engage in future improper conduct", which "should not be thought of solely as a penalty").

[86] Becker, "Crime and Punishment," 193 ("probation and institutionalization use up social resources, and fines do not, since the latter are basically just transfer payments, while the former use resources in the form of guards, supervisory personnel, probation officers, and the offenders' own time").

[87] Parker, "Criminal Sentencing Policy for Organizations," 572 ("the application of nonmonetary sanctions would be a system of regulation without specific legislative mandate, administrative expertise, or clear jurisdictional boundaries, and would employ an approach of government

sufficiently large corporate fine could induce similar corporate changes, such as voluntary compliance reforms and the hiring of compliance consultants, to prevent corporate crimes and shield the company from future enforcement actions.[88] Deference to corporate self-policing is believed to be superior to direct governmental intervention in the corporate compliance field, since corporate board and management often have greater knowledge than prosecutors pertaining to the design and implementation of corporate policies and compliance measures.[89] Moreover, it is argued by Fisse and Braithwaite that corporations are more committed to solutions they impose on themselves than external requirements.[90] Forcing compliance measures on corporations may be interpreted as distrust of the company, which is likely to make a self-fulfilling prophecy by triggering managerial resentment and encouraging creative corporate measures of resistance and avoidance.[91]

As already discussed in detail in the previous Chapter, in addition to organizational prosecutions, the enforcement authorities could also deter corporate wrongdoings and trigger corporate compliance measures by holding individual wrongdoers accountable.[92] Individual prosecution is desired in the sense that it supplements corporate internal disciplines and directly affects the individuals that actually commit the wrongdoings, without inflicting enormous undesired collateral consequences of corporate prosecution on the innocent third-parties.[93] In addition, prosecutors are traditionally trained and better skilled in the individual prosecutions, compared with reforming a corporate compliance program and rehabilitating corporate organizations.[94] Holding individual wrongdoers accountable could be more effective in preventing corporate wrongdoings than compliance obligations if the enforcement authorities do not have sufficient incentives and capability to prevent such compliance obligations from turning into a cosmetic project and marketing strategy.[95]

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standard-setting that is likely to be inappropriate and ineffectual in dealing with the problem of organizational crime"), & 523 ("the corporate offenders are motivated primarily, if not exclusively, by monetary incentives and are therefore likely to be most responsive to monetary forms of punishment which directly affect financial results").

[88] Garrett, "Structural Reform Prosecution," 876 ("[i]f punitive fines were imposed, organizations could then rationally decide what socially efficient compliance measures to pay for"); Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1729 ("[a] large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines").

[89] Cunningham, "Deferred Prosecutions and Corporate Governance," 59 (calling for the prosecutors to proceed with a degree of deference as "a target board and management likely have greater expertise and knowledge" than themselves concerning corporate governance generally and how they might work at their company).

[90] Brent Fisse, and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1983), 198 (noting that sustaining enthusiasm to continue enforcement of rehabilitative measures is crucial in the long time, and "only the corporation, not the court or the probation service, can deliver sustained commitment to compliance").

[91] *Ibid,* 197 ("when the state treats corporations as incorrigible, it creates managerial resentment and the rather effective forms of resistance and coverup discussed in the next section").

[92] USJM, 9-28.010 – Foundational Principles of Corporate Prosecution ("[o]ne of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing"); "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," September 10, 2015, http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school (accessed August 11, 2021) ("[B]y holding individuals accountable, we can change corporate culture to appropriately recognize the full costs of wrongdoing").

[93] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 366 ("[i]ndividual liability imposed on managers and directors who fail to implement the required policing is, in theory, the most direct way to address policing agency costs"); Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1378 (believing that "all criminal convictions generate harmful collateral consequences", but "individual convictions rarely produce systemic risk, layoffs, or permanent shareholder losses" that could follow corporate convictions).

[94] Garrett, "Structural Reform Prosecution," 882 ("[p]rosecutors' expertise may lie in prosecuting individual wrongdoers and not in reform of organizations or long-term implementation of structural remedies").

[95] Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?" *New York Review Books*, January 9 2014, http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions (accessed July 1, 2020) (claiming that individual prosecution would be more effective than "imposing internal compliance measures that are often little more than window-dressing").

However, the mere pursuit of a corporate fine or individual liability is insufficient to achieve the desired level of deterrence in many circumstances. In terms of the corporate fine, the imposition of a sufficiently large corporate fine is often practically impossible in view of the judgement-proof problem and the externality costs of corporate prosecution.[96] Another major deficit of corporate fine is that it falls indirectly on individual wrongdoers. The lack of adequate corporate incentives and capability to discipline relevant individuals could undermine the deterrence effect arising from corporate fine.[97] Though individual prosecutions could partially solve the problems, this approach is also faced with many challenges, especially in terms of identifying the individuals responsible for the misconduct and extraditing individuals located in foreign jurisdictions.[98] Without significant exposure of individual liability, corporate managers could view corporate fines as merely a cost of doing business.[99] Besides, the hiring of compliance advisors and voluntary enhancement to a corporate compliance program might be resisted by corporate executives for restricting their managerial power and autonomy, even when such measures are consistent with the long-term corporate interests.[100] In this sense, the use of a corporate fine or individual liability alone is insufficient to generate optimal deterrence in many circumstances, rendering the complementary use of non-monetary corporate sanctions, such as coerced compliance reforms, necessary.[101]

6.3.1.2 Additional Corporate Deterrence from Compliance Obligations

Forced corporate reform presents additional deterrence owing to its inherent costs and corporate management's deep aversion to governmental intervention. Firstly, corporate compliance reforms can be rather costly in financial terms. As is often the case, corporate remedial measures including enhancements to the compliance program began even before prosecutors entered the picture and lasted till the end of the deferral period. As noted by Koehler, the pre-enforcement internal investigations and compliance enhancements constitute typically the greatest financial exposure for the company aiming for a DPA.[102] For example, Walmart spent over $900 million in the global investigation and remediation for a period of seven years before the FCPA

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[96] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1729, ft. 67 (noting that firms are not actually hiring a monitor voluntarily without DPA-imposed monitorships for a number reasons, including (i) fines are not large enough; (ii) firms are not aware of the advantages of having a monitor; or (iii) monitors are actually not that valuable for all firms).

[97] See infra-Chapter 5, Section 5.3.3 for the limits of relying on corporations to sanction individual wrongdoers.

[98] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 366 (claiming that corporate mandates are needed to supplement individual managerial liability to adequately deter the misconduct, as "the person identified as responsible for policing may have insufficient assets to satisfy the optimal liability amount, or the person may be outside the jurisdiction of the United States and beyond the reach of its criminal and civil authorities").

[99] Mihailis E. Diamantis, "Clockwork Corporations: A Character Theory of Corporate Punishment," *Iowa Law Review* 103, no. 2 (2018): 549 ("[i]f fines are to have their intended deterrent effect, they must pose a credible threat to the individuals making decisions relevant to the commission of corporate crime. However, a corporate fine is too coarse a tool to accomplish this since its effects are, at best, evenly distributed across innocent and responsible individuals alike").

[100] Khanna, "Reforming the Corporate Monitor?" 232-33 (noting that corporate managers would not opt for the hiring of a monitor when their private interests are reduced, i.e., the arising of agency costs, even if the monitor benefits the firm); Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 354 (noting that agency costs can occur "when managers obtain personal benefits from facilitating substantive crimes or ensuring a low probability that wrongdoing is detected and sanctioned", or when policing measures entail oversight of managers' actions by compliance officers and thus reduce their power and autonomy).

[101] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1401 ("[i]f the government wants TBTJ companies to invest in corporate-crime prevention, it should mandate investment by including structural-reform requirements and independent monitorships in settlement agreements").

[102] Mike Koehler, "Foreign Corrupt Practices Act Ripples," *American University Business Law Review* 3, no. 3 (2014): 396 ("where a comparison is possible, it is clear that pre-enforcement action professional fees and expenses are typically the greatest financial consequence to a company resolving an FCPA enforcement action").

settlement that cost the retailing giant $282 million in monetary sanctions.[103] The post-resolution measures, including self-reporting to the government regarding its implementation of compliance obligations or/and the retaining of compliance monitors, can be prohibitively expensive as well. They often involve hundreds of hours' review of corporate documents, interview of corporate managers and employees and the preparation of initial and follow-up reports by a team of professionals, which may cost the company tens of millions of dollars in professional fees and expenses.[104] When external monitors are involved, the costs can be even higher.[105] In reality, it is common for the costs of monitorships to rise to $30 million or even to $50 million for a period of three years.[106] As far as economic disincentives are concerned, the compliance obligations can be just as effective as a corporate fine in reducing the expected utility of crime activities and generating optimal deterrence.[107] Moreover, unlike the corporate fine that might incur dead-weight costs on innocent third parties, the investment into corporate compliance is both a legal duty and good business for corporate shareholders given the fact that criminal misconduct typically puts shareholders' interests in jeopardy.[108]

Secondly, from the perspective of corporate management, coerced structural reforms and independent compliance monitorships are highly undesirable as the governmental intervention places serious restrictions on the managerial autonomy.[109] While a corporate fine could be shrugged off easily, the compliance obligations and monitorships that may last for years can hardly be discarded by corporate executives as a cost of doing business.[110] Since corporate misconduct can often be attributed to the tacit encouragement, willful blindness or extreme pressure of performance from the management, the threat of compliance obligations and monitorships is useful to deter corporate misconduct by impacting the incentives of corporate management.[111]

Lastly, the emphasis on corporate compliance in the use of DPAs promotes general deterrence as well. In order to prevent potential coerced compliance reforms and onerous monitorships, it is now common practice for Fortune 1000 companies to have a compliance department, independent of the legal department, to deter and prevent violations of law and corporate

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[103] Dylan Tokar, "Walmart's Spend-and-Tell Strategy Paid Off in Bribery Settlement," *Wall Street Journal*, June 26, 2019, https://www.wsj.com/articles/analysis-walmarts-spend-and-tell-strategy-paid-off-in-bribery-settlement-11561585841 (accessed June 8, 2020).

[104] Mike Koehler, "Foreign Corrupt Practices Act Ripples," *American University Business Law Review* 3, no. 3 (2014): 410-17 ("demonstrate[ing] the fact that the financial consequences of FCPA scrutiny and enforcement often continue even after enforcement action day").

[105] Garrett, *Too Big to Jail*, 186-87.

[106] Philip Inglima, "Corporate Monitors: Peace, At What Cost?" *Crowell Morning - Litigation Forecast*, January 2018, https://www.crowell.com/files/Litigation-Forecast-2018-White-Collar-Crowell-Moring.pdf (accessed October 20, 2020) ("[i]t's becoming the new normal for the costs to run well north of $30 million to $50 million over the course of three years").

[107] Diamantis, "Clockwork Corporations," 566 ("[s]o far as financial disincentives are concerned, it should not matter to deterrence theorists whether the additional expenditures go to paying fines or to implementing court-ordered reforms").

[108] Alexander, and Cohen, "Why Do Corporations Become Criminals?" *Journal of Corporate Finance* 5, no. 1 (1999): 4 ("shareholders do not typically seem to have benefitted from the encouragement of crime"); Diamantis, "Clockwork Corporations," 563 ("[t]he problem with fines is not just that they are costs borne by innocent third parties, but that they are dead-weight costs unjustifiably borne by them").

[109] Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions," *Southern California Law Review* 56, no. 6 (1983): 1155-56 ("probationary orders requiring corporations to rectify defective standard operating procedures or to make other structural changes within the organization may have a significant deterrent as well as rehabilitative effect because such intervention detracts from managerial autonomy").

[110] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 703 ("monitorships could be a truly 'scary deterrent' because, although shareholders may not be too concerned with fines, the presence of a monitor can create a troubling level of uncertainty that lasts throughout the monitorship").

[111] William S. Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," *Iowa Law Review* 87, no. 2 (2002): 657-58 ("[i]f there is a prototypic case of reverse whistleblowing, it is with an organization in which senior management winks at the illegal behavior of subordinate employees when under significant pressure to meet revenue or profit objectives").

policy.[112] Corporate personnel are regularly led by a Chief Compliance Officer (CCO) with an authority to report directly to the CEO and even to the board of directors.[113] Assisted by internal and external compliance experts and using the latest scientific theories and technology, corporations are developing more comprehensive codes of conduct, conducting targeted compliance training for corporate employees and agents, carrying out due diligence on all third parties and transactions, designing more effective channels for filing complaints and monitoring any potential misconduct.[114] When corporate wrongdoing is detected, corporations often spend tens, if not hundreds, of millions of dollars remediating the wrongdoing and enhancing the compliance program even before the initiation of criminal proceedings.[115] Moreover, independent monitorships could compensate for the prosecutors' limited experience and resources in monitoring the company's implementation of compliance mandates, as monitors generally have more expertise in compliance and the costs of monitorships are borne by the corporations.[116] By contracting out the onerous task of monitoring and assessing corporate compliance efforts to monitors, prosecutors may allocate their finite resources to bring more enforcement actions against corporate and individual wrongdoers and achieve a higher level of deterrence in general.[117]

6.3.2 Corporate Rehabilitation

It has been well recognized by organizational theorists that employees' misconduct is largely influenced by corporate-level features, such as corporate policies, processes, structure and culture.[118] In contrast with the individual prosecutions that place particular emphasis on retribution and deterrence, a major purpose of the criminal law enforcement in the corporate context is rehabilitation.[119] Corporate rehabilitation focuses on the reforming of defective corporate features to prevent future wrongdoings.[120] While the imposition of compliance obligations under DPAs poses serious threats to corporations and their management and advances the goal of deterrence, the direct purpose and core function is to promote corporate

[112] Miriam Hechler Baer, "Governing Corporate Compliance," *Boston College Law Review* 50, no. 4 (2009): 949-50 ("[t]he boards of Fortune 1000 companies approve eloquent codes of conduct, their corporate lawyers advise them on how best to structure their compliance programs, and thousands of compliance providers offer services guaranteed to promote adherence to legal obligations").

[113] Griffith, "Corporate Governance in an Era of Compliance," 2077 ("[c]ompliance is commonly headed by a Chief Compliance Officer (CCO) who reports directly to the Chief Executive Officer (CEO) and, often, to the board as well").

[114] Tom FoxMon, "Data-driven Compliance Can Create Business Success," *Compliance Week*, November 18, 2019, https://www.complianceweek.com/data-privacy/data-driven-compliance-can-create-business-success/28060.article (accessed December 12, 2020).

[115] Kaal, and Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance," 86 (finding that "63.47 percent of the N/DPAs in the sample contained references to preemptive remedial measures instituted before the execution of the N/DPA").

[116] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 715 ("the prosecutor's office has no experience or skills to analyze whether a company is reforming its internal governance practices"); Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1739 ("one of the reasons for having monitors might be to reduce enforcement burdens and costs for agencies so that they can focus their resources on bringing enforcement actions rather than monitoring firms").

[117] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1730 ("[e]nforcement agencies may be able to reduce their expenditures on enforcement and supervision by essentially subcontracting out the supervisory task to monitors… it frees up enough government enforcement resources that more cases can be brought and more deterrence achieved").

[118] Bucy, "Corporate Ethos," 1127 ("the formal and informal structure of a corporation can promote, or discourage, violations of the law"); Lynn Sharp Paine, "Managing for Organizational Integrity," *Harvard Business Review* 72, no. 2 (1994): 106 (noting that it is typical that "unethical business practice involves the tacit, if not explicit, cooperation of others and reflects the values, attitudes, beliefs, language, and behavior patterns that define an organization's operating culture").

[119] Peter J. Henning, "Corporate Criminal Liability and the Potential for Rehabilitation," *American Criminal Law Review* 46, (2009): 1419-20 (claiming that "while there is at least the possibility of deterring an individual from undertaking criminal conduct again by imposing punishment on the person, and society can exact retribution from the law-breaker to vindicate its, interests and those of the victim, these rationales for punishment do not work well for organizations that do not act through the same individuals and will continue to exist even if individual miscreants are removed").

[120] *Ibid*, 1420 ("[r]ehabilitation focuses on the future, through which a defendant resumes being a law-abiding member of society").

rehabilitation and reforming corporate culture and ethics.[121] The prosecution of several individual wrongdoers, especially low-level employees, is unlikely to trigger corporate structural reforms as broad as the compliance obligations imposed through DPAs.[122] Instead, the threats of a hefty corporate fine and individual prosecution may prompt companies to invest in the better concealing of corporate crimes, rather than strengthening the compliance program to prevent potential misconduct.[123] In this sense, the over-emphasis on the threats of punitive corporate fine and individual sanctions can be counter-productive and lead to more creative cover-ups.[124]

The compliance approach enables DPAs to promote corporate rehabilitation in many ways. Firstly, in order to address the problem of a window-dressing compliance program, prosecutors are placing greater emphasis on the effectiveness of corporate compliance programs and their impact on compliance culture. The compliance obligations under DPAs extend beyond the mere existence of corporate policies against bribery and corruption or the internal whistleblowing channel, which may easily turn to show business.[125] Companies are further required to engage managers at all levels, especially the top management, in the compliance development and to equip compliance personnel with sufficient autonomy and resources. Such measures are more closely related to corporate ethics and compliance and too expensive to be carried out as a purely window-dressing project.[126] In order to make sure that corporate compliance changes are not an improvised makeshift ploy to get over the crisis, prosecutors could even demand the overhauling of corporate management and governance system, such as the creation of a board-level committee or the position of the CCO, and the inclusion of outside director(s) in the board, to entrench the updated compliance program into corporate operation.[127] Moreover, prosecutors are paying more attention to the evolution and effectiveness of the corporate compliance program in practice. Corporations are expected to continually update the compliance program based on the evolving compliance risks, and to take prompt investigative and remedial measures whenever violations are detected.[128]

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[121] *Ibid* (claiming that the current trends towards using DPAs and NPAs to resolve corporate criminal investigations "highlight the proper focus on rehabilitation of the organization as the proper goal of the application of the criminal law to corporations"); Garrett, *Too Big to Jail*, 7 ("[p]rosecutors now try to rehabilitate a company by helping it to put systems in place to detect and prevent crime among its employees and, more broadly, to foster a culture of ethics and integrity inside the company").

[122] Baer, "Governing Corporate Compliance," 949-1020 (criticizing that the government's current compliance regulation approach through an adversarial system would only fuel the distrust between the regulator and regulated entity, as well as conflicts between corporations and employees, which are hardly consistent with corporate compliance).

[123] Khanna, "Reforming the Corporate Monitor?" 232-33 (noting that corporate managers would not opt for the hiring of a monitor when their private interests are reduced, i.e., the arising of agency costs, even the monitor benefits the firm).

[124] Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1847-48 (noting that the compliance reform measures adopted by the HSBC pursuant to DPA "may have great benefits to the public interest, perhaps farther reaching than individual prosecutions, even if these benefits cannot be easily measured in penalty dollars paid or months of jail time served").

[125] Mark Pastin, "A Study of Organizational Factors and their Effect on Compliance," in *Corporate Crime in America: Strengthening the "Good Citizen" Corporation* (Proceedings of the Second Symposium on Crime and Punishment in the United States, 1995): 141-43 (finding that 86% of the 660,000 employees from 203 large companies view the Codes of conduct as legalistic and one-sided, i.e., in favor of the company, increasing the likelihood that employees would exhibit behavior that they identified as unethical or illegal; 69% of hotlines were "defensive or not effective"; 51% of compliance training was ineffective).

[126] Linda Klebe Trevifio, "Out of Touch: The CEO's Role in Corporate Misbehavior," *Brooklyn Law Review* 70 (2005): 1211 (acknowledging the influence of senior management, especially CEOs, in developing and maintaining a strong ethical culture and climate in the organization through their ethical leadership).

[127] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 735 (claiming that corporate structural reforms and management change are essential "to entrench the changes made during the monitorship into the operations and structure of the corporation").

[128] Debevoise & Plimpton, FCPA Update: A Global Anti-Corruption Newsletter 12, no. 2 (2020): 5-7 (outlining the compliance obligations imposed under the Herbalife DPA).

Secondly, compliance monitorships advance corporate rehabilitation by ensuring the company's genuine compliance with the terms of DPAs, and "address[ing] and reduc[ing] the risk of recurrence of the corporation's misconduct".[129] Compliance monitors are armed with adequate monitoring resources, at the expense of the company, and the power to recommend the resumption of prosecution or refuse to endorse the corporate compliance efforts.[130] The presence of an independent monitor in the target company forces the company to direct more attention and resources to compliance and to live up to its commitments under DPAs.[131] Monitorships produce not only pressure but also incentives for the corporate management to adopt meaningful compliance reforms. When a monitor with perceived impartiality and integrity endorses its compliance progress at the end of the monitorship, the company will not only be spared from prosecution, but could also demonstrate full rehabilitation and retrieve reputational losses.[132] The liability-reducing and reputational benefits are much less notable when a company-hired consultant claims its full remediation and rehabilitation. Apart from the pressures and incentives, monitorships provide additional assistance for the target company in addressing and reducing compliance risks. With the required expertise and experience in the compliance matters, monitors could help the company build an effective and long-lasting compliance program by outlining the company's risk profile, proposing changes to address compliance lapses and assessing the effectiveness of the updated compliance program.[133]

Lastly, DPA-mandated compliance reforms may have a broader rehabilitation effect beyond the target corporation. In order to maximize the effect of the mandated compliance reform, enforcement agencies typically negotiate DPAs with, or seek a compliance undertaking from, the controlling corporation.[134] The parent company is required to enhance internal control and strengthen the compliance program in all of its subsidiaries.[135] In addition, prosecutors are increasingly paying attention to the third-party management and could ask the company to make sure that all of its third parties follow its compliance commitment.[136] In reality, big corporations often require their third parties to fully identify with their corporate policies and culture, undergo a strict pre-engagement due diligence check and ongoing audit, attend compliance training, or

[129] Morford Memorandum, at 2 ("[a] monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct"); Benczkowski Memorandum, at 1 ("[m]onitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution").

[130] For example, the board of Bristol-Myers Squibb, which had resolved the charge of accounting violations by signing a DPA, had to fire the company's CEO and general counsel following the advice of the monitor regarding a separate patent dispute, see John Carreyrou, and Barbara Martinez, "Board Members At Bristol-Myers Told to Fire CEO," *The Wall Street Journal*, September 12, 2006, https://www.wsj.com/articles/SB115802286278860139 (accessed December 9, 2019).

[131] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 719 (noting that the presence of a monitor "forces the company to direct attention and resources to compliance and ethics").

[132] Diamantis, "Clockwork Corporations," 551 (noting that "transparent corporate reform can reduce the reputational costs of conviction").

[133] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1729 ("[m]onitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor").

[134] Alexander, and Cohen, "The Evolution of Corporate Criminal Settlements," 579-81 (noting that the U.S. enforcement agency seems to find a balance between harsh sanctions against corporate wrongdoings and limited collateral consequences on corporate operation through the hybrid approach, namely, offering parent firms a DPA while requiring their subsidiaries to sign plea agreements). In addition, the SFO has obtained the undertaking from the controlling corporation in two DPAs involving Serco and G4S, see *supra* note 47 and the accompanying text.

[135] Letter from Serco Group plc to Lisa Osofsky, Director of the Serious Fraud Office, as Attachment A to the Deferred Prosecution Agreement between Serco Geografix Limited and the SFO, July 2, 2019.

[136] *United States v. Herbalife Nutrition Ltd.*, Deferred Prosecution Agreement, 20 Cr-00443-GHW, (S.D.N.Y Aug. 24, 2020), Attachment C, C6-C7 (requiring the company to ensure the third parties' acceptance of the company's commitment to compliance through detailed documentation and ongoing monitoring).

provide a certification of their compliance program.[137] Moreover, DPA-imposed compliance duties could shape the compliance standards and promote the best practices in the relevant industry.[138] As a matter of fact, compliance practitioners regularly use the enforcement policies, guidelines and previous DPAs as the template when advising similarly-situated companies on the development and implementation of compliance programs.[139]

6.4 Concerns over DPA-imposed Compliance Obligations and Monitorships

While coerced compliance reforms are valuable for strengthening corporate compliance programs and improving corporate ethics and culture, they also allow the prosecutors to intrude into the domain of corporate governance, which is dubbed as "prosecutors in the boardroom".[140] The prosecutors' rash jump into the area of corporate governance is highly ambitious yet deeply controversial.[141] This Section will discuss the major concerns from the legal scholars and business community regarding the prosecutors' attempts to impose compliance obligations and demand corporate monitorships via DPAs. Such concerns relate principally to the lack of transparency and accountability in the selection of monitors, the costs of compliance monitorships and their disruption to normal business operation, as well as the practical effectiveness of compliance obligations in terms of promoting authentic compliance.

6.4.1 Favoritism in the Selection of Compliance Monitors

In practice, an overwhelming majority of monitors appointed pursuant to the DOJ DPAs are former prosecutors or other government officials. According to the report released by the U.S. Government Accountability Office in 2009, 36 out of the 42 monitors retained pursuant to DOJ DPAs were former local or federal government officials, among which 23 had previous experience at the DOJ.[142] The corporate decisions to choose former prosecutors as the external monitors is understandable given their legal expertise, experience and close connection with the prosecuting agency. Corporations benefit from the monitors' credibility with prosecutors, who are actually the end consumers of the monitor's reports on the company's compliance program

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[137] "FCPA Compliance: Addressing Third-party Risks," *Foley & Ladners*, https://www.foley.com/en/files/uploads/GRS/GRS_FCPA_Compliance_Addressing_Third_Party_Risks.pdf (accessed December 2, 2020) (setting forth the best practices for minimizing the FCPA risks of engaging third-party representatives, consultants, agents, or distributors).

[138] Kaal, and Lacine, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance," 114-15 ("[s]hould the leading corporations in a particular industry Deferred and Non-Prosecution Agreements on Corporate Governance be bound by the terms of substantially similar N/DPAs with similar or overlapping terms, business and governance practices in that industry may at least be temporarily changed in accordance with the terms of the N/DPAs"); Griffith, "Corporate Governance in an Era of Compliance," 2090 ("in an accretive process not unlike the common law, the actions brought by prosecutors and reforms won in settlement of those actions have a precedential impact on similarly situated firms").

[139] Griffith, "Corporate Governance in an Era of Compliance," 2090 ("in an accretive process not unlike the common law, the actions brought by prosecutors and reforms won in settlement of those actions have a precedential impact on similarly situated firms").

[140] Anthony S Barkow, and Rachel E Barkow (eds.), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York: New York University Press, 2011); Haugh, "The Criminalization of Compliance," 1239 (noting that the use of DPAs to reform corporate compliance and culture allows prosecutors to get inside the corporations and makes prosecutors "super-regulators").

[141] Garrett, *Too Big to Jail*, 6-7 ("the big story of the twenty- first century is not corporate fines or convictions but prosecutors changing the ways that corporations are managed"); Griffith, "Corporate Governance in an Era of Compliance," 2134 (criticizing that the interference in corporate governance is exercised "in an opaque process by a largely unaccountable agent with no expertise in organizational design and no ability to measure effectiveness").

[142] Government Accountability Office, *Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts*, GAO-10-260T, November 19, 2009, at 10-11.

and the decision-makers as to whether to resume the prosecution.[143] However, the selection of monitors has caused huge controversies debating favoritism and cronyism. The debate reached its peak when John Ashcroft, the former DOJ Attorney General, was selected by his former subordinate prosecutor as the compliance monitor in a settlement involving a medical equipment company following neither public notice nor bidding.[144] The monitorship contract earned Ashcroft's consulting firm, the Ashcroft Group, $28 to $52 million for a period of 18 months.[145] This high-profile scandal attracted the attention of the Congressional investigators and eventually triggered the issuance of the "Morford Memo" in 2008, the first DOJ policy guiding the selection and use of monitors.[146] In order to avoid any actual or potential conflict of interests, the Morford Memo requires that the monitor be selected based on the merits, reviewed by a standing or *ad hoc* committee and approved by the Office of Deputy Attorney General.[147]

6.4.2 Costs of Compliance Monitorships

From the perspective of the target company, the costs of monitorships and their impacts on business operation are of particular concern.[148] The costs of monitorship include not only the fees paid to the monitor and a group of experts and assistants, but also the time, personnel and other resources devoted by the company to the monitor's assessment and implementation of the monitor's suggestions.[149] It is acknowledged by the U.S. practitioners that monitorships over a period of three years could cost the company $30 million to $50 million.[150] Even in France where a government agency is designated as compliance monitor, the concern about the costs of monitorships still exists, as the AFA might engage in private professionals for assistance in the course of monitorships.[151] Given that corporate shareholders are the ultimate cost bearers of the monitorships, the mechanism that is designed to protect shareholders from corporate misconduct may eventually harm their interests.[152]

The costly and intrusive monitorships can be largely attributed to the monitor's prosecutorial mindset to "root out and correct all injustice and malfeasance", as well as the company's

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[143] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 713 ("the DOJ selecting someone they know, trust, and are comfortable working with"; "[I]f you are the company looking to retain somebody, you want to have somebody the regulator is going to view as a credible force").

[144] Philip Shenon, "Ashcroft Deal Brings Scrutiny in Justice Dept.," *New York Times*, January 10, 2008, https://www.nytimes.com/2008/01/10/washington/10justice.html (accessed December 10, 2020).

[145] *Ibid*; Susan Biddle, "In Shift, Ashcroft to Testify on Oversight Deal," *The Washington Post*, February 26, 2008, https://www.washingtonpost.com/wp-dyn/content/article/2008/02/25/AR2008022502785.html? (accessed December 10, 2020).

[146] The Morford Memorandum.

[147] *Ibid*, at 3-4.

[148] Government Accountability Office, *Preliminary Observations on the DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 25, 2009, https://www.gao.gov/assets/130/122853.pdf (accessed October 20, 2020), 41 (describing criticisms concerning the costs of monitorship and the lack of work plans).

[149] Anthony S Barkow, and Michael Ross, "Introduction," in *The Guide to Monitorships – Third Edition*, Global Investigation Review, April 25, 2022, https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/introduction (accessed August 9, 2022) (listing different forms of costs for firms being subject to monitorships); Haugh, "The Criminalization of Compliance," 1243 ("[i]n addition to the significant monetary costs of employing a monitor, the monitor's staff may be attending business meetings, interviewing board members and senior managers, reporting on the actions of C-suite executives, and engaging in hands-on development of corporate compliance initiatives… All this takes time, energy, and focus away from what employees see as their real responsibilities").

[150] Inglima, "Corporate Monitors: Peace, At What Cost?" ("[i]t's becoming the new normal for the costs to run well worth of $30 million to $50 million over the course of three years").

[151] Michael Griffiths, "French Compliance Monitorships a 'Work in Progress'", *Global Investigation Review*, July 9, 2018, https://globalinvestigationsreview.com/news-and-features/investigators-guides/france/article/french-compliance-monitorships-work-in-progress (accessed November 24, 2021).

[152] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 724 ("[a] corporation may argue that an expensive and lengthy monitorship potentially … harms current shareholders").

pressing needs to please the government-approved monitor.[153] Compounding the problem is that monitorship is subject to few *ex-ante*, ethical or *ex-post* restraints. The monitor's remit is often loosely defined in the DPA, which may later lead to excessively expansive monitorships.[154] Besides, though compliance monitors are retained and paid by the company, they are not considered as corporate agents and owe no fiduciary duties to the company.[155] Monitors are not required to take the corporate costs into consideration when making recommendations to overhaul the corporate internal control and compliance program.[156] Furthermore, the prosecutor, who is not a party to the monitorship agreement concluded between the target company and the monitor, might feel restrained in resolving the disputes in relation to the costs and scope of monitorship.[157]

6.4.3 Can Compliance Obligations Really Promote Corporate Rehabilitation?

Corporate rehabilitation is a major goal of, and justification for, using DPAs to impose compliance obligations and monitorships.[158] However, whether prosecutors and compliance monitors have the will and ability to push for meaningful corporate compliance changes under the existing institutional framework merits serious query.[159] Moreover, even a compliance program that satisfies all the technical requirements may contribute little to the positive development of corporate culture and ethics, as demonstrated in the repeated scandals in corporations that were once perceived to have an industry-leading compliance program.[160] The analysis of the two allegations identified above determines the utility, or the lack of it, of the coerced compliance reform, and further affects its perceived legitimacy and desired frequency of use in reality.[161]

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[153] Caelah E. Nelson, "Corporate Compliance Monitors Are Not Superheroes with Unrestrained Power: A Call for Increased Oversight and Ethical Reform," *Georgetown Journal of Legal Ethics* 27, no. 3 (2014): 744 (noting the prosecutorial mindset often pushed the monitor to expand his or her role beyond the limits designed in the settlement agreement); Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 703 ("[n]ot only do corporations not have a better alternative to settlement that would give them a credible threat of leaving the negotiation table, but corporations may even be afraid to push back against government demands for fear of being perceived as not genuinely contrite or willing to correct their problems").

[154] Government Accountability Office, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 5, 2009, at 5 (noting that some "companies felt that the monitors' roles and responsibilities were not always clearly defined in the DPA or NPA, thus limiting the basis on which companies could assert that the monitor had expanded the scope of work").

[155] Morford Memorandum, Principle 3 ("[a] monitor is not responsible to the corporation's shareholders").

[156] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1735 ("the raison d'etre for monitors is usually to ensure the firm complies with the law rather than to ensure the firm makes profits … when the monitor bears none of the costs of his inquiry, he may engage in too much inquiry").

[157] Ephraim (Fry) Wernick, et al., "DOJ Publishes List of Compliance Monitors, Improving Transparency and Accountability," *Global Investigation Review*, April 20, 2020, https://www.velaw.com/insights/monitoring-corporate-monitors-doj-publishes-list-of-compliance-monitors-improving-transparency-and-accountability-in-the-monitorship-program/ (accessed October 28, 2020) ("DOJ is not a party to the contract between a company and the monitor, and Department prosecutors may feel limited in what they can do to resolve such disputes" with respect to the scope or costs of the monitorship).

[158] Morford Memo, at 2 ("[a] monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct"); Benczkowski Memorandum, at 1 ("[m]onitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution").

[159] Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs," 974 (discussing that "firms may rely on intuition, attempts to 'benchmark' their programs against those of other firms (rather than comparing them against objective standards), and a mixture of metrics that are disconnected from the ultimate objective of their programs" when investing in compliance without knowing its effectiveness).

[160] Haugh, "The Criminalization of Compliance," 1215-17 (describing that the once-applauded compliance program in the Intel later turned into a tool of criminality); Griffith, "Corporate Governance in an Era of Compliance," 2105-06 ("many compliance metrics track activity rather than impact, thereby demonstrating that compliance may be busy but not necessarily effective").

[161] Griffith, "Corporate Governance in an Era of Compliance," 2134 (advocating for government's exit from compliance, and increased corporate self-disclosure).

Firstly, it is generally found that prosecutors and monitors do not have strong motives or expertise to push for an effective compliance program in the current institutional system.[162] Prosecutors and monitors are often satisfied with a modestly-designed compliance program with standardized compliance measures following the industry practices. In this way, they are able to claim successful rehabilitation of the corporation in question before moving on to the next case, while avoiding criticisms over the excessively costly and disruptive monitorships.[163] However, a variety of factors, including but not limited to the company's "size, industry, geographic footprint, and regulatory landscape", define the compliance risks faced by a specific company and affect the scope and complexity of the desired compliance program.[164] The imposition of standardized compliance measures runs the risk of generating high corporate expenditure without promoting corporate compliance and ethics.[165] In addition, a major rationale for resorting to external monitors is the prosecutors' limited expertise and experience in the compliance field.[166] Considering the predominance of former prosecutors serving as compliance monitors, there is good reason to suspect that some compliance monitors may have inadequate knowledge about what makes effective compliance.[167]

Worse still, it is likely that even monitors with a compliance background may have insufficient knowledge about what makes an effective compliance program. Corporations are generally not required by any statutory or regulatory rules to disclose the compliance measures they have adopted or the performance of their compliance program.[168] Even when they are subject to supervised compliance reforms in the form of monitorships, the monitors' work plan and reports remain confidential with few exceptions.[169] What measures the corporation actually took in reforming its compliance program, how much the remedial compliance measures cost, and in

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[162] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 349 ("prosecutors often lack the resources or incentives to provide ongoing assessments of the policing measures they impose"); Hess, and Ford, "Corporate Corruption and Reform Undertakings," 310-11 ("[p]rosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of largescale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies").

[163] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 729 ("prosecutor wants to close his file in a way that is reasonably calculated to ensure that the subject corporation has at least decent, industry-standard compliance processes in place (at least on paper), and then move on to the next case. … mindful of criticisms about monitors running amok, the prosecutor does not want to … incur costs that are more burdensome than they have to be" … "the monitor wants to conduct an investigation that will enhance or at least not adversely affect her professional reputation and oversee a compliance program implementation that allows her to write a credible report for the government").

[164] U (Updated March 2023) ("[w]e recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program").

[165] Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," 492-93 ("the harsh treatment under current law of companies without internal compliance structures (or with less extensive structures than the industry standard) has caused a proliferation of costly—but potentially ineffective—internal compliance structures"); Griffith, "Corporate Governance in an Era of Compliance," 2104 (noting the trend of compliance to develop more ever more extensive (and expensive) compliance structures).

[166] For the notion of prosecutors' limited compliance expertise, see *supra* note 42; Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 715 ("[o]ne of the reasons why the deferred prosecution agreements require a monitor to be put in place is that the prosecutor's office has no experience or skills to analyze whether a company is reforming its internal governance practices").

[167] Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 715 (noting that the theoretical rationale for monitorship "seems inconsistent with the decision to consistently choose individuals with only prosecutorial or technical legal expertise with respect to compliance programs").

[168] Griffith, "Corporate Governance in an Era of Compliance," 2138-39 (claiming for the use of regulatory rules to push the company's disclosure of the standardized data on the performance of their own compliance programs).

[169] Rachel Louise Ensigna, and Aruna Viswanatha, "HSBC Monitor Says Bank's Compliance Progress Too Slow," *The Wall Street Journal*, updated on April 1, 2015, https://www.wsj.com/articles/hsbc-monitor-says-banks-compliance-progress-too-slow-1427912401 (accessed November 6, 2020) (noting the monitor's report was summarized in a court filing); Veronica Root, "Modern-Day Monitorships," *Yale Journal on Regulation* 33, (2016): 130, ft. 127 (noting that [t]he HSBC DPA is unique in that the district court required the government to file quarterly reports with the court while the case is pending, yet the selection of monitor and the monitor's responsibilities are determined solely between prosecutors and the company).

how many cases the corporation successfully obtained the monitor's endorsement or passed the prosecutors' evaluation are beyond the public's knowledge.[170] As a result of the opacity of the compliance world, compliance is seriously undertheorized. Many things remain unknown regarding how corporate compliance programs influence corporate culture and employees' behavior, and what an effective compliance program looks like.[171] Currently, the metrics used by compliance officers to assess the effectiveness of compliance programs focus more on the activities than the real impact.[172] Compliance personnel typically assess a compliance program based on the elements involved, for example, by tracking the hotline calls, documenting the training completion rates, conducting surveys among employees, comparing their compliance program against that of a similarly-situated company or government policies, or obtaining validation from external professionals.[173] However, whether a compliance program that satisfies all the metrics can effectively promote corporate compliance and a culture of ethics is questionable. The answer to this question calls for more research and experimentation.[174]

Moreover, the use of criminal prosecutions or settlements to reform corporate organizations may have a negative impact on the company's day-to-day compliance strategy. In order to prevent criminal prosecution, which could incur hefty monetary and reputational costs, debarment and even governmental intervention in the corporate affairs, big companies tend to hire former government officials as their CCOs and model their compliance program based the criminal laws and government policies.[175] As noted by Lynn Paine, the compliance approach rooted in the avoidance of legal sanctions, in opposition to the integrity approach focusing on the encouragement of ethical behavior, is doomed to fail.[176] Not only do legal rules rarely inspire excellent or exemplary ethical behavior, but over-emphasis on the threat of sanctions can be counter-productive and lead to more creative cover-ups.[177] The criminalized compliance program, which features "deterrence-focused rules, aggressive and onerous monitoring, and inconsistent enforcement", may breed more misconduct by facilitating the employees' rationalization of their

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[170] Michael Griffiths, "Rolls-Royce Bribery Compliance Reports to Remain Private," *Global Investigation Review*, June 23, 2020, https://globalinvestigationsreview.com/rolls-royce-bribery-compliance-reports-remain-private (accessed November 27, 2020); Ford, and Hess, "Can Corporate Monitorships Improve Corporate Compliance?" 725 (noting that a debriefing process at the end of a monitorships helps build "a foundation of knowledge on what practices have worked and what have not, and how the process can be improved", but it is scarce in reality).

[171] Mihailis E Diamantis, "An Academic Perspective," in Anthony S Barkowm, Neil M Barofsky and Thomas J Perrelli (ed.), *Guide to Monitorships* (Global Investigation Review, 2019): 83 ("[t]here is global ignorance about how to reform corporations and what effective compliance looks like. Efforts to advance the understanding of corporate compliance are stunted by the fact that monitors' reports are generally withheld from the public").

[172] Griffith, "Corporate Governance in an Era of Compliance," 2105-06 ("many compliance metrics track activity rather than impact, thereby demonstrating that compliance may be busy but not necessarily effective").

[173] Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs," 973-34 (noting that most firms use the completion rates to assess the effectiveness of compliance training or benchmarking their compliance program against that of other firms, without actually knowing the effectiveness of the compliance program).

[174] Griffith, "Corporate Governance in an Era of Compliance," 2106 (citing the statement of a CCO from a major financial company: "We do have our metrics around surveillance and testing, but in the end, do we know if we have an effective program? We haven't figured that out yet").

[175] Haugh, "The Criminalization of Compliance," 1218 ("[a]fter decades of scandal-driven legislation aimed at curbing corporate wrongdoing, companies have increasingly adopted criminal law-driven, deterrence-based compliance protocols to avoid criminal and quasi-criminal investigations and prosecutions. These protocols have become criminalized because the criminal law is the primary paradigm through which they are derived and implemented").

[176] Paine, "Managing for Organizational Integrity," 111 ("[w]hile compliance is rooted in avoiding legal sanctions, organizational integrity is based on the concept of self-governance in accordance with a set of guiding principles").

[177] *Ibid*, 109-11; *New York v. Intel Corp.*, No. 09-827 (D. Del. Nov. 4, 2009), Complaint at 19 ("the actual effect of the program was to school Intel executives in cover up, rather than compliance").

unethical or illegal behavior.[178] Being aware that the compliance program is treated by the corporate management as a public relations tool and insurance against personal liability, the employees would have less difficulty justifying their own breaches of the corporate compliance program.[179]

6.5 Analysis of Strategies to Improve the Assessment and Monitoring of Compliance

The success of the prosecutorial approach to the promotion of corporate compliance hinges on the positive answer to the following two questions: whether prosecutors can assess the effectiveness of corporate compliance programs and make sure that only effective compliance programs are credited; whether prosecutors can continually monitor the company's compliance with the terms of DPA and punish any breaches.[180] A variety of measures have been taken in the U.S., UK and France to ensure that the use of DPAs makes a real difference to the corporate compliance and culture, and to mitigate the criticisms over compliance monitorships regarding the excessive burdens caused to the corporations. This Section focuses on three prominent measures in this aspect. Firstly, it examines the compliance guidelines issued by various authorities to enhance the prosecutors' ability to assess the corporate compliance program and to help the company develop and implement an effective compliance program. Secondly, it attempts to address the question regarding the desired frequency of monitorships in the settlement of corporate crimes, considering the new DOJ policy that backs off from the previous position that monitorships should only be imposed in exceptional occasions. Thirdly, the two types of compliance monitorships, i.e., compliance monitorships involving private parties and those involving a public agency, are compared and analyzed to understand their respective merits and demerits, and to identify the conditions for their effectiveness. The analysis of these issues aims to offer useful lessons for other jurisdictions regarding the imposition of compliance obligations and monitorships via DPAs in order to effectively promote corporate compliance.

6.5.1 Guidance for the Evaluation of Corporate Compliance Program

The evaluation of the corporate compliance program, which determines the company's prospect of receiving a DPA and the extent of the DPA-imposed compliance obligations, is a fundamental element of the authorities' efforts to promote corporate compliance. Without an appropriate evaluation, a reward might be granted for companies with an inadequate compliance program, or

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[178] Haugh, "The Criminalization of Compliance," 1250 ("[b]ecause criminalized compliance mimics the criminal law, and has adopted many of its precepts—including deterrence-focused rules, aggressive and onerous monitoring, and inconsistent enforcement and adjudication—it suffers from the same lack of legitimacy in the eyes of corporate employees as white collar and corporate criminal law does in the eyes of the public").

[179] William S. Laufer, "Corporate Liability, Risk Shifting, and the Paradox of Compliance," *Vanderbilt Law Review* 52, no. 5 (1999): 1405-07 ("as is the case in traditional forms of self-insurance, firms purchase compliance to ensure against the inevitability of compliance failures"); Haugh, "The Criminalization of Compliance," 1262 ("[w]hen the 'world's best antitrust compliance program' is seen by employees as nothing more than a hedge against government intervention, and possibly as a means of shielding the company from liability at the expense of employee well-being, it calls into question the legitimacy of the full scope of Intel's rules and norms").

[180] Griffith, "Corporate Governance in an Era of Compliance," 2128 ("[t]he inability to demonstrate the effectiveness of compliance raises two difficult questions. First, why should prosecutors give firms any credit for employing compliance mechanisms whose effectiveness has not been proven? And second, why should prosecutors impose unproven compliance mechanisms on firms"); Garrett, "Structural Reform Prosecution," 920-21 ("[i]nstitutional remedies raise a raft of difficult practical and policy questions regarding their scope, cost, duration, detail, implementation, role for experts, reporting, effects on third parties, degree of participation by third parties, and alterations when conditions change").

excessive compliance measures might be demanded.[181] The previous Section identified the prosecutors' lack of expertise in the compliance field, as well as the difficulties of ensuring and assessing the effectiveness of the corporate compliance program. Several attempts have been made in this aspect, including providing compliance training for individual prosecutors, and retaining compliance counsel by the prosecutor's office.[182] Among all the attempts, an increasingly influential way is the issue of compliance evaluation guidance or guidelines, such as the *Evaluation of Corporate Compliance Programs* released by the DOJ,[183] the SFO's *Evaluating a Compliance Programme*,[184] and the AFA's Guidelines to interpret the compliance mandate set in the *Sapin* II law.[185]

Though the compliance documents released by those authorities differ in the precise elements of a desired corporate compliance program and the level of details, they similarly adopt a dynamic and functional approach to the assessment of a corporate compliance program.[186] The authorities are paying special attention to the effectiveness of a corporate compliance program in practice, in opposition to the mere existence of corporate policies and procedures on paper.[187] A model compliance program should include policies and procedures properly designed and regularly updated based on the company's evolving risk profile, a training program tailored to functions of employees and managers, and an effective whistle-blowing and reporting channel.[188] Moreover, corporations are required to engage the top and middle management in the development of the compliance program and to equip compliance personnel with sufficient autonomy and resources, which are essential to the integration of corporate compliance into corporate business and the promotion of the corporate culture of compliance and ethics.[189] The effectiveness of a company's compliance program is also assessed based on whether and how the misconduct was detected,

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[181] Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," 491-93 (claiming that the current legal regime that "places an overwhelming and steadily increasing importance on internal compliance structures as a liability determinant" may cause two problems: "(1) an under-deterrence of corporate misconduct and (2) a proliferation of costly—but arguably ineffective—internal compliance structures").

[182] *Fraud Section Year In Review- 2019*, at 47, https://www.justice.gov/criminal-fraud/file/1245236/download (accessed November 3, 2020) (describing "the first-ever compliance training for Department prosecutors held in April 2019, which was attended by over 150 attorneys, including prosecutors from across the Criminal Division, 20 U.S. Attorney's Offices, as well as attorneys from the SEC, CFTC, and the UK's Serious Fraud Office"); "New Compliance Counsel Expert Retained by the DOJ Fraud Section," November 3, 2015, https://www.justice.gov/criminal-fraud/file/790236/download (accessed November 3, 2020). See also, OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention: Phase 4 Report - United States,* November 2020, paras. 148-151 (acknowledging the development of compliance expertise in the Fraud Section over time).

[183] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated March 2023).

[184] SFO, Evaluating a Compliance Programme, January 2020.

[185] AFA, *Notice on the French Anti-Corruption Agency Guidelines to Help Public and Private Sector Entities to Prevent and Detect Bribery, Influence Peddling, Extortion by Public Officials, Illegal Taking of Interest, Misappropriation of Public Funds and Favouritism*, December 4, 2020, https://www.agence-francaise-anticorruption.gouv.fr/files/files/French%20AC%20Agency%20Guidelines%20.pdf (accessed August 7, 2022).

[186] White & Case, "DOJ Updates Guidance on Evaluation of Corporate Compliance Programs," June 15, 2020, https://www.whitecase.com/publications/alert/doj-updates-guidance-evaluation-corporate-compliance (October 4, 2020) (noting that the 2020 revisions "reflect the DOJ's continued emphasis on a practical and dynamic approach to evaluating the effectiveness of a company's compliance program, one that seeks to continually ensure not only that the program is in place, but that it is working"); SFO, Evaluating a Compliance Programme, January 2020 ("[i]t is critical that the compliance programme is proportionate, risk-based and regularly reviewed").

[187] U.S. Justice Manual, 9-28.800 – Corporate Compliance Programs ("prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner); SFO, Evaluating a Compliance Programme, January 2020 ("[a] key feature of any compliance programme is that it needs to be effective and not simply a 'paper exercise'").

[188] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated June 2020), at 15 ("[o]ne hallmark of an effective compliance program is its capacity to improve and evolve"); SFO, Evaluating a Compliance Programme, January 2020 ("[i]t is critical that the compliance programme is proportionate, risk-based and regularly reviewed").

[189] Trevifio, "Out of Touch: The CEO's Role in Corporate Misbehavior," 1198 (believing that the "CEO's 'commitment to ethics' influences the scope, orientation, and integration of the formal ethics/compliance program"); AFA 2020 Guidelines, para. 19 ("[t]he commitment of senior management to corruption-free performance of the organisation's tasks, competence or business constitutes the basis of any anti-corruption programme").

the timeliness and thoroughness of corporate internal investigation and remediation.[190] While the occurrence of a single case of misconduct does not necessarily mean that a company's compliance program is ineffective, the company's sluggish and weak response is key evidence of organizational deficiency.[191] The attention paid to the company's post-misconduct responses represents the prosecutors' efforts to evaluate the adequacy of a company's compliance program in a visible and measurable way.[192]

Beyond providing useful and detailed guidance for individual prosecutors in order to make an informed charging decision, such documents also offer corporations great clarity into how the prosecutors assess their compliance programs and what are the prosecutors' expectations.[193] They are useful for incentivizing and assisting corporations, especially small and medium-sized corporations, in designing and implementing a compliance program that makes a real impact on employee's behavior and corporate culture.[194] Although the DOJ's and SFO's compliance evaluation polices do not purport to provide a checklist for the business, the enumeration of questions that prosecutors would ask when evaluating a company's compliance program provides a useful benchmark for corporations in the development and implementation of their compliance programs.[195] Moreover, corporations that are obligated under the *Sapin* II law to have an anti-corruption program in place could even "benefit from a prima facie presumption of compliance" by following the AFA Guidelines.[196]

Though the release of compliance evaluation guidelines has complemented the prosecutors' lack of expertise in the compliance matters, the task of assessing a company's compliance program remains demanding. The DOJ guideline contains twelve sub-sections centering around three fundamental questions and is further broken into around 200 specific questions that prosecutors might ask when evaluating the effectiveness of a company's compliance program. It is unlikely that each question will be relevant, much less being equally important, given "the particular facts

[190] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated June 2020), at 14 ("[i]n assessing whether a company's compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts").

[191] Federal Sentencing Guidelines Manual, Article 8B 2.1 (2016) ("[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct"); U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated June 2020), at 14 ("if a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively").

[192] Garrett, *Too Big to Jail*, 186 (citing the speech from Siemens' monitor, "in such a large company, with 400,000 employees, uncovering occasional new violations would be inevitable, but what was impressive was that 'Siemens reacted at once' to any problems and did so effectively"); Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 329 (noting that the corporate managers' reactions to wrongdoings of self-reporting and full cooperation, as well as transformative change to the compliance lapses, may suggest reduced agency costs and less need for the imposition of coerced structural reform).

[193] Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs," 972 (claiming that the DOJ policy released in 2017 "offered transparency into how officials would determine whether a firm has an effective program … [f]or the first time in more than two decades since 'effective compliance' entered the nomenclature of the legal and regulatory process"); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 123 (complimenting that the AFA's recommendations and guides on anti-corruption measures have "provided companies with a clear and transparent framework for implementing their compliance programme").

[194] Davis, *Between Impunity and Imperialism*, 157 (noting that the guidance from enforcement authorities on the development of corporate compliance program "might serve as substitutes for individualized professional advice, particularly for small and medium-sized firms").

[195] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated March 2023), at 2 ("[t]he sample topics and questions below form neither a checklist nor a formula"); Soltes, "Evaluating the Effectiveness of Corporate Compliance Programs," 972 (noting that many firms attempt to establish the perceived effectiveness of their compliance program by responding to the questions listed in the evaluation policies).

[196] AFA 2020 Guidelines, para. 11.

at issue and the circumstances of the company".[197] Compared with the DOJ's comprehensive compliance evaluation policy, the SFO's compliance guidance is rather abstract and short on details.[198] Therefore, a great deal of discretion and uncertainty still exists in the compliance evaluation process.

6.5.2 Should the Use of Monitorships be the Default or Exception?

In order to mitigate the concerns over the costs of monitorships, a balanced test was introduced in DOJ's "Morford Memo" in 2008 and refined in the "Benczkowski Memo" in 2018.[199] Under the DOJ policies, prosecutors are required to assess the benefits and costs of monitorships when determining whether to require an independent compliance monitor as part of a DPA. The imposition of monitorship should be limited to circumstances where there is a demonstrated need for the monitorship and its potential benefits clearly outweigh the estimated costs.[200] On the one hand, monitorships can be an effective means of monitoring the company's compliance with the DPA and reducing the risks of the recurrence of misconduct.[201] On the other hand, monitorships incur hefty costs to the target company in terms of the monetary costs and the disruptions to the business operation.[202] For companies that had an adequate compliance program at the time of the offense, or that had taken effective remedial measures to strengthen the compliance program, external monitorship is rarely necessary according to the Benczkowski Memo.[203] Following the issuance of Benczkowski Memo, the DOJ has significantly reduced the use of external monitorships as the post-resolution oversight mechanism. In 2020 and 2021, not a single FCPA resolution required the hiring of external monitors.[204]

However, the DOJ's view on the use of monitorships has made a U-turn under the Biden administration. The incumbent Deputy Attorney General of DOJ, Lisa O. Monaco, backed off from the previous DOJ policy that required the imposition of external monitors only in exceptional circumstances.[205] According to the current DOJ policy, there is no presumption in

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[197] U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated March 2023), at 2 ("[t]he sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue and the circumstances of the company").

[198] Amanda N. Raad, et al, "UK Serious Fraud Office Clarifies Its Approach to Compliance Programmes," Ropes & Gray, January 30, 2020, https://www.ropesgray.com/en/newsroom/alerts/2020/01/UK-Serious-Fraud-Office-Clarifies-Its-Approach-to-Compliance-Programmes (accessed November 3, 2020) (noting that "ambiguity remains as to when prosecutors will consider procedures to have been "adequate" for the purposes of the Corporate Offence" as a result of the general guidance and the lack of meaningful precedents).

[199] Morford Memo, at 2 ("[i]n negotiating agreements with corporations, prosecutors should be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation"); Benczkowski Memo, at 2 (elaborating the considerations regarding the potential benefits and costs of monitorships).

[200] Benczkowski Memo, at 2 ("[i]n general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens").

[201] Morford Memo, at 1-2 ("[t]he corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace"); Benczkowski Memo, at 1 ("[i]ndependent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution, whether a DP A, NP A, or plea agreement. Monitors can also be an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution").

[202] Benczkowski Memo, at 1.

[203] *Ibid*, at 2 ("[wh]ere a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary").

[204] "DOJ FCPA Enforcement – 2021 Year In Review," *FCPA Professor*, January 12, 2022, https://fcpaprofessor.com/doj-fcpa-enforcement-2020-year-review-2/ (accessed August 7, 2022).

[205] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021, https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute (accessed November 1, 2021) ("[t]o the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance").

favor of or against independent monitorships in corporate resolutions.[206] Prosecutors may "require the imposition of independent monitors whenever it is appropriate to do so" by weighing on the factors and circumstances of a particular case.[207] Prosecutors are more likely to consider the imposition of monitorship when the corporate compliance program is "untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution".[208]

Against the background of the radical change in the DOJ's policy regarding the desired frequency in the use of monitorships, it is worth addressing the question: should the imposition of external monitors be the default or exception in the context of corporate DPAs? It is believed in this paper that compliance monitorships should be exceptional rather than the norm in the context of corporate DPAs based on the following reasons. Given that the primary responsibility of monitors under DPAs is to provide assessment and ongoing supervision of the company's implementation of the compliance obligations, the use of monitorship is only necessary when compliance obligations are actually imposed via DPAs. As already discussed in Section 6.3, the imposition of compliance obligations in the context of DPAs is mainly justified by the insufficiency of the corporate fine and individual liability to achieve optimal deterrence in certain circumstances.[209] Otherwise, it is generally socially desirable to use the less costly option of corporate fine to force the corporation to internalize the social costs of criminality and to trigger voluntary corporate investment in the compliance program.[210] Arlen & Kahan further claim that policing agency costs, which occur in situations where corporate managers personally benefit from the wrongdoing or defective corporate policing system and cannot be trusted to prevent the wrongdoings, present the only circumstances that justify the imposition of compliance mandates to complement individual liability.[211] Compliance obligations are more appropriate in cases where the use of a corporate fine and/or individual liability is unlikely to induce sufficient corporate preventive and self-policing measures. A more selective use of compliance obligations could reduce the government's expenses associated with the continual oversight in the post-resolution period and mitigate concerns over the disruption to normal

[206] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, on *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* ("Revised Monaco Memo"), September 15, 2022, https://www.justice.gov/opa/speech/file/1535301/download (accessed April 6, 2023), at 11-12.

[207] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021; *Ibid,* at 12 ("the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case").

[208] Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, on *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Monaco Memo), October 28, 2021, https://www.justice.gov/dag/page/file/1445106/download (accessed November 1, 2021), at 4.

[209] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1729-31 (arguing that the use of monitorships is merited only when (i) "the highest-imposable cash fine does not generate the desired level of deterrence" owing to the judgement-proof problem or the externality problem, (ii) the company is a recidivist (cautioning that recidivism by itself may not be enough to justify monitor-like sanctions without further inquiry), or (iii) the costs of having a monitor are less than the enforcement advantages); Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1424 ("[o]nce a company has demonstrated disrespect for the law, it is sensible to subject it to more intrusive supervision than law-abiding competitors face under generally applicable law, particularly where fines alone may not induce sufficient internal policing").

[210] A. Mitchell Polinsky, and Steven Shavell, "The Optimal Use of Fines and Imprisonment," *Journal of Public Economics* 24, (1984): 95 (noting that in the context of individual criminal cases, "it is always optimal first to use a fine to the fullest extent possible…before possibly supplementing it with an imprisonment term"); Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1730 (noting that corporate compliance duties are more costly than fine in terms of the costs associated with the assessment of impacts, ongoing supervisory costs, and the possibility to lead to either over-investment or under-investment).

[211] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 327-28 (claiming that prosecutors should only resort to compliance and governance sanctions when firms are plagued by policing agency costs, and traditional corporate sanctions will not efficiently induce firms to take effective self-policing measures); Cunningham, "Deferred Prosecutions and Corporate Governance," 45 (holding the same opinion as Arlen and Kahan, and arguing that DPAs are only desirable in the situations where duty-based criminal liability and *ex-ante* regulation are ineffective and the use of DPAs shall focus on reducing the costs of managerial deviation from optimal policing).

business operation. In this sense, the current DOJ enforcement practices, which demand corporate compliance reforms whenever the corporate compliance program showed deficiency at the time of misconduct, appear to be less justified.[212]

Even in cases where the imposition of corporate compliance obligations is desired, the necessity and scope of monitorships should be determined based on a cost-benefit analysis. Independent monitorships should be imposed only when their potential benefits clearly outweigh the estimated costs, and the extent of such monitorships should be targeted to reflect and address the deficiency in the corporate compliance program.[213] As discussed in Section 6.4.2, the employment of external compliance monitors to supervise the corporate compliance progress can be prohibitively expensive for the corporations, given the high fees paid to the monitors and supporting personnel, as well as potential disruptions caused to business operation.[214] However, monitorships are not all about costs. The use of monitorships can be an effective means of supporting and overseeing the company's compliance with the terms of DPA, reducing the risks of the recurrence of misconduct, and reforming the corporate culture.[215] If corporate self-monitoring and self-reporting cannot be relied on to ensure the genuine implementation of the compliance obligations imposed under the DPA and to mitigate the risk of future misconduct, the employment of independent monitorships to provide assistance in, and on-going oversight of, the corporate compliance efforts will be necessary and desired.[216] The factors that should be considered by prosecutors when determining the necessity and scope of monitorships, as acknowledged in the Monaco Memo, include (i) whether the company has voluntarily self-reported the misconduct; (ii) whether the company has an effective compliance report that is tested effective at the time of the resolution? (iii) whether the misconduct was pervasive within the company or involved senior management or compliance personnel; (iv) whether significant investigative or remedial efforts have been made by the company; (v) whether the company faces unique compliance risks, and whether the corporate risk profile has substantially changed; (vi) whether and to what extent is the company subject to the oversight from the industry regulators or monitor imposed by other agencies.[217]

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[212] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 376-77 (criticizing the current DOJ policies and practices that "encourage prosecutors to impose compliance mandates whenever the firm did not have an effective compliance program at the time of the wrongdoing" for being too broad); Baer, "Governing Corporate Compliance," 998 (noting that the prosecutors' *ex-post* assessment of the compliance program is likely to be driven by hindsight bias).

[213] Khanna, and Dickinson, "The Corporate Monitor: The New Corporate Czar," 1730 (noting that monitorships are justified "when the costs of having a monitor are less than the enforcement advantages gained when the government economizes on enforcement resources"); Jennifer O'Hare, "The Use of the Corporate Monitor in SEC Enforcement Actions," *Brooklyn Journal of Corporate, Financial & Commercial Law* 1, no. 1 (2006), 90 ("a court should appoint a Corporate Monitor only if the danger that a company will not comply with a court order to obey the federal securities laws outweighs the significant dangers associated with the use of a Corporate Monitor").

[214] See *supra* note 148-152.

[215] See *supra* notes 129-133; Garrett, *Too Big to Jail*, 190-91 ("when prosecutors conclude a company needs to improve its compliance and cannot do it alone, they should demand that the company hire a monitor"); SFO, Evaluating a Compliance Programme, ("[t]he DPA should set out the means by which the organisation will satisfy the prosecutor. This is likely to include a monitor being appointed at the organisation's expense").

[216] "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," October 28, 2021 (claiming that as an effective tool to encourage and verify corporate compliance, monitorship should be imposed whenever the company cannot be trusted to live up to its compliance and disclosure obligations under the DPAs).

[217] Revised Monaco Memo, September 15, 2022, at 12-13 (listing ten factors that would impact the evaluation of the necessity of a monitor).

6.5.3 Public Monitorships versus Private Monitorships

As discussed above, the French CJIP regime is different from the DPA programs in the U.S. and UK regarding the identity of the external compliance monitors.[218] Instead of outsourcing the compliance monitorships to private professionals, a special government agency, AFA, was relied on to oversee the company's efforts to reform the anti-corruption compliance program pursuant to CJIPs.[219] While AFA may resort to private experts for assistance when carrying out compliance monitorships, the agency itself is responsible for assessing and reporting to the prosecuting agency on the company's compliance program.[220]

The French monitorship arrangement is consistent with "their strong state-centric tradition, their anxiety over the influence of money injustice, and their implicit distrust of lawyers".[221] Resorting to the government agency for conducting monitorships remedies major deficiencies associated with monitorships based on private actors. The appointment of a single government agency as the compliance monitor prevents any criticism of favoritism in the selection of monitors.[222] Though both types of monitorships require that the target corporation pay for the relevant costs, the French regime is relatively more effective in mitigating the concerns over the costs of monitorships through the assessment and agreement on the maximum costs beforehand. AFA could be involved even before the conclusion of CJIP to advise on the extent of possible compliance obligations and to assess the costs of monitorships, while the maximum monitorship fees are agreed by the prosecutors and company in advance and included in the CJIP.[223] In terms of the potential doubts about the expertise and experience of compliance monitors, AFA as the special anti-corruption agency boasts its expertise in the anti-corruption compliance area.[224] In addition to monitoring the company's implementation of the compliance obligations imposed via CJIPs, AFA is also responsible for auditing firms as to the development of the anti-corruption

[218] See *supra*-Section 6.2.2.3.
[219] French Code of Criminal Procedure, II of Article 131-39-2; 2023 CJIP Guidelines, at 6 ("[t]he agreement may include one or more of the following obligations… implementation, under the supervision of the AFA, of a program to bring into compliance its procedures for preventing and detecting corruption, for a maximum period of three years"). For the environmental cases resolved via CJIP, specialized environmental agencies, i.e., the Ministry of the Environment and the services of the French Office for Biodiversity, will be appointed and a separate monitoring procedure will follow.
[220] 2023 CJIP Guidelines, at 18 ("[t]he AFA submits a report at the end of the implementation period to the PNF and must inform it of any implementation difficulties"); at 19 ("the AFA estimates the maximum costs incurred by its use of experts or qualified persons based on information received from the company").
[221] Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 778 ("[b]y capping fees and entrusting the substance of the work … to an administrative agency, the French are acting consistently with their strong state-centric tradition, their anxiety over the influence of money injustice, and their implicit distrust of lawyers").
[222] "The Independent Corporate Monitor: Who, What, When and How? Feedback from Laurent Cohen-Tanugi," *Revue Internationale De La Compliance Et De L'ethique Des Affaires*, no. 2 (2019): 8 (claiming that "sanctioned companies will not be able to nominate candidates they trust").
[223] 2023 CJIP Guidelines, at 18 (clarifying that when deciding whether the inclusion of compliance obligations in the CJIP is appropriate, the PNF would work in coordination with AFA, which would carry out a preliminary examination and analysis of the corporate anti-corruption compliance program); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 126 (noting that from 2017 to January 2021, "the AFA conducted four pre-resolution audits in the foreign bribery cases at the request of the PNF … to decide whether it was appropriate to subject the legal person to an OPMC the duration and scope of the obligation and/or to determine the ceiling of costs that the company would incur to cover the AFA's recourse to experts to monitor the implementation of the obligation"); *Ibid* (noting that the cap on monitoring fess can run against the goal of law, as it is often difficult to assess in advance the extent of compliance reform and fees, and therefore it would cause AFA to focus excessively on the costs in conducting monitorships).
[224] *AFA Annual Report 2021*, https://www.agence-francaise-anticorruption.gouv.fr/files/2022-09/RA_AFA_2021_EN.pdf, at 10 (showing that the agency has 51 members selected from other public branches and business community, including judges, civil engineers, customs inspectors, public finance administrators, inspectors, audit and compliance experts); Baer, "Governing Corporate Compliance," 992 (noting that industry-specific agencies are more suitable than generalist prosecutors to monitor and assess compliance, which is highly contextual and fact-specific).

program mandated by the *Sapin* II law.[225] Regular anti-corruption audits enable the agency to accumulate experience in the area of compliance monitoring and assessment.[226]

On the other hand, the reliance on a public agency to deliver the service of compliance monitoring could be hindered by the agency's lack of independence and resources. If the agency suffers from political constraints, shortage of staff or financial resources, or weak performance oversight, its compliance reports are unlikely to form a reliable basis for the prosecutors' charging decisions to the extent of promoting corporate compliance and rehabilitation.[227] In addition, some people have voiced concerns that the agency monitor tends to target compliance in one specific area, which could be inefficient to address broader compliance deficiencies in the company and to prevent violations in other areas.[228] What is more, the lack of independence and competency could even impact the agency's credibility in the eyes of foreign authorities and lead to duplicative monitorships imposed on the same corporation by different authorities, driving up the corporate expenditures and worsening the disruption to the business operation.[229] In order to ensure the independence of AFA, the agency is placed under dual oversight from Ministry of Justice and Ministry of the Economy, Finance and Recovery, with a specially designated operation budget.[230] The inclusion of staff from multiple disciplines and the accumulation of experience through regular audits increase the AFA's expertise in various areas and the public's acceptance of the oversight mechanism.[231] More significantly, the French policy makes it clear that AFA should be appointed to monitor the compliance program in the multi-jurisdictional coordinated settlements if the compliance program is imposed by the French judicial authority.[232] In the first joint resolution between PNF and DOJ involving the French bank Société Générale in 2018, the DOJ determined that an independently-retained monitor was unnecessary given that the company was already under the AFA oversight.[233] The coordinated settlement between the

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[225] Ludovic Malgrain, and Jean-Pierre Picca, "Compliance in France in 2019," June 10, 2019, in *Europe, the Middle East and Africa Investigations Review 2019* by Global Investigation Review, https://globalinvestigationsreview.com/review/the-european-middle-eastern-and-african-investigations-review/2019/article/compliance-in-france-in-2019 (accessed December 10, 2020) (introducing the newly-created French Anti-Corruption Agency, which provides compliance guidance and monitor compliance, with comprehensive audits at major corporations).

[226] AFA Annual Report 2021, at 37-38 (noting that AFA has conducted 159 audits of public and business entities since its creation in 2017).

[227] Laurent Cohen-Tanugi, "French Anti-corruption Compliance Monitoring: Differences from US Corporate Monitorships and Implications for Multijurisdictional Settlements," (noting that AFA is an administrative body that is not independent from the state, and may suffer from the potential shortage of resources and professional experience and expertise); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 128 (noting that the scope, diversity, complexity of "the AFA's responsibilities also raises questions about the availability and adequacy of its financial and human resources").

[228] Michael Griffiths, "French Compliance Monitorships a 'Work in Progress'," (considering the AFA monitorships too narrowly focused on anti-corruption and calling for the assessment of other areas of compliance risk); Veronica Root Martinez, "The Outsized Influence of the FCPA?" *University of Illinois Law Review* 2019, no. 4 (2019): 1214-18 (questioning whether regulators and corporations have placed too much attention on the FCPA compliance to the detriment of the prevention and detection of similarly serious violations in other regulatory and legal areas).

[229] Revised Monaco Memo, September 15, 2022, at 13 (warning that the DOJ prosecutors would consider the extent to which the company is subject to the oversight of monitors appointed by foreign agency when deciding whether to impose monitorships).

[230] AFA Annual Report 2021, at 10 (noting that "AFA's operating resources come from pooled appropriations made under budget programme, 'Conduct and steering of economic and financial policies' under the function 'Public finance and human resources management' overseen by the Ministry for the Economy, Finance and the Recovery); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 129 (voicing concerns over AFA's lack of budgetary or functional autonomy, as the change of political agenda could affect the AFA's stability and continuity).

[231] Einbinder, "Corruption Abroad: From Conflict to Co-Operation," 778-79 (noting that AFA increases its expertise and public acceptance "through public disclosure of AFA monitoring reports, accumulation of experience within a single agency of civil servants unlikely to pass through 'revolving doors,' and the broadening of monitors beyond the narrow base of elite lawyers").

[232] 2023 CJIP Guidelines, at 25 ("[i]f a compliance program is contemplated, the implementation of a single control mechanism is preferred. If the prosecution authorities decide that the compliance program is imposed by the French judicial authority, the AFA must be appointed to monitor the measure pursuant to the third paragraph of article 41-1-2 of the code of criminal procedure").

[233] "Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," June 4, 2018, https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan (accessed November 20, 2020).

French, U.S. and UK authorities targeting Airbus SE followed the same practice, as both DOJ and SFO decided not to impose their own monitors in deference to target audits conducted by the AFA.[234] The two cases demonstrate not only in-depth cooperation between anti-corruption agencies from different jurisdictions in the corporate enforcement actions, but also the credibility gained by the AFA in terms of compliance monitorship in the eyes of its foreign counterparts.[235]

For jurisdictions that do not have a thriving compliance market or are reluctant to entrust private actors with the authority of compliance monitoring, the French regime that designates a special public agency to conduct compliance monitorships can be inspiring. Comparatively speaking, the U.S.-style monitorship is more difficult to copy as it benefits from the highly developed compliance market consisting of lawyers, ethics professionals, auditors, accountants, data analysts and consultants.[236] It could take decades for other jurisdictions to train their prosecutors, legal practitioners and corporate executives to achieve the required skills and foster the culture of compliance in the legal and business community.[237] It is worth noting that for the French approach to compliance monitorships to work, it is particularly important that the public agency is provided with adequate resources, independence and incentives to carry out high-quality monitorships.

6.6 Conclusion

The prevalence of DPAs in the corporate context gives prosecutors more latitude to not only resolve the past corporate wrongdoings, but also influence corporate behavior in the future by mandating corporate compliance reforms and monitorships. Utilizing their formidable power of criminal indictment, prosecutors are incentivizing corporations to adopt proactive measures to implement an effective compliance program, and to take timely remedial measures to strengthen the compliance program following the detection of misconduct. For corporations that did not have an adequate compliance program at the time of the misconduct and had not effectively improved its compliance program at the time of resolution, prosecutors can use DPAs to directly instruct specific compliance measures and even demand the recruitment of independent monitors to supervise the compliance progress.

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[234] "Airbus Reaches Agreements with French, U.K. and U.S. Authorities," January 31, 2020, https://www.airbus.com/en/newsroom/press-releases/2020-01-airbus-reaches-agreements-with-french-uk-and-us-authorities (accessed November 22, 2021); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 127 (clarifying that "the AFA has not been formally designated as a monitor in a resolution concluded with a foreign authority". However, the foreign authorities decided not to impose additional monitoring measures in addition to the post resolution audit conducted by the AFA regarding the implementation of the compliance obligations imposed under the CJIP).

[235] "Four Years and Almost $4 Billion: Airbus Corruption Investigations End with Sky-High Fine," *Ropes & Gray*, January 31, 2020, https://www.ropesgray.com/en/newsroom/alerts/2020/01/Four-Years-and-Almost-4-Billion-Airbus-Corruption-Investigations-End-with-Sky-High-Fine (accessed November 20, 2020); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention Phase 4 Report - France*, 2021, at 133 (considering the creation and mandates of AFA as "a notable development in the French legal framework, which has, among other things, allowed France to regain credibility and visibility in its efforts to combat foreign bribery").

[236] The term of FCPA Inc. is coined to describe a multi-billion-dollar industry developed to suit the corporation's need to build effective compliance program, conduct internal investigations and cooperate with the authority, see Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," *U.C. Davis Law Review* 49, (2015): 523; Owen Walker, "Compliance Staff Enjoy Pay Boom as Demand for Expertise Rockets," May 12, 2018, *Financial Times*, https://www.ft.com/content/baf70664-2795-11e8-b27e-cc62a39d57a0 (accessed December 12, 2020).

[237] Davis, *Between Impunity and Imperialism*, 157 ("[i]t takes time for compliance advisers to develop expertise, and expertise developed in the context of one legal and commercial culture, or even one particular industry, is not necessarily transferable to other contexts").

The use of DPAs to seek compliance reforms, in addition to a hefty fine and continual corporate cooperation against individual wrongdoings, generates important social values, such as deterrence and rehabilitation. As discussed in more detail in the previous two Chapters, prosecutors are faced with major challenges in imposing a sufficiently large corporate fine and seeking individual accountability, which are crucial to optimally deterring corporate misconduct and promoting corporate rehabilitation. Corporate compliance reforms and monitorships can be useful in providing additional deterrence and rehabilitation owing to their inherent financial costs and restrictions on the managerial autonomy, and impacts on the corporate culture and the employees' behavior. The prosecutors' focus on the corporate compliance program in the application of DPAs induces corporations and their management to adequately invest in the corporate compliance program to prevent and detect corporate misconduct, and rehabilitates troubled corporate organizations into better citizens with enhanced culture and ethics. Therefore, for other jurisdictions that are contemplating the introduction of DPAs in the corporate context, the promotion of corporate compliance and rehabilitation should be set as a major goal in the designing and application of the mechanism.

For the purpose of leveraging DPAs to promote corporate compliance and ethics, two issues are critical. The first issue concerns the evaluation of the effectiveness of a company's compliance program, which is fundamental for prosecutors to make informed decisions on the desirability of resolving the corporate matter with a DPA and the extent of compliance obligations imposed via the DPA. Generally speaking, prosecutors are trained for criminal prosecution and thus lack the expertise in corporate compliance matters. They may end up crediting companies with only a window-dressing compliance program or pressing for excessive compliance measures. In order to enhance prosecutors' capability to assess the effectiveness of a corporate compliance program, the prosecuting authorities in the U.S., UK and France have released a series of guidelines. Such guidelines provide useful and detailed guidance for individual prosecutors as to the evaluation of a corporate compliance program when making charging and settlement decisions. Prosecutors are directed to focus on the evolution and implementation of a corporate compliance program in practice in order to distinguish a genuine and effective compliance program from a program that only exists on paper. On the other hand, the release of compliance evaluation guidelines offers corporations more clarity into the corporate settlement practices and incentivizes corporations to proactively design and implement a compliance program that conforms to the prosecutors' expectations. The dynamic and functional approach adopted in the compliance evaluation guidelines offers valuable lessons for other jurisdictions in the application of DPA-like mechanisms in terms of promoting corporate compliance and making real impacts on employees' behavior and corporate culture.

Another important issue concerns the monitoring of corporate compliance progress to ensure that the terms of DPAs are genuinely followed by the corporation at issue. It normally takes years for corporations to fulfill the compliance obligations stated in the DPAs and to test the effectiveness of the newly updated compliance program. Prosecutors rarely have sufficient resources or incentives to provide on-going monitoring of corporate compliance progress throughout the whole period of DPAs. In order to address the prosecutorial deficiency in this aspect, prosecutors in the U.S., UK and France require corporations to either monitor themselves or to retain an

external compliance monitor in order to reduce the corporate compliance risks and provide periodical reports on the corporate compliance progress. Each approach has its advantages and disadvantages. Independent monitorships enjoy higher credibility and effectiveness than corporate self-monitoring, yet the high financial costs and potential disruption to business operation are subject to sharp criticisms. In response, this Chapter proposes that prosecutors should restrict the imposition of compliance obligations to circumstances where the pursuit of corporate fines and individual liability is insufficient to achieve optimal deterrence and trigger satisfactory corporate compliance measures. For cases where the imposition of compliance obligations is necessary, independent monitorship should only be used when its potential benefits clearly outweigh the costs, and the scope of monitorship should be tailored to the corporate risk profile and compliance deficiency. If compliance monitorship is desired in a case, however, the duration of monitorship should be long enough. Though its precise duration depends on the circumstances of the specific case, a sufficiently long period is necessary to make sure that the corporate compliance program is reasonably designed and implemented and is tested to be effective in detecting and preventing relevant wrongdoings. Moreover, regarding the choice of compliance monitors in the context of corporate DPAs, the authorities may opt to designate a public agency or resort to private professionals considering their legal culture, the maturity of their compliance market, and other relevant factors. No matter which approach is adopted, it is essential to ensure the monitor's expertise, independence and incentives in carrying out high-quality monitorships, and to reduce monitorships' costs and disruption to normal business operation.

Chapter 7 Fostering State-Corporation Partnership via DPAs: Current Circumstances and Challenges in China

7.1 Introduction

Based on the analysis in Chapters 4, 5 and 6, one of the most important lessons that the corporate enforcement policies and practices in the U.S., UK and France can offer for China is the importance of engaging corporations in the fight against bribery.[1] Better cooperation between the public enforcement agencies and the private actors, as well as enhanced internal control and anti-corruption compliance program in the private sector are exactly the requirements of the UNCAC and the OECD Recommendations.[2] The popularity of DPAs in the corporate enforcement area reflects a departure from the traditional enforcement strategy relying mainly on the public enforcement resources to the partnership between corporations and government.[3] With the threats of criminal prosecution and the incentives of a pre-trial resolution and reduced penalty, corporations are induced to engage in effective corporate self-policing measures.[4] Such measures refer to the implementation of an effective compliance program, prompt disclosure of any detected wrongdoings, full cooperation with the government's investigations, including the investigations into relevant individuals, and timely remediation of any compliance risks.[5] Compared with the state investigators, corporations are generally more capable of detecting corporate wrongdoings, identifying individual wrongdoers and gaining access to witnesses and documents without incurring the same level of procedural restraints.[6] As corporate resources are tapped to prevent, detect and investigate the potential corporate wrongdoings, public monitoring and enforcement costs can be saved, and the overall efficiency of the monitoring and investigation efforts can be increased.[7]

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[1] See Chapter 4, Section 4.3 (discussing the social advantages of corporate self-reporting and cooperation); Chapter 5, Section 5.3.3 (identifying the benefits and limits of relying on corporations to sanction individual wrongdoers); Chapter 6, Section 6.3 (discussing the social values of compliance obligations and monitorships).

[2] United Nations Convention Against Corruption, Article 12 (measures to prevent corruption involving the private sector) and 39 (cooperation between national authorities and the private sector); OECD Council, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, amended on November 26, 2021, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378 (accessed February 11, 2022), Article XXIII (recommending the member states to provide incentives for corporations to adopt appropriate accounting and audit measures, and to enhance internal controls, ethics and compliance program).

[3] William S. Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," *Iowa Law Review* 87, no. 2 (2002): 643-45 (noting that both the U.S. Sentencing Guidelines and Prosecution Guidelines embrace the theory of cooperative enforcement).

[4] U.S. Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-prosecution Agreements, But Should Have Evaluate Effectiveness*, GAO-10-110, 2009, https://www.gao.gov/assets/300/299781.pdf, at 10 (enumerating the considerations for the prosecutorial decisions to decline, enter into a D/NPA, or prosecute).

[5] Jennifer Arlen, and Refier Kraaman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *New York University Law Review* 72, no. 4 (1997): 693 (defining the "policing measures" as a variety of corporate actions that increase the probability for wayward agents to be sanctioned, including monitoring, investigations, self-reporting and cooperation).

[6] John C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 408 (noting that "(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards").

[7] John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," *Michigan Law Review* 80, no. 7 (1982): 1480 (noting that under the enforced self-regulation, business operators would bear more of the enforcement costs); Lisa Kern Griffin, "Compelled Cooperation and the New Corporate Criminal Procedure," *New York University Law Review* 82, no. 2 (2007): 340 ("the organizational guidelines were adopted in part on the theory that strong private corporate compliance efforts would augment limited government resources"); John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law and Society Review* 18, no. 2 (1984): 184 ("agencies can

As discussed previously in Chapter 2, the enforcement of anti-bribery laws in China features heavy reliance on public resources, while corporations and other civil actors play only a minor role in the fight against bribery.[8] The public-enforcement-only approach is extremely costly, calling for significant investment of enforcement resources and putting immense pressure on the already overstretched enforcement and judicial personnel.[9] What is more, the high-profile and costly anti-bribery campaigns fail to effectively control the endemic bribery or improve the perception of corruption in China.[10]

Referring to the U.S., UK and French experience in the promotion of state-corporate partnership, this Chapter aims to explore the reasons for the inactive corporate role in China's anti-bribery movement. The minor role played by the corporations in the anti-bribery movement is reflected in the infrequent corporate investigations, uncommon corporate self-reporting and sluggish development of corporate compliance program. The understanding of the corporations' (lack of) will and ability to self-police themselves and to assist the authority in the fight against bribery is fundamental to any policy recommendations on the designing and implementation of the Chinese DPA program.[11]

DPA involves the negotiation between the prosecutor and the corporation. In the negotiation process, the prosecutor utilizes the carrot of pre-trial resolution and the threat of criminal indictment based on the prosecutorial discretion to bargain for the corporate investment in an effective compliance program and internal investigations. From the perspective of corporations, the development of an effective compliance program or the decision to voluntarily self-report and cooperate will not be a rational choice if the expected costs of doing so outweigh the expected benefits, or if they are unlikely to be subject to major adverse consequences if they do not do so.[12] Neither the prosecutors or the corporations would have adequate incentives or latitude to negotiate if the prosecutorial discretion or the corporate ability to conduct internal investigation is seriously restricted, or the trust between the two parties cannot be sustained.[13] This Chapter will analyze whether corporations have strong incentives and bargaining chips to negotiate with China's Procuratorates by examining the corporate liability regimes, as well as the

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shift scarce monitoring and prosecutorial resources from cooperative firms to bad firms, thereby increasing, through deterrence, the level of compliance among bad firms").

[8] See Chapter 2, Section 2.3.4.

[9] See Chapter 2, Section 2.3.2.

[10] See Chapter 2, Section 2.3.4 (showing that the sweeping and long-lasting anti-corruption movement has had little measurable effect on China's ranking on the CPI, as China consistently scored around 40 out of 100 points between 2012 and 2021).

[11] Wallace P. Mullin, and Christopher M Snyder. "Should Firms Be Allowed to Indemnify Their Employees for Sanctions?" *Journal of Law Economics & Organization* 26, no. 1 (2010): 40 ("targeting the firm is particularly effective if it can monitor the agent's actions better than can government authorities"); Jennifer Arlen, and Samuel W. Buell, "The Global Expansion of Corporate Criminal Liability: Effective Enforcement across Legal Systems," *Southern California Law Review 93,* (2020): 753 ("the use of such an enforcement policy to induce corporate detection and investigation, while reducing corporate sanctions, generally enhances welfare only if companies are better able to detect or investigate than the government").

[12] Louis Kaplow, and Steven Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," *Journal of Political Economy* 102, no. 3 (1994): 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not"); Charles J. Walsh, and Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?" *Rutgers Law Review* 47, no. 2 (1995): 633 (noting that corporations are typically viewed as calculating actors, who presumably act in the economic best interests and are more likely than individuals to weigh the costs and benefits before undertaking an action).

[13] Malcolm M. Feeley, "Plea Bargaining and the Structure of the Criminal Process," *Justice System Journal* 7, no. 3 (1982): 338-354 (noting that the tradition of prosecutorial discretion and judicial passivity foster the practice of plea-bargaining in the U.S., while the restrictive prosecutorial discretion and judicial activity explain the unpopularity of plea bargaining in Germany); Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (NY: Oxford University Press, 2019), 155 (noting that "laws that promote private regulation are most likely to be cost-effective when they are complemented by laws that place few restrictions on private actors' ability to engage in investigation").

laws governing the scope of prosecutorial discretion and the corporate ability to conduct private investigations. The analysis helps the designing of effective corporate enforcement initiatives and policies, including a Chinese version of the DPA program, for the purpose of triggering positive and adequate corporate self-policing measures.

This Chapter proceeds as follows. Following the Introduction, Section 7.2 discusses the individualism-centered feature of China's criminal justice system, which fails to pay sufficient attention to corporate criminal liability and the prosecution of corporate crimes. The unsophisticated criminal rules concerning corporate criminal liability and corporate prosecution, as well as the low enforcement risks confronting corporations largely account for the inactive role played by the corporate actors in combating corporate crimes. Section 7.3 focuses on the prosecutorial discretion and the skepticism towards negotiated justice under China's strongly inquisitorial criminal justice system. Though the gradually relaxed prosecutorial discretion opens the door for negotiated justice, the Procuratorates' credibility issue may discourage corporations from resorting to the formal settlement channel. Sections 7.4-7.6 attempt to explain why corporate actors play a relatively limited role in China's anti-bribery movement, as reflected in the uncommon corporate voluntary self-reporting, infrequent corporate internal investigations, and unbalanced development of corporate compliance programs. Section 7.7 concludes.

7.2 China's Criminal Justice System Remains Fixed at the Level of Individualism

With a predominant presence of corporate actors in almost all parts of the society, bribery, like most other crimes, is increasingly committed by or through corporate organizations.[14] A most important lesson the corporate enforcement practices in the U.S., UK and France can offer for China is that the government can only effectively deter bribery by collaborating with the corporations and encouraging corporations to prevent, investigate and self-report any instance of bribery.[15] As claimed by John Braithwaite, "a criminology which remains fixed at the level of individualism is the criminology of a bygone era".[16] However, the Chinese criminal justice system is still fixed at the level of individualism, paying inadequate attention to the corporate offenders. Given the unsophisticated substantive and procedural criminal rules targeting corporate crimes, as well as the authority's insufficient ability and motives to prosecute and sanction corporate offenders, it is not a big surprise that corporations rarely self-police themselves and implement costly compliance programs in reality.

[14] Christopher D. Stone, "Corporate Regulation: The Place of Social Responsibility," in Brent Fisse and Peter A. French (eds.), *Corrigible Corporations and Unruly Law* (San Antonio: Trinity University Press, 1985), 13 ("[t]he fact is simply that today, when things are done, they are being done increasingly, through (and by, and to) corporations.... This is not to say that the law can ignore the control of ordinary persons, but that the design of social institutions, once focused almost exclusively on how to deal with individual persons acting on their own account, has to be reconsidered in the light of a society in which bureaucratic organizations have come to dominate the landscape, and when persons are accounted for if at all, not simply as individuals, but as officeholders").

[15] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 644-45 (identifying the classic carrot and stick approach adopted in the U.S. Sentencing Guideline and Prosecution Guideline, and praising such approach for being necessary to "encourage businesses to join the government in the battle against corporate crime").

[16] John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), 148.

7.2.1 Individualism-Centered Criminal Law

The PRC Criminal Law is mainly designed with individual crimes in mind, as exemplified by its evolution and the simple rules on crimes involving entities.[17] The PRC Criminal Law was first promulgated in 1979, three years after the Cultural Revolution during which almost all statutes were suspended.[18] As there were few private corporations in the socialist market at that time, individual crimes were the sole concern of the legislature.[19] Between 1987 and 1995, with a rising number of corporate crimes in the emerging economy, the legislature introduced a dozen supplementary decisions to penalize corporate offenses such as smuggling crimes and customs violations.[20] As part of the overhaul of the PRC Criminal Law in 1997, entities including corporations, enterprises, public institutions, and even state organs and organizations were explicitly defined as being subject to criminal liability.[21]

However, the criminal law rules on corporate crimes are rather abstract and incomplete. The PRC Criminal Law includes only two Articles in its General Provisions to regulate corporate crimes. The Articles list the type of entities that may be pursued for criminal liability and specify that, if entity crimes are established, both the entity itself and the responsible personnel shall receive criminal sanctions unless it is otherwise provided.[22] Under the Specific Provisions of the PRC Criminal Law that enumerates specific criminal charges, when entity criminals are punishable, an abstract provision is often included concerning merely the entity fine (without quantification or upper limits) and the penalty for the responsible personnel.[23] As the Law was overhauled at a time when the market was dominated by SOEs, it shows clear leniency to the

[17] Jinzhan Xue, “单位犯罪刑罚的适用与思考 (Thoughts on the Application of the Criminal Punishment in Corporate Crimes),” *法学 (Law Science),* no. 9 (2002): 32 (claiming that though corporate crimes are recognized under the PRC Criminal Law, the criminal rules are no more than conceptual proclamation, with no types of penalty or penalty application rules specially designed for organizational offenders in light of the uniqueness of entity crimes).

[18] The PRC Criminal Law was first adopted on July 1, 1979 and revised on March 14, 1997. For the background of the introduction of the PRC Criminal Law in 1979, see Shizhou Wang, “On Development of Criminal Law in the People’s Republic of China,” *Law and Politics in Africa, Asia and Latin America* 43, no. 3 (2010): 293-94 (discussing the impact of the Cultural Revolution and Planned Economy on introduction of the Criminal Law in 1979).

[19] Mingcan Yin, “单位行贿的立法完善 (On Legislative Improvement to Entity Bribery),” *江西警察学院学报 (Journal of Jiangxi Police Institute)*, no. 5 (2014): 97 (noting that entities were first introduced as a type of bribe-giver in 1987, when SOEs accounted for 98.48% of all enterprises).

[20] For example, Article 47 (4) of the PRC Customs Law promulgated in 1987 stipulated for the first time that entities and responsible personnel shall be pursued for criminal liability if they commit smuggling crimes. See Wang, “On Development of Criminal Law in the People’s Republic of China,” 293-95 (discussing the adoption of a total of 23 individual supplementary decisions from 1979 to 1997 due to the great changes of the social and economic life at the time, through which unit crime or corporate crime was introduced into the PRC Criminal Law).

[21] The PRC Criminal Law, Articles 30 (“[c]orporations, enterprises, public institutions, organs and organizations shall undertake criminal liability if they commit acts endangering the society and such behaviors are prescribed by law as an entity crime”). Notably, the PRC Criminal Law uses the concept of entity crimes instead of corporate crimes. Entities include not only corporations (limited liability companies, joint stock companies, wholly state-owned companies and one-person limited liability companies) and enterprises (individual proprietorships and partnerships), but also public institutions, (state) organs and organizations (people’s organizations and social organizations).

[22] The PRC Criminal Law, Articles 30 and 31. Liangfang Ye, “论单位犯罪的形态结构—兼论单位与单位成员责任分离论 (On the Morphological Structure of Entity Crimes: Also on the Separation of Entity Liability and Personnel Liability),” *中国法学 (Law Science)*, no. 6 (2008): 93 (criticizing the definition of entity crime for not including the *mens rea* or *actus reus*, and being so general that it can only be interpreted as a declaration that entity crimes shall be criminally punished).

[23] For example, in Article 164 of the PRC Criminal Law regarding the bribery of non-state functionary, it is provided in the paragraph 3 that “[w]hen an entity commits a crime as provided for in the preceding two paragraphs, a fine shall be imposed on it, and its directly responsible person and other directly liable persons shall be punished according to the provision of paragraph 1 of this Article”. Only two entity charges, the crime of evading foreign exchanges and the crime of fraudulent purchase of foreign exchange, provide entity fine that is calculable. See Liangfang Ye, “论单位犯罪的形态结构—兼论单位与单位成员责任分离论 (On the Morphological Structure of Entity Crimes: Also on the Separation of Entity Liability and Personnel Liability),” 95 (noting that the entity fine without upper limits is a violation of *nulla poena sine lege*).

entity offenders and responsible personnel in the form of higher prosecutorial threshold and/or lower range of penalty when compared with pure individual offenders.[24]

The individualism-centered feature of the PRC Criminal Law is also reflected in the unsophisticated penalty regime for entity offenders, to which the only applicable type of criminal penalty is a criminal fine.[25] The Law fails to provide quantifiable or predictable corporate fines in most cases, without defining the range of the fine nor the method of calculation, giving the court extremely broad discretion to impose corporate fines in practice.[26] Moreover, the authority fails to provide any guidance that is similar to the U.S. Federal Sentencing Guidelines for Organizations for the sentencing of entity offenders.[27] The sketchy entity penalty regime creates many problems in practice. Penalty mechanisms such as probation, commutation, parole and statute of limitations under the PRC Criminal Law are solely linked with primary penalty, which concerns personal life or freedom and is thus only available for individual offenders.[28] For instance, the statute of limitations under the Law is 5 years for crimes punishable with up to 5-year imprisonment, 10 years for those punishable with 5 to 10 years of imprisonment, and so on.[29] It is thus impossible to calculate the statute of limitations for corporate offenses in the strict sense as the only type of penalty available to corporate criminals is a criminal fine, which is, however, deemed as a type of accessory penalty.[30]

7.2.2 Individualism-Centered Criminal Procedure Law

The PRC Criminal Procedure Law was promulgated in 1979 and modernized later in 1996, one year before the overhaul of the PRC Criminal Law in 1997.[31] The Law does not mention entity crimes at all, let alone providing any specific rules on the prosecution and trial of entity defendants.[32] The issue of jurisdiction concerning which tier of the court has the authority to try a specific case is a difficult one in the entity proceedings. Under the PRC Criminal Procedure

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[24] Mingcan Yin, "单位行贿的立法完善 (On Legislative Improvement to Entity Bribery)," 97 (noting that entity was first introduced as a type of bribe-giver in 1987, when SOEs accounted for 98.48% of all enterprises. In order to protect SOEs, the law makers set significantly lower penalty for entity bribery).

[25] Jinzhan Xue, "单位犯罪刑罚的适用与思考 (Thoughts on the Application of the Criminal Punishment in Corporate Crimes)," 32-33 (criticizing this single type of penalty against entity for being insufficient and overlapping with the fine imposed on the responsible personnel).

[26] Notably, the judicial interpretations have provided certain guidance for the assessment of criminal fine in specific cases, such as bribery and corruption cases. For example, SPC and SPP, 关于办理贪污贿赂刑事案件适用法律若干问题的解释 (Interpretations on Several Issues concerning the Application of Law in Handling Criminal Cases of Embezzlement and Bribery), April 18, 2016, Articles 7-9, and 19 (stating that criminal fine shall range from ¥100,000 (€12,821) to twice the amount of bribes).

[27] Though the SPC and SPP have recently released the Sentencing Guiding Opinions to guide the criminal sentencing practice regarding 23 common offences, such Opinions is solely designed for individual crimes, with no specific rules listing the factors impacting the prosecution of corporate offenders and the method of calculating corporate fine. See SPC and SPP, 最高人民法院、最高人民检察院关于常见犯罪的量刑指导意见(试行) (Guiding Opinions of the SPC and SPP on Sentencing for Common Crimes (for Trial Implementation)), July 1, 2021, Court [21] 2021, http://www.hezhenda.com.cn/show.asp?id=313 (accessed June 12, 2022).

[28] The PRC Criminal Law, Article 33 (listing five types of primary penalty, including public surveillance, detention, fix-term imprisonment, life imprisonment and death penalty, which mainly target the criminal's freedom and life); Jinzhan Xue, "单位犯罪刑罚的适用与思考 (Thoughts on the Application of the Criminal Punishment in Corporate Crimes)," 35-36 (claiming that the incapability between corporate sanctions and penalty mechanisms reflects the individualism-centered criminal theory and ideology).

[29] The PRC Criminal Law, Article 87.

[30] Kailin Du, and Cheng Xu, "单位犯罪追诉时效设置之研究 (Research on the Designing of Statute of Limitations for Entity crimes)," *人民司法 (The People's Judicature)*, no. 9 (2004): 44 (noting that legal scholars and practitioners have proposed several theories to determine the statute of limitations for entity crimes, but all of these theories have their own flaws). The PRC Criminal Law, Article 34 (listing three types of accessory penalty, including criminal fine, deprivation of political rights and confiscation of property).

[31] The PRC Criminal Procedure Law was adopted on July 1, 1979 and revised on March 17, 1996.

[32] Zheng Feng, and Lin Yu, "浅析犯罪单位追责的实践困境与制度完善 (On the Practical Dilemma and System Improvement for the Prosecution of Entity Crimes)," *犯罪研究 (Chinese Criminology Review)*, no. 5 (2018): 81 (attributing the complete no reference to corporate crimes in the PRC Criminal Procedure Law to the timing of promulgation).

Law, the jurisdiction is mainly determined based on the primary penalty that is likely to be imposed on the defendant, while the only type of criminal penalty for entities is a criminal fine that constitutes accessory penalty.[33] Besides, the PRC Criminal Procedure Law does not provide clear guidance on how an entity can exercise its right to defense and how it can be tried in the court.[34] This issue has now been partially remedied by the SPC's interpretation on the choice of litigation representative for entity defenders, but the litigation representative rules have been criticized for lacking operability in practice.[35]

7.2.3 Individualism-Centered Criminal Enforcement Practice

The low criminal risks confronting corporations and the clear emphasis on individual targets in China's anti-bribery movement were discussed in detail in Chapter 2.[36] Apart from the narrow corporate liability rule and the scruples about the collateral consequences of corporate prosecution, the individualism-centered feature of China's criminal legal framework also contributes to the inactive corporate criminal enforcement in practice.[37] Without clear and sufficient guidance on the prosecution and trial of entity offenders from the central authorities, local Procuratorates and courts are understandably reluctant to pursue entity charges.[38]

Generally speaking, Chinese judicial authorities are more used to dealing with individual wrongdoers. They prefer to bring only individual charges even when such individuals acted on behalf of an entity, which warrants an entity charge and dual sanctions against both the entity and the responsible personnel.[39] From the perspective of the Procuratorates, the prosecution of entity bribery is generally a less cost-efficient option, when compared with individual prosecution. The higher prosecutorial threshold for entity charges and the clear leniency shown to the responsible personnel implicated in entity bribery, when compared with pure individual defendants, largely dampen the local Procuratorates' enthusiasm about bringing entity bribery charges.[40] In reality, local Procuratorates tend to believe that the charge of entity offenses is so lenient that it allows the criminals to escape the consequences of criminality easily.[41]

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[33] The PRC Criminal Procedure Law, Articles 20-23 (stipulating that the first-tier People's courts have jurisdictions over all common criminal cases as a default, while for cases involving national secrets and terrorism and those that may be punished with life imprisonment and death penalty, the jurisdiction belongs to the Intermediate People's Courts).

[34] Zheng Feng, and Lin Yu, "浅析犯罪单位追责的实践困境与制度完善 (On the Practical Dilemma and System Improvement for the Prosecution of Entity Crimes)," 79-81 (identifying the practical challenges associated with the prosecution and trial of entity crimes, including the choice of litigation representatives, the procedural duties and rights of litigation representatives, as well as the lack of rules for dealing with the deregistration and bankruptcy of entities).

[35] SPC, 最高人民法院关于适用〈中华人民共和国刑事诉讼法〉的解释 (Interpretation of the SPC on the Application of the PRC Criminal Procedure Law), Fa Shi [1] 2021, effective as of March 1, 2021, Chapter 11, Articles 36-38 (setting rules about litigation representative, which shall in principle be the entity's legal representative, actual controller or person in charge); Zheng Feng, and Lin Yu, "浅析犯罪单位追责的实践困境与制度完善 (On the Practical Dilemma and System Improvement for the Prosecution of Entity Crimes)," 79-81 (criticizing the lack of operability of the litigation representative rules in practice and believing that the judicial interpretation cannot replace the statute in this aspect).

[36] See Chapter 2, Section 2.3.1.

[37] See Chapter 2, Section 2.2.1.3 (discussing the extremely narrow corporate criminal liability rule in China); Section 2.4.2 (discussing the authority's increasing reluctance to prosecute corporations over concerns about the economic implications).

[38] Shaoping Li, "行贿犯罪执法困局及其对策 (Law Enforcement Dilemma of Bribery Crimes and the Countermeasures)," *中国法学 (China Legal Science),* no. 1 (2015): 10 (noting that though entity bribery cases are widespread, few entities are criminally investigated and sanctioned in practice as a result of the difficulties associated with the identification of the nature of cases or the role of specific individuals, the investigation and the enforcement of the penalty).

[39] *Ibid*, 14 (noting that the judicial authorities tend to pursue individual charges due to the difficulty in investigating entity bribery, or tracing the bribes and ownership of illegal proceeds).

[40] Zhihui Zhang, "单位贿赂犯罪之检讨 (Re-examination of Crime of Entity Bribery)," *政法论坛 (Tribune of Political Science and Law)* 25, no. 6 (2007): 147 (criticizing the legitimacy of leniency shown to entity crimes for going against the general principle of market economy); Xiaonong Liu, and Ping Ye, "论我国单位行贿犯罪的治理 (On the Control of Entity Bribery Crimes in China)," *山东社会科学 (Shandong Social*

7.3 Restricted Prosecutorial Discretion and Skepticism towards Negotiated Justice

Chinese Prosecutors are legally obligated to prosecute violations of the law whenever the evidence warrants, owing to the obsession with "material truth" or "substantive justice".[42] Until recently, any negotiation between the prosecutors and the defendants was strictly prohibited for the fear of compromising the material truth. The increasingly expansive criminal law and the emphasis on the due process have caused a large number of petty criminal cases flooding into the criminal justice system and increased the pressure on the judicial authorities. The Chinese policy makers are thus forced to resort to the negotiated justice for relief. However, how to maintain the credibility of the Procuratorates in the eyes of corporations is a major issue to be addressed in order to ensure the appeal of the CNP and other settlement mechanisms.

7.3.1 Legality Principle and Principle of Opportunity

There are two types of theories regarding the organizing principle of the criminal system. Under the Legality Principle or Principle of Compulsory Prosecution, prosecutors are obliged to charge all crimes when evidence leads them to reasonably believe that a crime has been committed and the suspect has committed the alleged crime.[43] The Legality Principle plays a strong role in the traditionally inquisitorial civil-law jurisdictions including Germany and France.[44] Since criminal procedure is understood as the investigation conducted by the impartial state officials to determine the material truth within the inquisitorial system, arbitrary choice of investigation and prosecution is strictly prohibited.[45] By restricting prosecutorial discretion, the Legality Principle aims to ensure that all crimes are pursued, similar cases are treated alike, victims' interests are protected, and the truth-seeking function of criminal procedure is upheld.[46] In contrast, the so-called Principle of Opportunity governs criminal prosecution in the common-law jurisdictions, such as the U.S. and UK. In these jurisdictions, prosecutors enjoy broad discretion in making charging decisions and may decide to drop all or certain charges considering the public

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Sciences), no. 12 (2018): 166-69 (blaming the unbalanced punishment against entity bribery and individual bribery for increasing the incidence of entity bribery and complicating the judicial decisions as to the joint bribery between entities and individuals).

[41] Hong Li, "完善我国单位犯罪处罚制度的思考 (Reflections on Perfecting the Punishment System for Entity Crimes in China)," *法商研究 (Studies in Law and Business)*, no. 1 (2011): 82 (the claim that the alleged misconducts constitute an entity crime instead of individual crime is becoming an important defense strategy).

[42] Máximo Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargain and The Americanization Thesis in Criminal Procedure," *Harvard International Law Journal,* 45 (2004): 10-11 ("[i]n the inquisitorial structure of interpretation and meaning, 'truth' is conceived in more absolute terms: the official of the state-traditionally, the judge-is supposed to determine, through an investigation, what really happened, regardless of the agreements or disagreements that prosecution and defense may have about the event").

[43] John H. Langbein, "Land without Plea Bargaining: How the Germans Do It," *Michigan Law Review* 78, no. 2 (1979): 210–213 ("the German law requires that all felonies (*Verbrechen*) and all misdemeanors that cannot be excused under the two statutory criteria of pettiness must be prosecuted whenever the evidence permits").

[44] Abraham Goldstein, and Martin Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany," *Yale Law Journal* 86 (1977): 240–83.

[45] Regina E. Rauxloh, "Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?" *Fordham International Law Journal* 34, no. 2 (2011): 302, ft. 38 ("[c]ompulsory prosecution is a principle to protect from arbitrary choice of investigation and means that all crimes should be prosecuted"); Langer, "From Legal Transplants to Legal Translations," 22 (noting that the compulsory prosecution is necessary within the model of official investigation, as the criminal proceeding is an investigation to determine the truth).

[46] Langbein, "Land without Plea Bargaining," 211-12 ("[t]he rule is meant to achieve ends that are immensely important in the German tradition: treating like cases alike, obeying faithfully the legislative determination to characterize something as a serious crime, preventing political interference or other corruption from inhibiting prosecution, and more").

interests.[47] The broad prosecutorial discretion fits the adversarial nature of the criminal procedure, which aims to resolve the dispute between the prosecution and the defense.[48] Plea bargaining, which is developed on the basis of the broad prosecutorial discretion, is widely praised for saving the enforcement resources, promoting the efficiency in handling criminal cases, and avoiding the stigmatizing effect of conviction for the first-time and minor offenders.[49]

DPA is predicated on the prosecutorial discretion in terms of deciding whether to charge or settle, the terms of resolution, whether the corporation has fulfilled all the obligations, and any remedies in case of breaches. The making of such decisions necessarily involves the fact-specific assessment of a series of factors pertaining to the strength of evidence and any public interests, as well as a careful deliberation of all possible consequences.[50] Sufficiently broad prosecutorial discretion is not only needed to reward and incentivize corporate self-policing measures, but also necessary to search for tailored settlement terms based on the circumstances of the case and the continual negotiation between the prosecution and corporation.[51] Overly restrained prosecutorial discretion is thus detrimental to the DPA program in terms of effectively combating corporate crimes and rehabilitating troubled organizations.[52]

When defining the prosecutorial discretion in making charging decisions, the PRC Criminal Procedure Law generally adheres to the Legality Principle, while allowing the application of the Principle of Opportunity in extremely limited circumstances. On the one hand, the People's Procuratorates are bound to indict cases if it is believed that sufficient evidence has been collected to establish the criminal facts and the suspect should be pursued for criminal liability.[53] Declining to prosecute due to concerns about the public interests or the prospect of obtaining a conviction is prohibited.[54] If a non-prosecution decision is made by the Procuratorate, the police investigator and victims are allowed to appeal to the higher-level Procuratorate and request the

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[47] Darryl K. Brown, "American Prosecutors' Powers and Obligations in the Era of Plea Bargaining," in *The Prosecutor in Transnational Perspective, ed.* Luna, Erik, Marianne Wade, and Bojańczyk Antoni (Oxford: Oxford University Press, 2012), 201 ("in contrast to the European model of prosecution bound by a principle of legality, American prosecutors possess formally unrestrained charging discretion").

[48] Langer, "From Legal Transplants to Legal Translations," 10-11 ("[p]lea bargains can also be explained through the dispute model because it is natural in any dispute that the parties can negotiate a resolution").

[49] George Fisher, "Plea Bargaining's Triumph," *The Yale Law Journal* 109, no. 5 (2000): 867 (noting that plea bargaining helps relieve the mounting caseload for the prosecutors and judges, and protect them from the humiliating failure in conviction or the reversal of judgment); Cynthia Alkon, "Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?" *Transnational Law & Contemporary Problems* 19, no. 2 (2010): 391-392 (citing three rationales for the U.S. plea bargaining, including the large number of cases with no facts in dispute; the costliness nature of jury trial and the necessity to offer deals to cooperating witnesses in the complex cases).

[50] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 2019, 67-78 (documenting the criteria and factors considered by relevant authorities in the OECD countries when offering a resolution, including public interest, prosecution time/resources, strength of evidence and corporate policing and prevention measures).

[51] Eugene Bardach, and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982), 152 (noting that narrowing down discretion enjoyed by the enforcement agencies could lead to a rulebook-oriented system, undermining the search for the most efficient regulatory response); Lawrence A. Cunningham. "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform," *Florida Law Review* 66, no. 1 (2015), 50 ("[g]overnance terms operate differently at different companies, and the formal uniformity of typical regulatory conceptions obscures those different operations. DPAs can supply custom-tailored terms that *ex ante* legislation and administrative rulemaking cannot").

[52] Robert J. Ridge, and Mackenzie A. Baird, "The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements," *University of Dayton Law Review* 33, no. 2 (2008): 202 ("[t]he popularity and efficacy of DPAs is directly attributable to the ability of the parties to tailor each agreement to meet their particular needs").

[53] The PRC Criminal Procedure Law, Article 172, para. 1 (requiring the People's Procuratorate to initiate a public prosecution decision if "the criminal facts are clear, the evidence is reliable and sufficient, and the suspect shall be subject to criminal liability").

[54] Ruihua Chen, "论企业合规的中国化问题 (On the Problems of the Sinicization of Corporate Compliance)," *法律科学 (Science of Law)*, no. 3 (2020): 46 (noting that unlike the common law jurisdictions that list both evidence and public interests as important considerations for charging decisions, China's Procuratorates are required to consider mainly the severity of crimes, consequences and evidence, while the public interests are not adequately considered).

revocation of the decision.[55] On the other hand, the Procuratorate is granted limited discretion to make a non-prosecution decision when the circumstances of a crime are so minor that no penalty is necessary according to the PRC Criminal Law or that the suspect is likely to be exempted from penalty if the case proceeds to the court.[56] For special cases where the suspect has truthfully confessed the criminal facts and provided major meritorious service, or where the national interests are involved, the Procuratorate may drop all or partial charges with the approval of the SPP.[57] However, such cases are extremely rare in reality.

7.3.2 Conditional Non-prosecution, Leniency System and Compliance Non-Prosecution

Under the Legality Principle, prosecutors are legally bound to prosecute any crimes. The prosecutors thus lack the authority or latitude to utilize lesser charges or immunity to reward the defendant's confession.[58] Even with the defendant's confession, prosecutors are not exempt from the duty of proving the defendant's guilt beyond reasonable doubt.[59] Restricted prosecutorial discretion makes it difficult, if not outright impossible, for the prosecutors to negotiate any trade-offs with corporate offenders to encourage corporate self-reporting and cooperative behavior.[60] With the trends of expansive criminal law, the complexity of modern criminal offenses, and the increasingly sophisticated criminal procedural rules, dockets are piled up on the desks of prosecutors and judges. Criminal prosecution is also becoming increasingly burdensome and unpredictable for both the prosecutors and the defendants.[61] More and more jurisdictions, including many of the traditional civil-law jurisdictions such as Japan and Germany, began to abandon the absolute Legality Principle in favor of plea-bargaining or similar mechanisms as a pragmatic and efficient way to dispose of criminal cases.[62] The trend has also grown in China, as the Chinese criminal justice system is slowly evolving from the traditional resistance to any type of plea-bargaining to the introduction of regimes embodying the elements of negotiation.

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[55] The PRC Criminal Procedure Law, Articles 178-181 (the victims could also bring the case to the court themselves).

[56] The PRC Criminal Procedure Law, Article 177, para. 2. Hongjie Tian, "刑事合规的反思 (Rethinking on Criminal Compliance)," *北京大学学报(哲学社会科学版) (Journal of Peking University (Philosophy and Social Sciences)*) 57, no. 2 (2020): 122 (identifying the severe restrictions on prosecutorial discretion as a great obstacle to the development of a Chinese version of DPA, as it will certainly create political and moral concerns when applying a non-prosecution decision to entity crimes punishable with hefty fine).

[57] The PRC Criminal Procedure Law, Article 182.

[58] Langbein, "Land without Plea Bargaining," 212 ("[t]he prosecutor, who is duty bound to prosecute in every case, lacks authority, for example, to offer to reduce the charge in return for a concession of guilt"); Thomas Swenson, "The German 'Plea Bargaining' Debate," *Pace International Law Review 7*, no. 2 (1995): 400-418 (listing the arguments against plea bargaining, including the lack of authorization or legal basis, the inconsistence with the principle of law, compromising court trial, and the arbitrary results).

[59] Langer, "From Legal Transplants to Legal Translations," 11 (noting that the concept of guilty plea is not recognized in the inquisitorial system, as a court trial is necessary to determine the truth and the defendant's guilt even with the defendant's confession).

[60] John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law and Society Review* 18, no. 2 (1984): 211 ("[a]ttempts in the last decade to curtail agency discretion and flexibility have made it more difficult, both politically and legally, for agencies to allow cost-saving tradeoffs or alter levels of enforcement for cooperative firms").

[61] G Fisher, "Plea Bargaining's Triumph," 867 ("[f]or prosecutor and judge, who together held most of the power that mattered, the spread of plea bargaining did not merely deliver marvelously efficient relief from a suffocating workload. It also spared the prosecutor the risk of loss and the judge the risk of reversal, and thereby protected the professional reputations of each"); Feeley, "Plea Bargaining and the Structure of the Criminal Process," 338-54 (claiming that the prevalence of plea bargaining is a result of fundamental changes in the structure and theories of American criminal procedure, including the operative theories of criminal process, broader prosecutorial discretion, more detail-defined criminal offenses, more complicated procedural rules and the rise of full-time legal professionals, instead of a response to the limitations of resources or the drive for organizational efficiency).

[62] Rauxloh, "Formalization of Plea Bargaining in Germany," 298-301 (discussing the increasing use of informal agreements in Germany, which is similar to plea bargaining in the common-law system); Priyanka Prakash, "To Plea or Not to Plea: The Benefits of Establishing an Institutionalized Plea Bargaining System in Japan," *Pacific Rim Law & Policy Journal* 20, no. 3 (2011): 607–33 (discussing the innovative use of tacit bargaining in Japan, involving "an implicit, often unspoken, exchange of the defendant's confession for lesser charges or recommendation of a more lenient sentence by the prosecutor").

Though the Procuratorates enjoy certain prosecutorial discretion under the PRC Criminal Procedure Law to make a non-prosecution decision, the scope of prosecutorial discretion is extremely restricted. Under such circumstances, the Procuratorates have little room to bargain with the defendant.[63] Nonetheless, the attempt of plea bargaining was sporadically reported. In 2002, the Railway Transport Court of Mudanjiang in Heilongjiang Province approved a plea agreement between the Procuratorate and an individual defendant over the charge of intentional injury.[64] This first public attempt of plea bargaining triggered a country-wide discussion and invited severe criticisms. The critics questioned the absence of the legal basis for such practice, the violation of the defendant's right to a fair trial and the presumption of innocence, as well as the risks of undue coercion, unequal treatment and corruption.[65] As a result of the strong resistance, plea bargaining was not repeated for a long time, at least not in public.[66]

In order to facilitate the rehabilitation of juvenile suspects, the conditional non-prosecution mechanism was introduced into the PRC Criminal Procedure Law for the resolution of juvenile misdemeanors in 2012.[67] Under this mechanism, the Procuratorate is authorized to make a non-prosecution decision conditioned on the juvenile defendant's compliance with the law and acceptance of requirements with regard to periodical reporting and remediation for a certain period, varying from six months to one year.[68] If the suspect is found to have violated any specified requirements, the Procuratorate will withdraw the non-prosecution decision and proceed with the indictment.[69] The selective application of the NPA-like resolution mechanism to the juvenile cases as the first attempt of negotiated justice follows the same path as the evolution of DPAs in the U.S., which was discussed in Section 3.2.1 of Chapter 3.[70]

In order to address the disparity between the large caseload and limited judicial resources, the leniency system for admission of guilt and acceptance of penalty (hereinafter "the leniency system") was formally introduced via a major amendment to the PRC Criminal Procedure Law in 2018.[71] Unlike the conditional non-prosecution that is applied only to juvenile misdemeanors,

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[63] Feeley, "Plea Bargaining and the Structure of the Criminal Process," 338-354 (noting that the tradition of prosecutorial discretion and judicial passivity foster the practice of plea-bargaining in the U.S., while restrictive prosecutorial discretion and judicial activity explain the unpopularity of plea bargaining in Germany).

[64] Jiangyi Zhang, et al, "聚焦国内'辩诉交易'第一案 (Spotlight on the First Case of Plea Bargaining in China)," August 8, 2002, https://www.chinacourt.org/article/detail/2002/08/id/9780.shtml (accessed November 15, 2022).

[65] *Ibid*.

[66] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," *法学研究 (Chinese Journal of Law)*, no. 4 (2016): 86 (noting that the practice of plea bargaining was discontinued due to the huge controversies, yet since then the cooperation and consensus elements have been understood and accepted by the academia and legal practitioners). In a high-profile and controversial case targeting Li Zhuang, a lawyer, Li was prosecuted for his irregular activities of representing a gang suspect during the Chongqing crackdown on organized crimes in 2010. The authority was reported of tacitly promising Li a suspended penalty, which was later breached, in exchange for his plea at the court. See Tania Branigan, "Chinese Lawyer Claims He Was 'Tricked' Into Confessing to Falsifying Evidence," *The Guardian*, February 10, 2010, https://www.theguardian.com/world/2010/feb/10/chinese-lawyer-tricked-pleading-guilty?INTCMP=SRCH (accessed August 13, 2022).

[67] The PRC Criminal Procedure Law, Articles 282-284.

[68] The PRC Criminal Procedure Law, Article 283.

[69] The PRC Criminal Procedure Law, Article 284.

[70] Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1866 (tracing the deferred prosecution of individuals to 1914. The aim was to process juvenile offenders without branding them as criminals).

[71] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," 79-82 (noting that the leniency system was introduced against the background where the criminal laws were used by the authority to intervene in the social life more aggressively under the trend of activism and functionalism, while the increase of judicial personnel is relatively slow, thus calling for a diversional mechanism).

the leniency system may be applied to all offenses regardless of the type and severity.[72] If the criminal suspect holds no objection to the Procuratorate's alleged criminal facts, charges and sentencing suggestion, and signs an affidavit to confirm his/her standpoint,[73] the Procuratorate will subsequently recommend to the court to impose a more lenient penalty within the statutory range of punishment.[74] The court is generally expected to accept the charge and sentencing suggestion, unless it has doubts about the appropriateness of the charge, the culpability of the defendant or the voluntariness of the confession.[75] The leniency system, which was inspired by the American-style plea-bargaining, is built upon the Procuratorate's authority of proposing sentencing suggestions to the court. Unlike the plea-bargaining rule in the U.S., China's leniency system allows only the bargaining of sentences rather than bargaining of charges or *non contendere*.[76] According to the SPP's annual work reports, 85% - 90% of all criminal cases from 2020 to 2022 were resolved via the leniency system.[77]

Though the leniency system could theoretically be applied in the corporate context as well, it is rarely chosen by corporate offenders in reality.[78] The tepid response from the corporate world can be attributed to the limited penalty reductions (penalty below the statutory range is not allowed absent mitigating circumstances) and the lack of statutory means for the corporation to be insulated from criminal conviction under the leniency system.[79] In order to provide a pragmatic and efficient way for the Procuratorates to resolve corporate criminal matters and promote corporate compliance, the CNP has been proposed by the SPP since 2021 and is now being tested by the local Procuratorates, as discussed extensively in Section 2.4 of Chapter 2.

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[72] SPC, SPP, Ministry of Public Security, Ministry of National Security, Ministry of Justice, 关于适用认罪认罚从宽制度的指导意见 (Guiding Opinions on the Application of the Leniency System), released on October 11, 2019 and became effectively on the same day, Article 5 ("the leniency system is not limited to offenses for certain charges or potential sentences; all criminal cases can be resolved through the leniency system").

[73] The PRC Criminal Procedure Law, Article 174.

[74] The PRC Criminal Procedure Law, Article 176, para. 2; Guiding Opinions on the Application of the Leniency System, Article 33, para. 2 (the Procuratorate is generally required to propose a specific sentencing suggestion, but a penalty range can also be suggested for cases they are new in type, uncommon or complexed in sentencing circumstances); Article 8 (the sentencing suggestions and final sentence shall be within the statutory range in absence of mitigating circumstances).

[75] The PRC Criminal Procedure Law, Article 201, para. 1.

[76] Weidong Chen, "认罪认罚从宽制度研究 (On the Leniency System)," *中国法学 (China Legal Science)*, no. 3 (2016): 54 (claiming that the leniency system allows the negotiation between the prosecutors and defendants on sentences to certain extent instead of on the number or nature of charges, the Procuratorate's burden of proof to prove the guilt of defendants is neither relieved nor reduced, and *nolo contendere* is not allowed); Yongzhong Gu, and Peiquan Xiao, "'完善认罪认罚从宽制度'的亲历观察与思考、建议——基于福清市等地刑事速裁程序中认罪认罚从宽制度的调研 (Personal Observation, Thinking and Suggestions on Improving the Leniency System: Empirical Survey of the Leniency System in the Fast-Track Criminal Procedure in Fuqing City and Other Places)," *法治研究 (Research On Rule of Law),* no. 1 *(2017)*: 64-65 (noting that a charge under China's Criminal Law often involves several specific acts and there are few overlaps among different charges, therefore the Procuratorate generally cannot negotiate on the number of charges or the specific charge applicable).

[77] Jun Zhang, 最高人民检察院工作报告 (Work Report of the Supreme People's Procuratorate), March 17, 2023, https://www.spp.gov.cn/spp/gzbg/202303/t20230317_608767.shtml (accessed April 26, 2023) (over 90% of cases were handled through the leniency system at the stage of prosecution in 2022); Jun Zhang, 最高人民检察院工作报告 (Work Report of the Supreme People's Procuratorate), March 15, 2022, https://www.spp.gov.cn/spp/gzbg/202203/t20220315_549267.shtml (accessed August 13, 2022) (the leniency system was applied in 85% of all cases in 2021); Jun Zhang, 2020 年最高人民检察院工作报告 (Work Report of the Supreme People's Procuratorate of 2020), March 15, 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed August 13, 2022) (the leniency system was applied in 85% of all cases in 2020).

[78] Yong Li, "检察视角下中国刑事合规之构建 (The Construction of Criminal Compliance in China from the Perspective of the Procuratorate)," *国家检察官学院学报 (Journal of National Prosecutors College)*, no. 4 (2020): 107 (acknowledging that the leniency system is not originally introduced to target enterprise crimes).

[79] Liuquan Xie, "现实主义考量下实证完善认罪认罚从宽制度的建议 ——以试点单位广州市 N 区人民检察院的司法实践为视角 (Suggestions on Improving the Leniency System in the Context of Realism: From the Perspective of the Judicial Practice of the People's Procuratorate in N District of Guangzhou as a Pilot)," http://www.gzns.gov.cn/nsjcy/dcyj/201806/t20180622_370379.html#_ftn1 (accessed June 28, 2019) (documenting one case where the corporate suspect withdrew its affidavit and claimed innocence before the trial for fear of the disqualification from biddings following the criminal conviction).

Following a successful completion of the pilot program, it is expected that the PRC Criminal Law and Criminal Procedure Law will be amended to formalize the CNP, establishing a Chinese version of pre-trial corporate resolution mechanism.

It is worth noting that both the leniency system and the CNP still bear strong inquisitorial features. It is inappropriate to equate the leniency system with plea-bargaining, or equate the CNP with DPA.[80] The proposal of lower sentence suggestions to the court under the leniency system and the non-prosecution decision made under the CNP by the Procuratorate are not the result of equal negotiation between the prosecution and defense. Instead, they are in essence the unilateral decisions made by the Procuratorate based on its authority in the application of laws.[81] The defender's acceptance of responsibility and promise to improve the corporate compliance program are simply part of the factors considered by the Procuratorates when making charging decisions and sentencing suggestions.[82] The huge power imbalance between the Procuratorate and the defense in reality makes the leniency more of a mercy bestowed on the defendant in a condescending manner.[83] As a consequence, the limited control enjoyed by the defendant over the final results of proceedings may reduce the appeal of the leniency system or the CNP to the corporate actors, discouraging corporations from voluntarily self-reporting or providing full cooperation.

7.3.3 Can I Trust you? The Credibility Gap between the Procuratorates and Corporations

DPA is the result of negotiation and trade-offs between the prosecutor and the corporation in the context of information asymmetry and power imbalance.[84] The corporation trades the acceptance of responsibility and self-policing measures for leniency, while the prosecutor utilizes the carrot of DPA and the threat of criminal indictment in the form of prosecutorial discretion to induce corporate cooperation.[85] For the smooth-functioning of the DPA system, the existence of adequate trust between both parties is crucial.[86] The corporation's engagement in evasive and avoidance measures may cause prosecutors to credit a sham internal investigation or cosmetic

[80] Weidong Chen, "认罪认罚从宽制度研究 (On the Leniency System)," 54 (claiming that the leniency system borrowed some elements from plea bargaining, but it is not a Chinese version of plea bargaining); Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2020): 57 (claiming that similar to the leniency system, CNP shall be designed as the unilateral prosecutorial act in the application of laws in consideration of the corporate attitude, instead of a compromise between the prosecution and the defense).

[81] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (acknowledging that the leniency system is inspired by the American plea bargaining, while stressing that the decision of offering leniency can find its basis in China's substantive laws, thus the Procuratorate's decision to offer leniency remains an act in the application of laws).

[82] *Ibid* (claiming that the CNP shall not be interpretated as a reconciliation or agreement between the Procuratorial organ and the enterprise suspect, as corporate compliance efforts are only a consideration underlying the Procuratorate's charging decision).

[83] Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," 83 (criticizing the leniency system for being more of "a mercy shown to the defendant in a condescending manner rather than equal negotiation").

[84] Peter Gill, "Policing and Regulation: What is the Difference?" *Social and Legal Studies* 11, (2002): 527-29 (noting two problems of state regulation, i.e., the "knowledge" problem (the state's inability to understand and monitor the social and economic subsystems in a complex and diverse world) and "power" problem (the state rarely possesses adequate powers and instruments of policy with which to 'order' the processes of the subsystems), while the problems are often severer for crime policing than for the regulation of legal activities); Greenblum, "What Happens to a Prosecution Deferred?" 1885-86 (acknowledging the "corporate offender's unique adverse publicity and collateral consequences" and questioning "whether the choice to enter into deferral is really a choice at all").

[85] Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," 646 ("[t]his bargained-for exchange, or trading of favors, with an arsenal of sanctions in the background, is a decision template for prosecutors and judges in cases of corporate crime").

[86] P. Fenn, and C.G Veljanovski, "A Positive Economic Theory of Regulatory Enforcement," *Economic Journal* 98, no. 393 (1988): 1055 ("[a]ny strategy based on negotiation will, of course, depend upon the credibility of threats and promises on both sides").

compliance program, or, instead, demand privilege waivers in a more aggressive way to assess corporate cooperation.[87] On the other hand, prosecutors that backpedal on the offering of DPA will leave a cooperating corporation worse off and discourage future corporate cooperation. The corporation would find itself in a more hostile situation given the considerable resources already spent in the internal investigations and compliance enhancement. Moreover, the prosecutor is already aware of the corporate misconduct, and also possesses incriminating evidence that was provided by the corporation during the negotiation process.[88] The distrust in the formal negotiation channel could drive corporations to adopt more effective avoidance measures or even resort to unofficial trade-off channels, including bribing the enforcement officials.[89]

Although both the prosecutor and the corporation have to bear serious consequences when the other counterparty turns its back on the deal, the credibility of prosecutors is particularly important as it can mean the life or death for the corporation.[90] The prosecutors' credibility issue merits serious attention when contemplating the introduction of a DPA program in China. Expansive discretion enjoyed by the prosecutors over the business is likely to invite favoritism, corruption and even extortion, especially when adequate controls such as accountability and transparency are missing.[91] If left unchecked, the broad prosecutorial discretion could cause more harm to the society than the benefits gained from negotiated justice.[92] Privately-owned enterprises and private entrepreneurs, which are the main objects of application of the CNP, have suffered long-term discrimination in the corporate enforcement area when compared with their SOE counterparts.[93] The fostering of relationship with the enforcement agency is often a key strategy of survival and development for private businesses.[94] Being viewed as uncooperative by the enforcement agencies could cause destructive consequences to private businesses, including

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[87] Kimberly D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly* 81 (2003): 491-92 (arguing that corporations may easily use paper compliance for window-dressing purpose and securing reduced legal liability); Miriam H. Baer, "When the Corporation Investigates Itself," in *Research Handbook on Corporate Crime and Financial Misdealing, ed.* Jennifer Arlen (Northampton, MA: Edward Elgar Publishing, 2018), 326-28 (noting that prosecutors who lack complete information or assurance of corporate self-policing measures are more likely to demand privilege waivers to verify corporate investigative findings. Even with waivers, prosecutors may still claim that corporations engage in insufficient investigations, discounting the value of corporate cooperation and becoming more reluctant to offer organizational leniency).

[88] Greenblum, "What Happens to a Prosecution Deferred?" 1884 (noting that after the deferral period, prosecutors hold the "sword of Damocles" above corporations as they "can unilaterally declare breach and prosecute using the fruits of the offender's cooperation against it" and "are virtually assured of a conviction").

[89] Simon Johnson, Daniel Kaufmann, and Zoido-Lobatón Pablo, "Regulatory Discretion and the Unofficial Economy," *The American Economic Review* 88, no. 2 (1998): 387 (noting that "[i]f the rules are fine on paper but officials have a great deal of discretion in their interpretation and implementation, this leads to a higher effective burden on business, more corruption, and a greater incentive to move to the unofficial economy").

[90] Fenn, and Veljanovski, "A Positive Economic Theory of Regulatory Enforcement," 1065 (noting that a negotiated agreement can only be attainable with adequate trust between the regulating agency and the firm. "Not only must the agency's promise to hold back on prosecution be credible, but also the firm's promise to comply must be credible to the agency").

[91] Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* Policy Research Working Paper (World Bank Group, November 1999), 16 ("[t]he more discretion government officials have over the operation of business or lives of citizenry, the more likely corruption would occur and flourish, other things being equal").

[92] A. Mitchell Polinsky, and Steven Shavell, "Corruption and Optimal Law Enforcement," *The Journal of Public Economics* 81, no. 1 (2001): 1-3 (demonstrating the social undesirability of corruption in the law enforcement as it dilutes deterrence); Anthony Ogus, "Corruption and Regulatory Structures," *Law & Policy* 26, no. 3-4 (2004): 332–35 (discussing the economic impacts of corruption in regulatory decision-making).

[93] See Chapter 2, Section 2.4.2; "Entrepreneurs' Criminal Patterns Studied," *China Daily*, January 25, 2013, http://www.chinadaily.com.cn/bizchina/2013-01/25/content_16175647.htm (accessed August 25, 2022) (reporting that in 2012, the most common crime among private entrepreneurs is illegal financing, while SOE executives were more likely to take bribes, as a result of their distinct market status and the greater difficulties experienced by private entities in accessing the market, obtaining loans or making profits); Langxiao Tao, "A Study on China's Corporate Crime Enforcement: An Emerging Reprieve Approach," *US-China Law Review* 17, no. 5 (2020): 178-79 (however, blaming the low-level development of corporate compliance program in privately-owned enterprises for their higher percentage of involvement in criminal investigations).

[94] Mike Koehler, "The Unique FCPA Compliance Challenges of Doing Business in China," *Wisconsin International Law Journal* 25, no. 3 (2007): 417-19; F. Joseph Warin, Michael S. Diamant, and Jill M. Pfenning, "FCPA Compliance in China and the Gifts and Hospitality Challenge," *Virginia Law and Business Review* 5, no. 1 (2010): 59-61.

more frequent inspection, and administrative or even criminal investigations. Local Procuratorates have a number of charges at their disposal for uncooperative enterprises and entrepreneurs, such as bribery, fraud, tax violations, state secrets violations, embezzlement, or organized crimes.[95] Given the authorities' infamous record of disregarding corporate managerial autonomy and commercial secrets, the Procuratorate's requests for corporations to provide all relevant information and accept the compliance monitoring are likely to be received with skepticism.[96] It is also natural and reasonable for privately-owned enterprises to question the credibility and real motives of the Procuratorate's offer of the CNP.[97]

However, this situation is likely to improve with the high-scale anti-corruption movements targeting corruption in the criminal enforcement and judicial agencies, as well as the strategic importance of economic recovery for the leadership after incessant Covid-19 lockdowns. According to the SPP's Work Repot in 2021, job-related crimes committed by the judicial personnel were among the central focuses in the National Crackdown on Gang Crimes and the Education and Rectification of the Political and Legal Team.[98] A total of 2253 judicial personnel were investigated in 2021 for the criminal misconducts that harm the citizens' rights and undermine judicial justice, representing a 58.6% increase over the previous year.[99] In addition, the economic and political significance of privately-owned enterprises has been more appreciated and actively protected by the leadership in order to promote economic recovery amid the U.S.-China trade war and the Covid-19 pandemic.[100] Against this background, corporations are expected to be less likely to experience corruption or betrayals in their negotiation with the Procuratorates in the context of the CNP, though caution is still needed and it is better to be safe than sorry.

7.4 Why are Corporations Reluctant to Self-report to Chinese Authority

In spite of the leniency provided under the PRC Criminal Law for the self-reporting of bribery issues, which is even more generous than self-reporting in other contexts, corporations do not often choose to self-report to the Chinese authorities after discovering employees' bribery schemes.[101] It has been noted by legal practitioners that multinational corporations rarely self-report first in China. It is more common that self-reporting to Chinese authorities is followed by

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[95] Chuan Han Wong, "China's Push to Purge Organized Crime Casts Shadow Over Private Businesses," *The Wall Street Journal*, July 22, 2021, https://www.wsj.com/articles/chinas-push-to-purge-organized-crime-casts-shadow-over-private-businesses-11626960650 (accessed August 25, 2022); Wang Yong "Ending The Nightmare of Private Sector 'Crime' in China," *Caixin Global*, February 20, 2014, https://www.caixinglobal.com/2014-02-18/ending-the-nightmare-of-private-sector-crime-101045781.html (accessed August 25, 2022).

[96] "China Clears Entrepreneur Gu Chujun of Two Charges Amid Campaign to Reassure Private Sector," *South China Morning Post*, April 10, 2019, https://www.scmp.com/business/companies/article/3005551/china-clears-entrepreneur-gu-chujun-two-charges-amid-campaign (accessed August 27, 2022); "Herbal Tea Rivals Must Share Trademark, Supreme Court Says," Sixth Tone, August 17, 2017, https://www.sixthtone.com/news/1000705/herbal-tea-rivals-must-share-trademark%2C-supreme-court-says (accessed August 27, 2022).

[97] Emma Li, "Chinese NPAs Target the Wrong Firms," *The Global Anticorruption Blog*, January 3, 2022, https://globalanticorruptionblog.com/2022/01/03/chinese-npas-target-the-wrong-firms/ (accessed August 25, 2022) (claiming that "giving prosecutors unchecked discretion to reach NPAs with SMEs [small and medium enterprises] invites favoritism and corruption, as lower-level prosecutors can use NPAs as a way to effectively pardon SMEs").

[98] Jun Zhang, 最高检察院工作报告 (Work Report of the SPP), March 8, 2022, http://www.npc.gov.cn/npc/c30834/202203/0a7f6a10811d4145b300c3790d968e64.shtml (accessed August 28, 2022).

[99] *Ibid*.

[100] See Chapter 2, Section 2.4.2.

[101] The PRC Criminal Law, Article 390, para. 2; Article 164, para. 4 (providing even more leniency and lowering the bar for voluntary surrender from bribe-givers).

self-reporting to foreign jurisdictions such as the U.S. and UK.[102] The individualistic feature of China's criminal justice system identified above provides useful explanations for the infrequency of corporate self-reporting to the Chinese authorities.

7.4.1 Low Expected Corporate Liability and Enhanced Individual Liability Exposure

As discussed above, companies in China are subject to a low risk of prosecution or conviction for bribery violations as a result of the incomprehensive criminal rules, extremely narrow corporate liability rule and the authorities' deep concerns about the collateral consequences of corporate prosecution. Even if they do get prosecuted and convicted, the corporate sanctions tend to be mild.[103] The absence of real threats of criminal prosecution and the generally low corporate criminal sanctions in China greatly hamper the corporate incentives to self-report. It was identified in Chapter 4 that DPAs can only incentivize corporations to self-report and cooperate if they are otherwise subject to credible and perceivable threats of detection and prosecution.[104] Without sufficiently large criminal sanctions in prospect, corporations would have few incentives to incur the costs of internal investigations, business disruption and reputational damages following self-reporting.[105] They will reasonably find it more attractive to engage in lucrative illegal schemes and detection avoidance activities.[106]

In addition, the Procuratorates' preference for bringing individual charges further discourages corporate self-reporting. Being aware of the Chinese authorities' inclination to target individual wrongdoers, corporate executives implicated in the bribery schemes may have severe doubts about the benefits of self-reporting.[107] The executives' increased exposure to personal liability gives rise to a conflict of interests between such executives and their corporation. The executives would choose not to self-report even if self-reporting is in the interests of the corporation.[108] The individualism-centered corporate enforcement practice offers another explanation, from the individual's perspective, for the rarity of corporate self-reporting in China.

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[102] Kyle Wombolt, et al, "Anti-Corruption and Bribery in China," Herbert Smith Freehills LLP, December 13, 2018, https://www.lexology.com/library/detail.aspx?g=760a5dc1-33db-4d92-91de-c475eb4110da (accessed June 8, 2022) (noting that self-reporting to the Chinese government is highly unusual, while self-reporting first to foreign authorities with follow-on report to China is more common).

[103] See Chapter 2, Section 2.3.1.

[104] *OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention, 2019*, at 82 (claiming that the resolution systems can only work where "a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public"); Louis Kaplow, and Steven Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," *Journal of Political Economy* 102, no. 3 (1994): 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not").

[105] Jennifer Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," in Tina Søreide, Abiola Makinwa (ed.), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Northampton, MA: Edward Elgar Publishing, 2019), 165 ("absent liability, companies have little incentive to either invest in a full investigation or to incur the reputational and other risks associated with self-reporting").

[106] See Chapter 4, Section 4.4.2 for the potential costs and risks associated with corporate self-reporting.

[107] OECD, *The Detection of Foreign Bribery*, 2017, at 27 (noting that companies weighing up the decision of self-reporting will generally consider the implications for individual liability, which is "particularly so where senior managers and/or directors are possibly implicated and still employed by the company").

[108] Arlen, "The Potentially Perverse Effects of Corporate Criminal liability," 840, ft. 28 ("[g]iven the realities of corporate decision making, and the possibility that some decision makers may have conflicting incentives in deciding whether, when, and what to report, many corporations will not report crimes sufficiently"); Sharon Oded, "Coughing Up Executives or Rolling the Dice? Individual Accountability for Corporate Corruption," *Yale Law & Policy Review* 35, no. 1 (2016): 74 (noting that "those sitting in the corporate driver's seat might steer the organization away from cooperation with the DOJ" due to the increased legal exposure of personal liability under the Yates Memo).

7.4.2 Insufficient and Uncertain Benefits for Self-reporting

Though voluntary self-reporting is the most effective post-misconduct remedy a corporation can take, it also carries significant costs for the corporation. Self-reporting increases the probability of detection to a hundred percent, and may trigger criminal investigations in one or multiple jurisdictions and cause great reputational damages to the corporation.[109] According to the analysis in Chapter 4, in order to effectively induce corporate self-reporting, the incentives provided should be substantial and predictable enough to mitigate the extra costs associated with voluntary self-reporting and make self-reporting corporations better off than those that adopt a “wait and see” approach.[110] Under the Chinese legal system, however, corporations that choose to voluntarily self-report are faced with insufficient and unpredictable benefits.

Firstly, China’s court enjoys excessive discretion in determining the corporate criminal fine in the bribery cases, making it basically impossible for the corporations to predict the final penalty and the leniency when deciding whether to voluntarily self-report.[111] The corporate fine is unquantified under the PRC Criminal Law, though the recent juridical interpretation defines the range of the criminal fine for bribery as from ¥10,000 (€1,282) to twice the amount of bribes.[112] While the scope of corporate fine has been specified, neither the PRC Criminal Law nor the judicial interpretation provides a specific method of calculation. As an important attempt to restrict the court’s discretion in the sentencing stage for the purpose of preventing judicial corruption and enhancing the consistency of criminal penalties, the recent Sentencing Guiding Opinion provides a number of principles and rules guiding the criminal sentencing process.[113] The Opinion lists in total twenty-three common offenses, yet bribery offense is not included.[114] Moreover, in accordance with China’s individualism-centered criminal system, the Opinion was designed for individual offenses only.[115] Corporations contemplating the choice of self-reporting of bribery issues still face considerable uncertainty regarding the potential criminal sanctions and leniency. As the current judicial system provides no guarantee that self-reporting will make a

[109] See Chapter 4, Section 4.4.2 for the potential costs and risks associated with corporate self-reporting.
[110] See Chapter 4, Section 4.4.3.1.
[111] Bingzhi Zhao, *中国刑法案例与学理研究(第一卷)* (*Chinese Criminal Law Case and Theoretical Study (Volume 1)*), (Beijing: *Law Press China*, 2001), 497 (refuting the existence of corporate self-reporting based on the practical impossibility of mitigating or lowering the corporate sanctions); Yunxia Yin, Yanjun Zhuang, and Xiaoxia Li, “企业能动性与反腐败‘辐射型执法效应’——美国 FCPA 合作机制的启示 (Enterprise Initiative and ‘Radiative Effect of Anti-corruption Law Enforcement’: Lessons from the Cooperative Regime under the U.S. FCPA),” *交大法学 (SJTU Law Review)*, no. 2 (2016): 38-39 (claiming that the lack of detailed and uniform sentencing calculation standard discourages corporate self-reporting and cooperation as corporations cannot reasonably predict the reward for such policing measures).
[112] SPC and SPP, 关于办理贪污贿赂刑事案件适用法律若干问题的解释 (Interpretations on Several Issues concerning the Application of Law in Handling Criminal Cases of Embezzlement and Bribery), April 18, 2016, Articles 7-9, &19.
[113] See SPC and SPP, 最高人民法院、最高人民检察院关于常见犯罪的量刑指导意见(试行) (Guiding Opinions of the SPC and SPP on Sentencing for Common Crimes (for Trial Implementation)), July 1, 2021, Fa fa [21] 2021, http://www.hezhenda.com.cn/show.asp?id=313 (accessed June 12, 2022) (specifying the fundamental principle and method of calculation for sentencing, while further providing sentencing guideline for the common aggrating and mitigating circumstances as well as 23 common offenses).
[114] Qiuhong Xiong, “中国量刑改革：理论、规范与经验 (China’s Sentencing Reform: Theory, Norms and Experience),” *法学家 (Jurists Review)*, no. 5 (2011): 38-39 (noting that sentencing standardization reform in China is directly related to imbalance, unfair and improper sentencing practices that raise public concerns about the sentencing justice. For example, the retrial court reduces the life imprisonment imposed by the court of the first instance court to five years in one case; cases of similar circumstances receive distinctive sentences in different regions).
[115] Jinzhan Xue, “单位犯罪刑罚的适用与思考 (Thoughts on the Application of the Criminal Punishment in Corporate Crimes),” 32-36 (noting that though entities have been specified in law as a subject being capable of committing crimes, the relevant form of criminal sanctions and sentencing factors have not been established, and the simple transplant of systems available in individual crimes presents many obstacles).

corporation better off than remaining silent after discovering potential violations, the authorities' capability of incentivizing corporate self-reporting is severely restricted.[116]

Secondly, until the introduction of the CNP in 2021, corporations and relevant individuals had no effective control over the prospect of obtaining reductions to the punishment or avoiding the criminal conviction due to the restricted prosecutorial discretion.[117] Unlike the U.S. prosecutors that are equipped with a variety of resolution tools, China's Procuratorate is bound to indict crimes according to the "legality principle", except in highly restricted circumstances.[118] Even under the leniency system, which can theoretically be applied to corporate offenders as well, the Procuratorate's bargaining chips are limited to more lenient sentencing suggestions within the statutory scope.[119] It has no authority to offer corporations a way out of conviction no matter how timely and comprehensive the corporate self-reporting and cooperative measures are.[120] The limited penalty reduction and the absence of a pre-trial resolution mechanism severally restrain the authority's ability to induce, and the corporations' incentives to engage in, self-reporting and cooperation.[121]

Lastly, the anxiety about piling-on enforcement actions and the lack of hope for a global coordinated settlement offer another useful explanation for the paucity of self-reporting to the Chinese authorities by multinational corporations. Self-disclosure of bribery violations in China may actually fuel parallel enforcement actions in foreign jurisdictions, which could outweigh any potential benefits gained from the self-reporting.[122] The fact that a pre-trial settlement mechanism is not available in China undermines any corporate attempts to coordinate a global resolution of bribery issues involving the Chinese authorities.[123] Notably, the leniency system does not present a pre-trial resolution mechanism and the CNP remains a pilot program.

7.5 The Unfavored Private Investigations

The strategy of encouraging corporations to join in the fight against bribery is mainly justified by the corporations' general superiority to the state in detecting and investigating employees'

[116] Qionghong Xiong, "认罪认罚从宽的理论审视与制度完善 (Theoretical Examination and Systematic Perfection of the Leniency System)," *法学 (Law Science)*, no. 10 (2016): 99 (noting that leniency for self-disclosure is often used as a means of inducing confession by the enforcement agency in practice and may lead to more unfavorable outcomes for the offenders and inconsistencies in practice as the court has wide discretion to award leniency for self-reporting).
[117] See *supra*-Section 7.3 for the discussion of the limited prosecutorial discretion and the restrictions on negotiated justice.
[118] Standards for Criminal Justice: Prosecution Function § 3-3.9(b) (3d ed. 1993) (a prosecutor may decide not to prosecute certain charges, even in the presence of "sufficient evidence ... [to] support a conviction," where "circumstances and ... good cause consistent with the public interest" warrant such a decision); The PRC Criminal Procedure Law, Article 172 (requiring the People's Procuratorate to initiate a public prosecution decision if "the criminal facts are clear, the evidence is reliable and sufficient, and the suspect shall be subject to criminal liability").
[119] See *supra* notes 71-76 and the accompanying text.
[120] Guangquan Zhou, "论刑法与认罪认罚从宽制度的衔接 (On the Connection between Criminal Law and the Leniency System)," *清华法学 (Tsinghua University Law Journal)* 13, no. 3 (2019): 35 (noting that the penalty discount is too limited to incentivize suspects to choose the leniency system).
[121] Liuquan Xie, "现实主义考量下实证完善认罪认罚从宽制度的建议 ——以试点单位广州市 N 区人民检察院的司法实践为视角 (Suggestions on Improving the Leniency System in the Context of Realism: From the Perspective of the Judicial Practice of the People's Procuratorate in N District of Guangzhou as a Pilot)," (documenting one case where the corporate suspect withdrew its affidavit and claimed innocence before the trial for fear of the disqualification from biddings following the criminal conviction).
[122] See Daniel Chow, "The Interplay between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act," *Ohio State Law Journal* 73, no. 5 (2012): 1018 ("[t]he real risks posed by commercial bribery cases brought under PRC law are not the actions themselves, but the collateral FCPA prosecutions launched by DOJ that might ensue").
[123] Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," *法学* (Law Science), no. 9 (2014): 115 (recommending the Chinese agencies to enhance cooperation with the international communities to strengthen the global fight against commercial bribery).

wrongdoings.[124] If the state could conduct criminal investigations in a more cost-effective manner than the corporations, it is hardly socially desirable to reward corporate cooperative efforts with a DPA and significantly reduced sanctions.[125] Corporate internal investigation helps the corporation to understand the allegation of misconduct, identify culpable individuals and collect relevant evidence. It is also a crucial part of a corporate compliance program, a key form of corporate cooperation, and forms the foundation for the corporate decisions to self-report and cooperate.[126] Overly severe restrictions on the corporations' ability to conduct investigations and gather evidence increase the corporate costs and risks associated with the self-policing activities. Such restrictions are thus detrimental to the fostering of the state-corporation partnership in the combating of corporate crimes.[127] In this aspect, the Chinese criminal justice system and the relevant laws have created great obstacles to the effective corporate self-regulation and state-corporation partnership.

7.5.1 State-Centric Model in Conducting Criminal Investigations

China's criminal justice system embodies strong inquisitorial features. It is designed with the primary goal of ascertaining the criminal facts, correctly applying the law and punishing criminals.[128] Rather than relying on the confrontation between the prosecution and the defense to resolve criminal issues, the administration of justice is traditionally believed to be the business of the public authorities only.[129] According to the PRC Constitution, the Procuratorate is more than a prosecuting agency in opposition to the defense but also a legal supervision organ.[130] In terms of criminal prosecution, the Procuratorate needs to ensure that both evidence in favor of and against the suspects are gathered and considered when making charging decisions and included in the file presented to the court.[131] Rather than being a passive decision-maker, the court in China may take an initiative to gather any information itself, beyond the case file or dossier prepared by the Procuratorate, for the purpose of ascertaining the factual truth and determining the guilt or innocence of the defendant.[132] Moreover, unlike the U.S. Attorney's office that is

[124] Arlen, and Buell, "The Global Expansion of Corporate Criminal Liability," 753 ("the use of such an enforcement policy to induce corporate detection and investigation, while reducing corporate sanctions, generally enhances welfare only if companies are better able to detect or investigate than the government").

[125] Davis, *Between Impunity and Imperialism*, 154-155 (claiming that using corporate liability to incentivize self-regulation will only be cost-effective if the self-regulation is either more effective or less expensive than public regulation); Mullin, and Snyder, "Should Firms Be Allowed to Indemnify Their Employees for Sanctions?" 40 ("targeting the firm is particularly effective if it can monitor the agent's actions better than can government authorities").

[126] Miriam H. Baer, "When the Corporation Investigates Itself," 308 (noting that "the investigation has become an integral component of the firm's compliance department … [g]overnment prosecutors and regulators … encourage and rely upon their corporate counterparts' information-generating activities").

[127] Davis, *Between Impunity and Imperialism*, 155 (noting that "laws that promote private regulation are most likely to be cost-effective when they are complemented by laws that place few restrictions on private actors' ability to engage in investigation"); Arlen, and Buell, "The Global Expansion of Corporate Criminal Liability," 702-04 (claiming that DPA's particular value to the U.S. prosecutors depends on the background legal regime that gives firms a comparative advantage over public enforcers in the obtaining of evidence of corporate misconducts).

[128] The PRC Criminal Procedure Law, Article 2.

[129] Langer, "From Legal Transplants to Legal Translations," 4 ("whereas the adversarial system conceives criminal procedure as governing a dispute between two parties (prosecution and defense) before a passive decision-maker (the judge and/or the jury), the inquisitorial system conceives criminal procedure as an official investigation, done by one or more impartial officials of the state, in order to determine the truth").

[130] The PRC Constitution, Article 134 (designating the People's Procuratorate as the legal supervision organ).

[131] The PRC Criminal Procedure Law, Article 52 (instructing the judges, procurators and investigators to collect various evidence that can prove the suspect or defendant's guilt or innocence and the seriousness of the criminal circumstances in accordance with the legal procedures).

[132] The PRC Criminal Procedure Law, Article 194, para. 2 (allowing the court to interview the witnesses and the appraiser); Article 196 (authorizing the court to adjourn and verify the evidence through investigation if it has any doubts about the evidence); Langer, "From Legal Transplants to Legal Translations," 9 ("[w]hereas the inquisitorial system judge is understood and perceived as an active investigator with, consequently, the duty to be active in these interrogations, the adversarial system judge is usually understood as a passive umpire who is not supposed to participate actively in the interrogation of witnesses").

positioned as a government agency, China's Procuratorate is often understood as an agency parallel to the court exercising the judicial authority.[133] The main goal of the Procuratorate is to ensure the correct and consistent implementation of laws, and to protect the national and public interests.[134] This distinctive status of the Procuratorate juxtaposes prosecutors with judges. Both of them come from the same legal background, enjoy the same status and benefits, and reinforce their camaraderie by continually interacting with each other at key stages of the criminal procedure.[135]

The understanding of the criminal procedure as an official investigation for the court to determine the truth, which is a key concept of the inquisitorial criminal system, reduces the need and perceived legitimacy for the defense to conduct extensive pre-trial investigations.[136] It could also explain the highly restricted role enjoyed by private lawyers in China's criminal procedure and the fact that their investigation is often refuted for undermining the authority's truth-seeking efforts.[137] Under the PRC Criminal Procedure Law, the private defender can only collect materials from the victims, their relatives and other witnesses with their consent, as well as the approval of the Procuratorate or the court.[138] For other witnesses and relevant persons, the defender may collect materials with their consent, or request the Procuratorate or the court to collect the evidence.[139]

Apart from the legal restrictions, criminal lawyers are faced with serious difficulties and risks when carrying out investigations and collecting materials in practice.[140] The defenders' requests to meet the suspects under pre-trial detention, access the Procuratorate's dossier or collect materials are constantly obstructed by the public authorities, though a major revision to the PRC Criminal Procedure Law in 2013 has significantly improved the situation.[141] The requests for the prosecuting witnesses to appear in court for examination are often rejected by the court as being

133 The PRC Criminal Procedure Law, Article 7 (mandating the court, Procuratorate and public security organs to divide responsibilities, coordinate and check each other to ensure the correct and effective enforcement of law in conducting criminal proceedings).

134 "中共中央关于加强新时代检察机关法律监督工作的意见 (Opinions of the CPC Central Committee on Strengthening the Legal Supervision of Procuratorial Organ in the New Era)," June 15, 2021, http://www.gov.cn/zhengce/2021-08/02/content_5629060.htm (accessed January 19, 2022).

135 Both the judges and prosecutors are required to pass the national judicial examination and civil service examination, and both professions are considered as civil servants in China. Fred Einbinder, "Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice," *International Comparative, Policy & Ethics Law Review* 3, no. 3 (2020): 679-80 (noting similar relationship between judges and prosecutors in France, which creates a sense of belonging to the same corps).

136 Langer, "From Legal Transplants to Legal Translations," 22-23 ("the whole procedure is structured and understood as a unitary investigation. Thus, there is only one pre-trial investigation, the official one").

137 Thomas Stevenson, "The Precarious Lives of Criminal Defense Lawyers in China," *The Atlantic*, September 23, 2013, https://www.theatlantic.com/china/archive/2013/07/the-precarious-lives-of-criminal-defense-lawyers-in-china/278049/ (accessed August 27, 2022).

138 The PRC Criminal Procedure Law, Article 43, para. 2.

139 The PRC Criminal Procedure Law, Article 43, para. 1.

140 Sida Liu, and Terence C. Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge: Cambridge University Press, 2017), 44-64 (discussing the difficulties and dangers for Chinese criminal lawyers in practice).

141 Xu Han, "新《刑事诉讼法》实施以来律师辩护难问题实证研究——以 S 省为例的分析 (Empirical Research on the Problem of Lawyers' Difficulty in Defense After the Implementation of New Criminal Procedure Law——Analysis on S Province as an Example)," *法学论坛 (Legal Forum)* 30, no. 3 (2015): 134 (noting that though the difficulties of meeting the suspects and accessing the prosecutorial file have generally been solved, defenders still face a lot of difficulties in carrying out investigation and collecting materials, or requesting the witnesses to appear before the court). For a discussion of the reasons for the failure to improve the working conditions for criminal defense lawyers despite numerous reforms, see Sida Liu, and Terence C. Halliday, "Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law," *Law & Social Inquiry* 34, no. 4 (2009): 911-50.

unnecessary.[142] As a result, the Procuratorate's dossier and documentary evidence almost always dominate the court trial.[143] What is more, the notorious Article 306 of the PRC Criminal Law, which criminalizes the lawyer's perjury, has been fiercely criticized for threatening the personal liberty of criminal lawyers as the "Sword of Damocles" hanging over their head.[144]

The severe risks confronting the criminal lawyers practicing in China were extensively demonstrated in the criminal prosecution of Li Zhuang. Under the leadership of Bo Xilai, the former Party Secretary of Chongqing Municipality, and Wang Lijun, the former Police Chief of Chongqing Municipality, the highly publicized crackdown on gangsters became in full swing since July 2009.[145] A total of 4781 persons were arrested and 13 persons were executed in just 10 months.[146] Against this background, as the lawyer representing a mafia boss that was later sentenced to life imprisonment, Li Zhuang claimed that his client was mistreated and tortured. In opposition to Li's claim, the PSB in Chongqing brought criminal charges against the lawyer for his "irregular professional practices", referring to fabricating evidence and inciting the witnesses.[147] Li Zhuang was sentenced to 18 months in jail after two trials in 2009 and 2010.[148] The conviction of Li Zhuang has incited a huge debate about the rule of law and the rights and personal safety of criminal lawyers. It is also blamed for the low-defense rate in China and the inactive role played by the criminal defense lawyers since then.[149]

7.5.2 Corporate Internal Investigations: No Guidance and Full of Risks

The predilection for public enforcement actions and the distrust of investigation conducted by private actors are visible not only in the Chinese criminal procedure rules, but also in other laws governing the conduct of corporate internal investigations. It is true that the corporation's

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[142] Xiaona Wei, "审判中心视角下的有效辩护问题 (Effective Defense Issue from the Perspective of Trial Centrism)," *当代法学 (Contemporary Law Review)*, no. 3 (2017): 108 (noting that few criminal lawyers have made requests for the Procuratorate and court to collect and obtain evidence (less than 10%), and almost half of such requests were rejected).

[143] Ruihua Chen, "案卷笔录中心主义—对中国刑事审判方式的重新考察 (Dossier and Documentary Evidence Centrism – A Re-examination of China's Criminal Trial Method)," *法学研究 (Chinese Journal of Law)*, no. 4 (2006): 64 (identifying China' criminal trial method as being centered on the dossier and documentary evidence, where criminal judges prepare the trial by reading the Procuratorate's dossier and documentary evidence, assess the witness' testimony, the victims' statement and the defendant's confession through hearing transcripts, and even cite the investigator's transcripts as the basis for judgement).

[144] Rush Doshi, "Promoting the Rule of Law in China: Criminal Defense Lawyers and the Politics of Article 306," *The Journal of Politics and Society*, (2011): 128-29 (claiming that "the abuse of Article 306 is in part a result of the cultural and institutional difficulties posed by the transition from from an inquisitorial system, in which the prosecutor was dominant, to an adversarial one that formally subordinates the prosecutor to judges and places them on equal footing with the defense").

[145] Simon Elegant, "China's Underworld on Trial in Chongqing," October 21, 2009, Time, https://web.archive.org/web/20091024031243/http://www.time.com/time/world/article/0,8599,1931342,00.html ((accessed February 5, 2023) (calling the trials of mafia and corrupt officials in Chongqing as "China's trial of the 21st century").

[146] Louisa Lim, "Abuse Claims Follow Mafia Crackdown in Chinese City," NPR, March 27, 2012, https://www.npr.org/2012/03/27/149467544/in-chinas-crime-crackdown-claims-of-abuse (accessed February 5, 2023).

[147] Shiyuan Huang, "Li Zhuang: Chinese Defense Lawyer Who Was Found Guilty of Suborning Perjury," March 31, 2012, https://wrongfulconvictionsblog.org/2012/03/31/li-zhuang-chinese-defense-lawyer-who-was-found-guilty-of-suborning-perjury/ (accessed February 5, 2023); Mandy Zuo, "Chongqing Mafia Boss Says Jailed Lawyer was Framed," *South China Morning Post*, November 26, 2012, https://www.scmp.com/news/china/article/1090816/chongqing-mafia-boss-says-jailed-lawyer-was-framed (accessed February 5, 2023).

[148] "Li Zhuang Retracts Admission of Guilt Following Reduced Sentence," *The Economic Observer*, February 9, 2010, http://www.eeo.com.cn/ens/2010/0209/162824.shtml (accessed February 5, 2023); He Xin, "Prosecutors Withdraw Charges Against Li Zhuang," *CaiXin Global*, April 22, 2011, https://www.caixinglobal.com/2011-04-22/prosecutors-withdraw-charges-against-li-zhuang-101017107.html (accessed February 5, 2023).

[149] Louisa Lim, "Abuse Claims Follow Mafia Crackdown in Chinese City," NPR, March 27, 2012, https://www.npr.org/2012/03/27/149467544/in-chinas-crime-crackdown-claims-of-abuse (accessed February 5, 2023) ("[i]t was a warning to all the lawyers in China: We're cracking down on the mafia here, no one should come here. They were 'killing the chicken to scare the monkeys.' They made all China's lawyers so scared no one dared speak out. It was extremely terrifying"); Sida Liu, Lily Liang and Terence C. Halliday, "The Trial of Li Zhuang: Chinese Lawyers' Collective Action against Populism," *Asian Journal of Law and Society* 1, no. 1 (2014): 81 (describing the case as "a fight against populism and a defence of professionalism", and a crucial battle for the Chinese lawyers and "the future development of China's legal and political reform").

decision to voluntarily surrender is actively encouraged with a mitigated or lighter penalty or even an exemption from punishment under the PRC Criminal Law.[150] However, many issues related to the conduct of corporate internal investigation, which is the basis for the corporate decisions to self-report and a key form of corporate cooperation, are largely unguided.[151] For example, should corporate investigators follow a due process procedure when conducting internal investigations and what are the procedure rules?[152] For the information collected through internal investigations, can the government force the disclosure of such information, and which party, the corporation or the employee, is authorized to decide whether to disclose?[153] If such information is handed over to the authorities, can it be directly endorsed and used by the prosecutors as criminal evidence or should the public investigators collect relevant information again?[154] Apart from those undefined issues, the emphasis on the protection of citizens' privacy and state sovereignty under the Chinese legal system has created even more risks for the conduct of corporate internal investigations, concerning mainly the legal privileges, data privacy and state secrets.[155]

7.5.2.1 The Absence of Legal Professional Privileges in China

The absence of protections equivalent to the attorney-client privilege in the common-law jurisdictions dampens the corporate incentives and ability to conduct internal investigations.[156] As corporate internal investigations are typically led by the in-house counsel and/or outside lawyers, the protection of legal privileges gives corporations more control over the information gathered during the investigation.[157] Corporations will thus be more incentivized to investigate corporate misconduct robustly for the purpose of securing a superior position in the subsequent interaction with the authorities. Besides, legal privileges could also facilitate the conduct of

[150] Bribery of state functionaries by individuals and bribery of state functionaries by entities are addressed in separate provisions under the PRC Criminal Law, Articles 389 and 393 respectively, thus the additional leniency provided for bribe-givers related to Article 389 is technically applied only to individuals. See Dong Li, "自首制度中单位因素的介入及其思考 (Organization Intervening in Surrender System)," *法学杂志 (Law Science Magazine)*, no. 5 (2012): 104-10 (summarizing the debate on the qualification of entities for constituting surrender under the Criminal Law). The SPC's judicial interpretation settles this issue and allows an entity bribe-giver to claim leniency based on this mitigation clause if the decision to voluntarily confess the bribery acts is made by the entity collectively or by the person in charge of the entity, see SPC and SPP, 关于办理行贿刑事案件具体应用法律若干问题的解释 (Interpretation on Several Issues concerning the Specific Application of Law in the Handling of Criminal Cases of Offering Bribes), Interpretation No. 22 [2012] of the SPC, released on December 26, 2012.

[151] Yunxia Yin, Yanjun Zhuang, and Xiaoxia Li, "企业能动性与反腐败'辐射型执法效应'——美国 FCPA 合作机制的启示 (Enterprise Initiative and 'Radiative Effect of Anti-corruption Law Enforcement': Lessons from the Cooperative Regime under the U.S. FCPA)," 38 (noting that there are no clear incentives or guidance for companies to voluntarily initiate internal investigation in China).

[152] Brent Fisse, and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1983), 193-98 (calling for the recognition and development of corporate internal justice system, with the rising importance of corporate internal investigations and disciplinary system); Samuel W Buell, "Criminal Procedure Within the Firm," *Stanford Law Review* 59, no. 6 (2007): 1616-17 (demonstrating the distinctive setting of the firm and its implication on the criminal procedure within the firm).

[153] See the infra-Section 7.5.2.1 for the discussion about the absence of the common law style attorney-client privileges in China.

[154] Under the paragraph 1 of Article 52 of the PRC Criminal Procedure Law, it is explicitly stated that only the court, Procuratorate and public security agencies have the authority to collect evidence. Though the defense lawyers may collect materials from relevant persons with their consent, such materials do not have a legally evidential status. In addition, paragraph 2 of Article 52 provides that the tangible evidential materials collected by the administrative agencies in their law enforcement practices can be used as evidence in the criminal proceedings. Therefore, it is reasonable to infer that information collected by corporate investigators cannot be used as evidence without reform of the current legal regime.

[155] Peter C. Pang, "Handling Internal Investigations In China: Special Considerations," July 17, 2019, *Mondaq*, https://www.mondaq.com/china/corporate-and-company-law/826796/handling-internal-investigations-in-china-special-considerations (accessed August 24, 2022) (identifying the privacy, secrecy and privilege as the "Dark Triad" for conducting internal investigations in China).

[156] Leah M. Christensen, "A Comparison of the Duty of Confidentiality and the Attorney-Client Privilege in the U.S. and China: Developing a Rule of Law," *Thomas Jefferson Law Review* 34, no. 1 (2011): 171-96 (detailing the unique challenges created by the lack of legal privileges in China for Chinese lawyers, in-house counsel and foreign lawyers).

[157] Arlen, and Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," 721-23 (noting that the broad attorney-client privilege and work product doctrine in the U.S. assist the corporate internal investigations by giving the corporations more control over the information and leading employees to speak more frankly).

internal investigations to the extent that the corporate investigators could assure employees of the confidentiality of their communication and encourage them to be more forthcoming.[158] Under the PRC Lawyer's Law, lawyers are generally required to protect the confidentiality of the clients' private information, trade secrets and information that the clients wish to keep confidential based on professional secrecy.[159] However, in-house counsel and foreign lawyers are excluded from the scope of lawyers for the purpose of the confidentiality rule.[160] Notably, the confidentiality provision does not exempt the lawyers from being forced to testify in a judicial action, which is the key element of the common-law legal privileges.[161] In 2013, an Amendment was introduced to the PRC Criminal Procedure Law to acknowledge the criminal lawyers' right, in addition to their duty, to keep confidential the information they obtained from the clients in the criminal proceedings.[162] However, the lack of interpretation of key issues, including the scope of clients and the procedure for the assertion of the confidentiality right, renders the privilege-like rule merely a declaration of symbolic meaning so far.[163]

The absence of the formal concept of attorney-client privilege or work-product doctrine under the Chinese laws has serious domestic and foreign implications. Without the guarantee that the information collected and generated in the course of internal investigation will be protected from forced disclosure, corporations have reasonably fewer incentives to conduct comprehensive internal investigations in the beginning.[164] Beyond the domestic scenario, some U.S. judges have rebuked claims that documents involving communication between Chinese counsel and their clients should be exempt from disclosure, considering the non-existence of the U.S.-style attorney-client privilege in China.[165]

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[158] Lonnie T. Brown, Jr., "Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox," *Hofstra Law Review* 34, (2006): 900-01 ("corporate executives and employees will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed"). However, though the employee's communication with in-house or external lawyers is privileged, it is the company rather than the employee that enjoys the exclusive right in deciding whether to waive according to the U.S. attorney-client privilege rule. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[159] The PRC Lawyer's Law, last revised on September 1, 2021, Article 38 (requiring lawyers to protect state secrets, trade secrets and the client's personal information, except for the ongoing or planned criminal facts and information against state security, public security and personal safety).

[160] Yingxi Fu-Tomlinson, "'Privilege-Like' Protection in China: Nine Ways for US Companies to Safeguard Confidential Communication and Attorney Work Product at Home and Abroad," https://www.arnoldporter.com/en/perspectives/publications/2016/03/20160323_privilege_like_protection_in_ch_12771 (accessed August 5, 2022) (noting the unequal statuses enjoyed by the different categories of lawyers in China).

[161] The PRC Civil Procedure Law, Article 70 (authorizing the court to obtain evidence from relevant entities or individuals, who are in no position to refuse); Xu Xi, "A Comparative Study of Lawyers' Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality," Tsinghua China Law Review 46, no. 1 (2009): 48-61 (noting that the duty of confidentiality under the Chinese laws is different from attorney-client privilege as it does not entitle a party to refuse the demand from the authority regarding the communication between the attorney and the client).

[162] The PRC Criminal Procedure Law, Article 48 (stating the criminal defense lawyers' rights to keep confidential relevant circumstances and information they obtained in the practicing activities in relation to the clients, while listing exceptions regarding crimes against state security, public security and serious damages to personal safety).

[163] Lisi Xiong, "论我国刑辩律师保密特权制度的完善——以新刑事诉讼法第四十六条为视角 (On the Improvement of Confidentiality Right of Criminal Defense Lawyers in China: From the Perspective of Article 46 of the Revised Criminal Procedure Law)," *People's Court Daily*, November 10, 2013, https://www.chinacourt.org/article/detail/2013/10/id/1108243.shtml (accessed May 9, 2022) (noting that the newly-created confidentiality right is lacking in several aspects, including the failure to acknowledge the client as the subject of the right, the ambiguity as to the conditions for the right and the scope of the protected information, the lack of procedure for the assertion of the right).

[164] Yingxi Fu-Tomlinson, "'Privilege-Like' Protection in China," ("[a]lthough in practice there is hardly any precedent of lawyers being required to testify on their clients' matters or turn over evidence, the existence of a legal basis to require them to do so makes client communication and attorney work product vulnerable").

[165] *Wultz et al. v. Bank of China*, 1:11-cv-1266 (S.D.N.Y. Jan. 21, 2015).

7.5.2.2 Data Privacy Laws

Chinese laws are restrictive on investigations conducted by private and unlicensed actors out of concerns over the state sovereignty and citizens' privacy.[166] Corporate internal investigation necessarily involves the collection, storage and distribution of loads of data and documents, such as HR files, emails, phone calls, and information on corporate devices.[167] Recognizing the strategic value of data for the protection of personal privacy, cybersecurity, state security and sovereignty, China has introduced a patchwork of laws for data regulation, including the Personal Information Protection Law, Cybersecurity Law, and Data Security Law.[168] The data privacy laws have placed heavy and sometimes imposing demands and restrictions on the conduct of corporate international investigations in China.[169]

Employees in China are used to using personal portable devices and messaging platforms such as WeChat and QQ, instead of corporate devices and emails, for work-related communication. The reality of modern electronic communication creates more challenges for corporate investigators. For example, corporate investigators need to obtain employees' express and informed consent for gaining access to their personal information, as required by the Personal Information Protection Law.[170] Besides, the DOJ CEP requires corporations to implement "appropriate guidance and controls on the use of personal communications and messaging applications" for the purpose of receiving full remediation credits.[171] The popularity of messaging platforms in China creates higher demands for international corporations operating in China in this aspect. The infringement of citizens' personal information, which is broadly defined by the Chinese judicial authorities, is punished as a criminal offense.[172] The 30-month imprisonment awarded to Peter Humphrey and Yu Yingzeng, the private investigators hired by GSKCI to uncover the

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[166] Bradley A. Klein, Steve Kwok, "Compliance Investigations in China Take On New Urgency," *Skadden's 2019 Insights*, January 17, 2019, https://www.skadden.com/insights/publications/2019/01/2019-insights/compliance-investigations-in-china (accessed December 23, 2022) (calling for clients to conduct investigations into potential misconducts with caution, given the strict limits imposed by China on the investigation conducted by non-governmental and unlicensed actors to avoid infringement on the state sovereignty and individual's privacy).

[167] Arlen, and Buell, "The Global Expansion of Corporate Criminal Liability," 703-04 (referring to the laws that allocate powers between corporations and governments in the collection and use of evidence as background laws affecting corporate criminal enforcement, including state security laws, data privacy rules, and labor laws).

[168] 中华人民共和国个人信息保护法 (The PRC Personal Information Protection Law), promulgated on August 20, 2021 and became effective as of November 1, 2021, unofficial English translation at https://digichina.stanford.edu/work/translation-personal-information-protection-law-of-the-peoples-republic-of-china-effective-nov-1-2021/ (accessed August 13, 2022); 中华人民共和国网络安全法 (The PRC Cybersecurity Law), promulgated on November 7, 2016 and became effective as of June 1, 2017, unofficial English translation at https://digichina.stanford.edu/work/translation-cybersecurity-law-of-the-peoples-republic-of-china-effective-june-1-2017/ (accessed August 13, 2022); 中华人民共和国数据安全法(The PRC Data Security Law), promulgated on June 10, 2021 and became effect as of September 1, 2021, official English translation at http://www.npc.gov.cn/englishnpc/c23934/202112/1abd8829788946ecab270e469b13c39c.shtml (accessed August 13, 2022).

[169] Sammy Fang, and Han Liang, "China's Emerging Data Protection Laws Bring Challenges for Conducting Investigations in China," DLA PIPER, July 25, 2022, https://www.dlapiper.com/en/us/insights/publications/2022/07/chinas-emerging-data-protection-laws-bring-challenges-for-conducting-investigations-in-china/ (accessed August 28, 2022).

[170] Eric Carlson, "In China Investigations, Messaging Platforms Can be a Goldmine or a Landmine," *FCPA Blog*, March 12, 2018, https://fcpablog.com/2018/03/12/eric-carlson-in-china-investigations-messaging-platforms-can/ (accessed August 13, 2022) (identifying the values and risks of WeChat for corporate internal investigations given the fact that WeChat is often used for both casual and business communications in China); 中华人民共和国个人信息保护法 (The PRC Personal Information Protection Law), Article 13 (the Chinese version of GDPR demands data processors to obtain the consent of data targets for the purpose of collecting, storing, processing, sharing and analyzing their personal information).

[171] USJM, 9-47.120 - Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.

[172] SPP and SPC, 关于办理侵犯公民个人信息刑事案件适用法律若干问题的解释 (Interpretation on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Infringing on Citizens' Personal Information), Article 1 ("[c]itizens' personal information as prescribed in Article 253A of the PRC Criminal Law refers to all kinds of information recorded in electronic form or other forms, which can be used, independently or in combination with other information, to identify a specific natural person's personal identity or reflect his/her activities, including but not limited to the name, identity certificate number, communication and contact information, address, account and password, property status, and whereabouts").

identity of a whistleblower, for unlawful acquisition of citizens' personal information clearly demonstrates the risks of conducting private investigations in China.[173]

7.5.2.3 State Secrets and Cross-Border Data Transfer

The ubiquity and broad nature of "state secrets" in China presents another key challenge for the conduct of corporate internal investigations. Under the PRC Law on Guarding State Secrets, state secrets are defined in an ambiguous and broad manner to include any matter vital to the state security and national interests, including those involved in the "national economic and social development" or "science and technology".[174] It is thus highly likely that corporations will encounter and run the risks of infringing state secrets when conducting business transactions, performing compliance checks, or carrying out internal investigations.[175] More importantly, sharing relevant information with foreign business partners or authorities may easily contravene the state secrets law that penalizes the export of state secrets to foreign jurisdictions without the approval of the competent authorities.[176]

Even if state secrets are not involved, corporations should still handle the storing of data and cross-border data transfer with caution. According to the Cybersecurity Law and Personal Information Protection Law, personal information or important data gathered and generated by the critical information infrastructure operators in mainland China must be stored within mainland China.[177] In response to the aggressive enforcement of foreign laws with extraterritorial jurisdiction, the Chinese version of the blocking statute, the Law on International Judicial Assistance in Criminal Matters, was introduced in 2018.[178] According to the Law, no Chinese individuals, organizations or institutions should provide evidential materials or other forms of assistance to foreign criminal investigation or prosecution without an approval from the competent authorities.[179] Similar restrictions on cross-border data transfer can be found in other data protection laws as well.[180] If China's new blocking provisions are actively enforced, international corporations would be forced to make difficult decisions between respecting

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[173] Patrick Boehler Daniel Ren, "British Investigator Peter Humphrey Jailed for 2.5 Years for Buying Private Data," *South China Morning Post*, August 8, 2014, https://www.scmp.com/news/china/article/1569614/investigator-peter-humphrey-and-wife-jailed-buying-private-information (accessed August 27, 2022).

[174] 中华人民共和国保守国家秘密法 (Law of the PRC on Guarding State Secrets), recently revised on April 29, 2010, Article 2 ("[s]tate secrets shall be matters that have a vital bearing on state security and national interests and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time").

[175] "Rio Tinto Four Jailed for Up to 14 years by Chinese Court," *The Guardian*, March 29, 2010, https://www.theguardian.com/business/2010/mar/29/rio-tinto-four-jailed-china (accessed August 28, 2022) (four executives of Rio Tinto were convicted of accepting bribes and stealing state secrets against the background of soaring iron ore prices and mounting tensions between China and Australia).

[176] 中华人民共和国保守国家秘密法 (Law of the PRC on Guarding State Secrets), Article 48 (4) (the exporting of state secrets without the approval of the relevant competent authorities is subject to criminal or administrative liability).

[177] 中华人民共和国网络安全法 (The PRC Cybersecurity Law), Article 37; 中华人民共和国个人信息保护法 (The PRC Personal Information Protection Law), Articles 38-43.

[178] 中华人民共和国国际刑事司法协助法 (Law of the PRC on International Criminal Judicial Assistance), Order No. 13 of the President of the PRC, promulgated on October 26, 2018 and became effective as of the same day, unofficial English translation at https://www.chinajusticeobserver.com/law/x/international-criminal-judicial-assistance-law-20181026 (accessed August 13, 2022); Eric Carlson, "Practice Alert: China Asserts 'Judicial Sovereignty' with New Blocking Statute," FCPA Blog, December 10, 2018, https://fcpablog.com/2018/12/10/practice-alert-china-asserts-judicial-sovereignty-with-new-b/ (accessed August 28, 2022).

[179] 中华人民共和国国际刑事司法协助法 (Law of the PRC on International Criminal Judicial Assistance), Article 4.

[180] 中华人民共和国个人信息保护法 (The PRC Personal Information Protection Law), Article 41; 中华人民共和国数据安全法(Data Security Law of the PRC), Article 36; 中华人民共和国网络安全法 (The PRC Cybersecurity Law), Article 37.

China's legal restrictions and complying with the cooperation requests from foreign enforcement agencies or courts.[181]

Considering the lack of clear official guidance, the absence of legal professional privileges, as well as the multiple risks inherent in the corporate internal investigations, it should be no surprise that corporations seldom conduct extensive internal investigations into potential violations in China. Without frequent and comprehensive corporate internal investigations, corporations hardly have any basis for engaging in voluntary self-reporting and cooperation.

7.6 Evolution of Corporate Compliance in China and Possible Reasons

The concept of compliance and compliance monitorships was previously unknown to most Chinese actors in the business and legal community. It first became widely known in China around 2021 following the U.S. sanctions against the ZTE Corporation, the second largest China-based telecom equipment provider.[182] Since then, the strategic values of having an effective compliance program in place are increasingly recognized and actively pursued by both Chinese firms and Chinese authorities. This Section describes the emerging practices of compliance and attempts to identify the reasons for the underdeveloped corporate compliance in China.

7.6.1 Corporate Compliance Development Triggered by Foreign Sanctions

The concept and practices of compliance are emerging and flourishing in China, driven by the rising compliance risks faced by the corporations due to stricter regulatory rules and more active enforcement actions at home and aboard.[183] The concept of compliance monitorship first became widely known in China following the U.S. sanctions against the ZTE Corporation. The company was added to the Entity List by the Bureau of Industry and Security (BIS), the U.S. Department of Commerce in March 2016 for violating the U.S. export laws by re-exporting the U.S.-originated products to Iran and North Korea.[184] In order to regain the right to deal with the U.S. companies, ZTE concluded settlement agreements with multiple U.S. agencies in March 2017, agreeing to pay $892 million in fine plus $300 million in escrow payment, strictly implement the corporate audit and compliance plan, discipline individual wrongdoers and accept a three-year

[181] Carlson, "Practice Alert: China Asserts 'Judicial Sovereignty' with New Blocking Statute," (noting that "U.S. officials have encouraged dialogue when there are conflicts of laws that restrict companies from disclosing information; however, U.S. officials have also signaled that companies may ultimately have to decide whether to violate a foreign law or be held in contempt by a U.S. court").
[182] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," *比较法研究 (Journal of Comparative Law),* no. 1 (2020): 19-20 (identifying the ZTE incident as a milestone in the corporate compliance development in China).
[183] Ruihua Chen, "论企业合规的中国化问题 (On the Problems of the Sinicization of Corporate Compliance)," 35-38 (identifying three main incentives for corporate compliance development in China: the stricter and more aggressive corporate regulation and enforcement in the international context, the compliance development guidelines released by the Chinese administrative authorities, and the import of modern corporate governance concept).
[184] "Rule from the Bureau of Industry and Security, Department of Commerce on Additions to the Entity List," Docket No. 160106014-6014-01, https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-05104.pdf (accessed December 2, 2020).

court-imposed monitorship.[185] Following the settlement, the export ban against ZTE was suspended for a probationary period of seven years.[186]

Only one year later, at a time of ever-bitter Sino-U.S. trade tensions, ZTE was accused of failing to punish responsible individuals as agreed and misrepresenting the disciplinary actions in its reports to BIS.[187] The denial of export privileges was activated on April 15, 2018, and ZTE was barred from receiving any U.S.-origin products or service. As a result of the export ban, the company relying heavily on U.S. suppliers ceased the operation of its main business and was on the brink of extinction.[188] Benefiting from the mediation by the Chinese and U.S. government, ZTE once again reached a settlement agreement with BIS on June 7, 2018. The export ban was suspended for another ten years on the condition that the company pays $ 1.4 billion in fine and escrow payment, retains a team of special compliance coordinators to monitor the company's compliance with the U.S. export control laws for a period of 10 years, and replaces the entire board and senior leadership.[189]

The ZTE incident serves as a warning bell for other Chinese enterprises going abroad about the dire consequences of violating foreign laws and the strategic value of implementing an effective compliance program.[190] Against the backdrop of stiff competition between the U.S. and China in the area of trade and high technology, enforcement risks confronting Chinese businesses operating overseas will only increase. In November 2018, the DOJ launched a controversial "China Initiative", directing prosecutors to prioritize the prosecution of Chinese persons suspected of engaging in, among others, economic espionage, trade secret theft and the FCPA violations.[191] About 90 criminal charges were filed against Chinese companies, individuals or foreign persons with Chinese links, including academic researchers and scientists, under the "China Initiative".[192] The Initiative was terminated in February 2022 in response to serious concerns about the rule of law and racial discrimination.[193]

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[185] Press Release, "Secretary of Commerce Wilbur L. Ross, Jr. Announces $1.19 Billion Penalty for Chinese Company's Export Violations to Iran and North Korea," March 7, 2017, https://www.ice.gov/file-download/download/public/15034 (accessed September 2, 2022); "ZTE Corporation Agrees to Plead Guilty and Pay Over $430.4 Million for Violating U.S. Sanctions by Sending U.S.-Origin Items to Iran," March 7, 2017, https://www.justice.gov/opa/pr/zte-corporation-agrees-plead-guilty-and-pay-over-4304-million-violating-us-sanctions-sending (accessed December 2, 2020).

[186] Press Release, "Secretary of Commerce Wilbur L. Ross, Jr. Announces $1.19 Billion Penalty for Chinese Company's Export Violations to Iran and North Korea," March 7, 2017.

[187] Lily Kuo, "China's ZTE May be First Major Casualty of Trade War with US," *The Guardian*, May 10, 2018, https://www.theguardian.com/world/2018/may/10/chinas-zte-may-be-first-major-casualty-of-trade-war-with-us (accessed September 2, 2022).

[188] ZTE Corporation, Inside Information Announcement, May 9, 2018, https://www.zte.com.cn/mediares/zte/Investor/20180509/E1.pdf (accessed December 2, 2020) (acknowledging that the company's major operating activities have ceased as a result of the Denial Order).

[189] Press Release, "Secretary Ross Announces $1.4 Billion ZTE Settlement; ZTE Board, Management Changes and Strictest BIS Compliance Requirements Ever," June 7, 2018, https://www.iranwatch.org/library/governments/united-states/executive-branch/department-commerce/secretary-ross-announces-14-billion-zte-settlement-zte-board-management-changes (accessed September 2, 2022).

[190] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," 19 (claiming that the ZTE incident gives Chinese people a close sense of what is corporate compliance, the significance of corporate compliance to the country and individual corporations, and the significance of developing compliance for Chinese enterprises that are operating internationally).

[191] Information About the Department of Justice's China Initiative and A Complication of China-related Prosecutions Since 2018, Updated till November 19, 2021, https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related (accessed February 25, 2022).

[192] *Ibid*.

[193] "Assistant Attorney General Matthew Olsen Delivers Remarks on Countering Nation-State Threats," February 23, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-olsen-delivers-remarks-countering-nation-state-threats (accessed February 25, 2022) (admitting that the China Initiative introduced in 2018 promotes "a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to that country or that we in some way view people with racial, ethnic or familial ties to China differently").

Another lesson from the ZTE scandal is for the Chinese authority. It is worth noting that even before the ZTE incident, China's financial regulatory authorities had already issued a series of compliance management guidelines to assist commercial banks, securities companies and insurance companies in complying with relevant laws and regulatory rules and to encourage corporate self-regulation.[194] In the wake of the ZTE incident, there has been a growing recognition of the value of compliance among government agencies beyond the financial industry.[195] In order to encourage companies to enhance compliance management and provide compliance guidance, a number of compliance guidelines have been released by the regulatory agencies and central authorities.[196]

Apart from issuing non-binding guidelines to promote compliance, the Chinese authorities, including the Procuratorates, the court and regulators, began to incentivize compliance via the corporate liability mechanism.[197] The Procuratorates' attempts in this aspect are mainly exemplified in the CNP, which has been discussed in detail in Chapter 2. This Section will focus on the efforts of the court and regulatory agencies to promote compliance through the reform of corporate liability rules. According to a 2017 judgement by Lanzhou Intermediate People's Court of Gansu Province against Nestlé (China), the existence of corporate policies and procedures against the illegal collection of consumers' personal information is cited for the judgement decision that convicts only individual wrongdoers but not the company.[198] The case is hailed as the first corporate trial acknowledging the penalty exemption role of corporate compliance program.[199] According to the judgement, a corporation may defend itself from the criminal penalty by showing that it has an effective compliance program in place and that the

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[194] China Banking Regulatory Commission, 商业银行合规风险管理指引 (Guidelines on Compliance Risk Management in Commercial Banks), issued on October 20, 2006, unofficial translation at http://www.lawinfochina.com/display.aspx?lib=law&id=5688&CGid= (accessed December 3, 2020); China Securities Regulatory Commission, 证券公司和证券投资基金管理公司合规管理办法(Measures for the Compliance Management of Securities Companies and Securities Investment Fund Management Companies), issued on June 6, 2017 and last revised on March 20, 2020 (invalidating the Provisions for the Trial Implementation of the Compliance Management of Securities Companies issued by the same agency on July 14, 2008); 保险公司合规管理办法(Measures for the Compliance Management of Insurance Companies), promulgated on December 30, 2016, unofficial translation at http://www.lawinfochina.com/display.aspx?id=23547&lib=law&SearchKeyword=&SearchCKeyword= (accessed December 3, 2020) (invalidating the Guidelines for the Compliance Management of Insurance Companies issued by the same agency on September 7, 2007).

[195] Xuezhao, "中央企业及其他国有企业合规管理体系建设实务 (Practical Points of the Building of Compliance Management System for the Central Enterprises and Other State-Owned Enterprises)," July 25, 2020, http://www.bjqiyelaw.com/s/120964.html (accessed December 3, 2020) (noting that as a result of the ZTE incident and other foreign-imposed sanctions, compliance becomes a hot topic in the whole society, especially in the business and legal community, rather than a nascent subject attracting only a small group of people).

[196] SASAC, 中央企业合规管理指引（试行）[Guidelines for Centrally Administered Enterprises on Compliance Management (for Trial Implementation)], Guo Zi Fa Fa Gui [2018] No. 106, November 2, 2018, http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAwMTEzNDY5Njg%3D&showType=1 (accessed December 3, 2020); National Development and Reform Commission, Ministry of Foreign Affairs, Ministry of Commerce, People's Bank of China, SASAC, State Administration of Foreign Exchange, All China Federation of Industry and Commerce, 企业境外经营合规管理指引 (*Guidelines for Enterprises on the Compliance Management of Overseas Operations*), Fa Gai Wai Zi [2018] No. 1916, December 26, 2018, unofficial English translation at http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAwMTE0MjQxODU%3D&showType=1 (accessed December 3, 2020); Anti-monopoly Commission of the State Council, 经营者反垄断合规指南(Anti-monopoly Compliance Guidelines for Business Operators), Guo Fan Long Fa [2010] No. 1, September 11, 2020, unofficial English translation at http://lawv3.wkinfo.com.cn/document/show?collection=legislation&aid=MTAxMDAxMzkyNTU%3D&showType=1 (accessed December 3, 2020).

[197] Ruihua Chen, "论企业合规的中国化问题 (On the Issues of the Sinicization of Corporate Compliance)," 36-37 (noting that the documents force enterprises to implement compliance program through administrative requirements and threats, but the incentives for corporate compliance development are lacking in the administrative and criminal laws).

[198] *Lanzhou Intermediate People's Procuratorate v. Zheng Zhen, Yang Li, and three other former employees of Nestlé (China)*, Crime of Sale and Illegal Providing Citizen's Personal Information, Criminal Final Written Order No. 89 of 2017 of Lanzhou Intermediate People's Court of Gansu Province.

[199] Ruihua Chen, "合规无罪抗辩第一案 (First Case of Compliance Affirmative Defense)," *中国律师(Chinese Lawyers)*, no. 5 (2020): 83-85.

wrongdoing is committed purely for the individual benefits rather than out of the corporation's will.[200]

In the administrative law context, the revisions to the Anti-unfair Competition Law (AUCL), under which commercial bribery is prohibited as an administrative offense, adopt the "failure to prevent" model. Article 7 of AUCL provides a safe harbor for a business organization if it could prove that the employee's bribery act is irrelevant to seeking trading opportunities or competitive advantages for the organization.[201] According to a senior official from the highest market regulator, this provision intends to urge business operators to lay down lawful, compliant, reasonable and effective regulation measures, and not to indulge in or disguise the acts of bribery committed by the staff.[202] Practitioners began to view the provision as a welcoming signal from the regulator in terms of incentivizing corporations to set up an anti-bribery compliance program.[203] In the Anti-Unfair Competition Regulation of Shanghai Municipality, business operators are explicitly required to strengthen internal control and encouraged to improve their anti-commercial bribery compliance program.[204]

7.6.2 Emerging and Uneven Compliance Development

In the context of evolving regulatory rules and enforcement tactics at home and abroad, Chinese companies are devoting more attention and resources to the compliance area. In accordance with the regulatory rules, the compliance department has been set up in a majority of corporations in the highly-regulated industries either independently or together with the legal or internal control department.[205] China's legal community is experiencing an explosive growth in the compliance area. A growing number of law firms began to list corporate compliance as their star business.[206]

However, it is widely recognized that compliance development in most of China's domestic-funded corporations is still in its infancy, with the exception of those in the highly regulated industry.[207] According to a report conducted by Deloitte, while half of the surveyed foreign

[200] Kendai, "Nestlé Case: Increasing Criminal Enforcement against Infringing Personal Information and Enhanced Data Compliance is Required," August 28, 2017, https://www.linkedin.com/pulse/nestl%C3%A9-case-increasing-criminal-enforcement-against-infringing-dai (accessed August 3, 2022).
[201] Anti-Unfair Competition Law of 2018, Article 7, paragraph 3.
[202] Nan Wu, "总局反垄断与反不正当竞争执法局局长就新《反不正当竞争法》接受记者专访 (Director of Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC Interviewed Regarding the New AUCL)," November 13, 2017, http://gsj.sm.gov.cn/xxgk/flfg/201712/t20171226_1114206.htm (accessed August 3, 2022).
[203] Ting Liu, and Yuanhao Zhang, "反贿赂管理体系：经营者商业贿赂责任豁免的法律适用探索 (Anti-bribery Management System: Exploration of the Legal Application of the Exemption of Commercial bribery Responsibility for Business Operators)," King & Wood Mallesons, December 6, 2017; Ruihua Chen, "论企业合规的中国化问题 (On the Issues of the Sinicization of Corporate Compliance)," 44 (however, noting that as AUCL does not explicitly design the anti-bribery compliance program as a defense factor, the legal force of an explanation from an enforcement official in this aspect is questionable).
[204] 上海市反不正当竞争条例 (Anti-unfair Competition Regulation of Shanghai Municipality), revised in October 2020 and effective on Jan 1. 2021, unofficial English translation available at http://www.lawinfochina.com/display.aspx?id=34555&lib=law (accessed September 2, 2022).
[205] Jun Xue, Qiming Ren, and Hui Zhou, Institute of Rule of Law and Development, "中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," March 6, 2019, http://www.senior-rm.com/detail.aspx?nid=17&pid=358&tid=0&id=30717 (accessed December 3, 2020) (noting that in the financial industry, both foreign-funded and domestic-funded banks have set up compliance department as demanded by the requirements of the banking regulation commission, and the bigger banks may have multiple compliance positions due to the businesses or regulatory requirements).
[206] For the top PRC firms in the compliance area, see The Legal 500, Regulatory/Compliance: PRC Firms, https://www.legal500.com/c/china/regulatorycompliance-prc-firms/ (accessed September 2, 2022).
[207] Nengzi Shi, et al, Deloitte, "依法治企 合规经营: 国企改革系列白皮书之六 (Corporate Regulation According to Rule of Law, Business Operation Based On Compliance: The VI in the Series of State-owned Enterprises Reform)," March 27, 2017, https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/process-and-operations/deloitte-cn-soe-transformation-issue-6-zh-170327.pdf (accessed December 4, 2020), at 9 (noting that the compliance management of domestic enterprises is still in the primary stage); Jun Xue, et al,

invested corporations have an independent compliance department and a Corporate Compliance Officer (CCO) who has a great say in major corporate decisions, the percentage for China's SOEs is only 17%.[208] The lack of an independent compliance department or CCO indicates the marginalized role of compliance in a corporation, leading to ineffective compliance management and coordination.[209] In terms of the compliance activities, domestic enterprises often pay more attention to compliance training and compliance support for the business operation. Most enterprises don't have comprehensive, systematic and workable policies and procedures tailored to their risk profile and structure, and compliance training is often nothing more than a formality.[210] Regarding the technology used for compliance management, over one third of domestic firms being surveyed do not have any information system or tool for the prevention and detection of crimes or the assessment of the effectiveness of the compliance program.[211]

7.6.3 Legal, Economic and Cultural Roots for China's Undeveloped Compliance

As shown in the previous Section, the trend of compliance is just emerging in China, and the level of development is generally low and unevenly spread across enterprises and industries. The underdeveloped corporate compliance in China may be attributed to a series of legal, economic and cultural factors. According to the 2018 Report on the Corporate Compliance External Environment released by *Compliance In China*, 47% of the surveyed enterprises believe that the external environment conducive to compliance development is absent.[212]

In terms of the legal factors, corporations in China are generally faced with low risks of criminal sanctions, while the existence of a corporate compliance program is not a formally recognized determinant of corporate liability. As discussed in Chapter 2, corporations engaging in bribery schemes face an extremely low probability of being prosecuted or convicted in China, and the criminal penalty is generally petty even if they are actually convicted.[213] According to a report published by EY regarding the top 10 risks perceived by multinational corporations, regulation and compliance risk ranks the first among international firms but only 7th among Chinese firms.[214] An effective compliance program is not only expensive to implement and maintain, as already discussed in Chapter 6, but may expose corporate misconduct more easily and subject

"中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," March 6, 2019, http://www.senior-rm.com/detail.aspx?nid=17&pid=155&tid=0&id=30716 (accessed December 3, 2022) (claiming that they did not find well-designed compliance program in any domestic-funded corporation, which is possibly because that the building of compliance management is in the infancy stage in most of the domestic corporations).

[208] Nengzi Shi, et al, Deloitte, "依法治企 合规经营: 国企改革系列白皮书之六 (Corporate Regulation According to Rule of Law, Business Operation Based On Compliance: The VI in the Series of State-owned Enterprises Reform)," March 27, 2017, at 7.

[209] Jun Xue, et al, "中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," March 6, 2019, http://senior-rm.com/detail.aspx?nid=17&pid=155&tid=0&id=30717 (accessed December 4, 2022) (noting that most enterprises don't have a unified compliance management department, leading to unclear responsibilities and low efficiencies, and the senior managers that are responsible for multiple tasks may overlook compliance out of departmental interests).

[210] *Ibid* (noting that most corporation policies don't have effective accountability mechanism to discipline the violations; and some enterprises may copy other company's compliance program or the regulatory rules).

[211] Nengzi Shi, et al, Deloitte, "依法治企 合规经营: 国企改革系列白皮书之六 (Corporate Regulation According to Rule of Law, Business Operation Based On Compliance: The VI in the Series of State-owned Enterprises Reform)," March 27, 2017, at 12.

[212] Litong Chen, "企业合规外部环境报告 2018 (Report on External Environment for Corporate Compliance 2018)," *Compliance in China*, February 5, 2019, https://www.sohu.com/a/293424379_733746 (accessed December 5, 2022).

[213] See Chapter 2, Section 2.3.1.

[214] "安永报告：监管与合规是银行最应关注的风险 (EY Report: Banks Lay Greatest Importance to the Risk of Regulation and Compliance)," December 15, 2011, http://www.chinanews.com/fortune/2011/12-15/3535448.shtml (accessed December 4, 2022) (in its first-ever Chinese version of Top 10 Business Risks and Opportunities, EY noted that regulation and compliance ranked first among international enterprises, while Chinese enterprises perceive new technology as their biggest risks).

the corporation to higher risks of enforcement actions and reputational loss.[215] Moreover, the existence or effectiveness of a corporate compliance program does not have a legally recognized role in the criminal context in terms of affecting the Procuratorate's charging decisions or reducing the magnitude of the corporate fine following the conviction.[216] Therefore, the enterprises often find it more rewarding to develop cover-up schemes than to invest in an expensive and possibly self-detrimental compliance program.[217]

In terms of the economic factor, the major presence of SOEs in China's socialist market economy, accounting for around 30% of China's GDP, further explains the sluggish compliance development in China.[218] SOEs enjoy a monopoly status in many of China's capital- or resource-intensive industries, such as the finance, tele-communication, transportation, construction, military and energy industries, and are a leading force in the overseas investment.[219] However, SOEs generally operate in an opaque manner due to the lack of modern corporate governance structure and concerns of state secrets, creating abundant opportunities for the occurrence of bribery.[220] Meanwhile, the senior staff and executives of SOEs typically receive a fixed and petty salary, compared to the huge authority and discretion they exercise in making procurement and investment decisions. They are thus particularly vulnerable to the temptation of bribery and corruption.[221] In addition, unlike the private enterprises, Chinese SOEs are generally faced with much lower risks of enforcement actions as a result of their close links with the state and their strategic importance to the economy and the politics.[222] All factors combined, it is not a surprise that SOEs and their management are reluctant to enforce strict internal control rules or to invest

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[215] For the costs of corporate compliance program, see Chapter 6, Section 6.3.1.2; Harvey L. Pitt, and Karl A. Groskaufmanis, "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct," *Georgetown Law Journal* 78, no. 5 (1990): 1593 (using the Greek fable of Sisyphus to demonstrate that "companies adopt extensive programs beyond the norm of other American companies only to be mired in a series of public scandals").

[216] Ruihua Chen, "企业合规制度的三个维度——比较法视野下的分析 (Three Dimensions of Corporate Compliance System: Analysis from the Perspective of Comparative Law)," *比较法研究 (Journal of Comparative Law)*, no. 3 (2019): 76 (claiming that without incentives in the criminal context, barely no enterprises will take compliance seriously, let alone investing money and time in building or improving their compliance program).

[217] Jun Xue, et al, "中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," March 6, 2019, http://senior-rm.com/detail.aspx?nid=17&pid=155&tid=0&id=30717 (accessed December 4, 2020) (claiming that the fact that uncompliant enterprises don't get sanctioned is unfair to enterprises playing by the rules and detrimental to the development of corporate compliance management).

[218] Zoey Ye Zhang, "China's SOE Reforms: What the Latest Round of Reforms Mean for the Market," *China Briefing*, May 29, 2019, https://www.china-briefing.com/news/chinas-soe-reform-process/ (accessed August 16, 2022).

[219] *Ibid*; OECD, *State-owned Enterprises and Corruption: What Are the Risks and What Can be Done? Highlights*, 2018, https://www.oecd.org/corporate/SOEs-and-corruption-what-are-the-risks-and-what-can-be-done-highlights.pdf (accessed August 15, 2022), at 4 (finding that oil and gas, mining, postal, energy, transportation and logistics sectors reportedly "have witnessed corrupt and other irregular practices more often than average. These sectors are the most highly regulated, are likely to have natural market monopolies and are engaged in high-value public procurement projects").

[220] Xinwen Yan, et al, "国企反腐 迎难出击 (Anti-Corruption in the Context of SOEs, Advancing in Face of Difficulties)," *中国纪检监察报* (China Discipline Inspection and Supervision), April 13, 2019, https://www.sohu.com/a/307714082_100181284 (accessed August 15, 2022) (describing that the inspection of the provincial-level SOEs in Zhejiang Province discovered that most SOEs do not follow the formal procedure and rules when making major investment decisions nor have standardized bidding procedure, and suffer high business risks).

[221] Zengke He, "Corruption and Anti-Corruption in Reform China," *Communist and Post-Communist Studies* 33 (2000): 251 (noting that "the relative reduction of officials' income … drives government officials and public institutions to seek extra income to supplement their own or their staff's relative low and fixed official salaries", which is a major cause for corruption in reforming China); Xunan Feng, and Anders C Johansson, "Underpaid and Corrupt Executives in China's State Sector," *Journal of Business Ethics* 150, no. 4 (2018): 1199–1212 (discovering that the compensation is related to the likelihood of Chinese SOE executives coming under corruption investigation).

[222] OECD, *State-owned Enterprises and Corruption*, at 5 ("[o]pportunistic behaviour leading to corruption may be derived from a "too public to fail" mentality in which SOEs are protected by their state ownership, their market dominant position or their involvement in the delivery of public services, and are insulated from the same threat of bankruptcy and hostile takeover that private companies face"); Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 236 and 240 (noting that most enterprises implicated in criminal offenses in China are private enterprises).

in the anti-corruption compliance program with the aim of preventing and detecting bribery and mitigating enforcement risks.[223]

Moreover, the prevalence of SOEs makes it more challenging for the regulatory and criminal authorities to pursue corporate compliance and structural reforms. After several rounds of corporate reforms starting in the 1990s, most Chinese SOEs have now been successfully demutualized to embrace the corporate structure.[224] Though SOEs have been granted more autonomy in making business decisions, a modern and market-based management and internal control system is absent in most SOEs.[225] The future SOE reforms are scheduled to focus on the diversified ownership, the establishment of a market-based approach to the hiring of managers, and the improvement of the level of management and the internal labor and compensation system.[226] Against the background of the nationwide SOE reform, it is unlikely that any local Procuratorate or regulatory agency would step forward to dictate how a SOE should be reformed by imposing compliance obligations or engaging in compliance monitorship. In addition, the involvement of the CPC in the SOEs in the form of Party Groups further complicates the compliance development in the Chinese SOEs.[227]

Last but not least, the culture of reciprocity is deeply entrenched in the Chinese society and there was no recognition of the concept of compliance. Under the influence of "rule by rites" in the Confucian thought, law plays only a marginal role in the governance of the society.[228] Corporations are accustomed to sending gifts during festivals to maintain relationships or to curry favor in a culture that attaches great importance to "guanxi" or connections.[229] The conflict between the traditional customs and the modern anti-bribery rules hinders the development of compliance culture in China's business community.[230] Compliance is generally viewed by the

[223] OECD, *State-owned Enterprises and Corruption*, at 4 (noting that "[i]n face of known corruption risks, SOEs generally appear less risk averse or less ready to take action than private companies").

[224] Xi Wang, "国企公司制改革打响 '收官战' (Final Battle Starting in the Corporatization Reform of State-owned Enterprises)," *Xinhua News Agency*, November 27, 2020, http://www.xinhuanet.com/2020-11/27/c_1126795764.htm (accessed December 7, 2020) (noting that at the level of central enterprises, 68 group companies supervised by SASAC of the State Council that need to be restructured had all completed the restructuring work by 2017; while for local state-owned enterprises, about 96% of the first-level enterprises supervised by SASAC at the provincial level have completed the reform").

[225] Nengzi Shi, et al, Deloitte, "依法治企 合规经营: 国企改革系列白皮书之六 (Corporate Regulation According to Rule of Law, Business Operation Based On Compliance: VI in the Series of State-owned Enterprises Reform)," March 27, 2017, at 9 (noting that the compliance management in SOEs remains at a relatively primary stage. Though the surveyed enterprises have gradually paid more attention to the compliance management under the background of SOE reform and the initiative of Running Enterprises by Law, they are still lacking in the familiarity of compliance management and effective means of compliance management).

[226] "国企公司制改革打响攻坚收官之战 (A Crucially Final Battle Starting in the Corporatization Reform of State-owned Enterprises)," December 4, 2020, http://www.sasac.gov.cn/n2588025/n2588139/c16133182/content.html (accessed December 7, 2020) (claiming that following the completion of the corporatization reform, it is necessary to further promote the internal reform, deepen the reform of internal labor, personnel and distribution system and improve the level of corporate management); For a more vivid timeline of China's SOEs reform progress and the current policies, see Zoey Ye Zhang, "China's SOE Reforms: What the Latest Round of Reforms Mean for the Market," *China Briefing*, May 29, 2019, https://www.china-briefing.com/news/chinas-soe-reform-process/ (accessed August 16, 2022).

[227] Tao, "A Study on China's Corporate Crime Enforcement," 179 ("[i]n terms of business structures, a state-owned corporation must employ a party committee representing the Chinese Communist Party to supervise daily business and compliance work"). Notably, in recent years, the CPC has also been pushing for foreign-invested firms in China to establish Party organization among their employees, see Michael Martina, "Exclusive: In China, the Party's Push for Influence inside Foreign Firms Stirs Fears," *Reuters*, August 24, 2017, https://www.reuters.com/article/us-china-congress-companies-idUSKCN1B40JU (accessed August 16, 2022).

[228] Benedict Sheehy, "Fundamentally Conflicting Views of the Rule of Law in China and the West & (and) Implications for Commercial Disputes," *Northwestern Journal of International Law and Business* 26, no. 2 (2006): 240-44 (describing that law was conceived under the Confucian tradition as the last resort when shame and respect fail).

[229] *Ibid*, at 259 ("Chinese relationships with family and friends develop into strong bonds and these special relationships, or 'guanxi,' appear to be an integral part of commercial relations in China").

[230] Jun Xue, et al, "中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," http://senior-rm.com/detail.aspx?nid=17&pid=155&tid=0&id=30717 (accessed December 5, 2020); Litong Chen, "企业合规外部环境报告 2018 (Report on

Chinese business community and even legal scholars as merely a non-violation of laws and regulations.[231] Such passive understanding of compliance runs counter to the modern concept of compliance, which requires firms to actively develop the compliance program and create compliance-based values.[232]

7.7 Conclusion

In the context of finite public enforcement resources, the state-corporation partnership is greatly needed in the enforcement of anti-bribery laws, as demonstrated in the analysis of the U.S., UK and French DPA programs in Chapters 4-6. In order to effectively incentivize corporations to join in the combating of corporate bribery, the state should provide clear, proportionate and predictable incentives for the self-policing corporations to outweigh the relevant costs, and subject other corporations to credible threats of sanctions. The prosecutors should possess sufficient capability and discretionary authority to assess and credit corporate self-policing measures and seek corporate liability, while maintaining their credibility for the delivery of the commitments and threats. Meanwhile, the state should attempt to minimize the restrictions on the corporations' ability to conduct internal investigation, which is the foundation for the corporate decisions to self-report and cooperate and for the state-corporation partnership.

The examination of China's criminal justice system and relevant laws affecting corporate investigations helps identify the reasons for the corporations' inactive role in China's anti-bribery movement. Firstly, China's criminal justice system remains fixed at the level of individualism and does not pay enough attention to corporate crimes. Under the PRC Criminal Law, the corporate criminal liability rule regarding whether corporations can be held criminally liable for individuals' misconduct is extremely narrow. Even in the case of corporate conviction, the only type of penalty available for corporations is a criminal fine, and the responsible personnel are subject to more lenient sanctions when compared with pure individual offenders. The PRC Criminal Procedure Law puts emphasis on the criminal procedure in the individual context, and fails to provide clear guidelines for the prosecution, defense and trial of corporate crimes. As a result of the challenges associated with the prosecution of corporate defendants, the leniency shown to responsible personnel, as well as the lack of formal guidance, local Procuratorates and courts are reluctant to actively pursue corporate liability in practice. Faced with low expected criminal liability, corporations generally find it more attractive to engage in lucrative bribery and detection avoidance schemes than to implement costly compliance programs or to voluntarily self-report.

Secondly, China's criminal justice system with strong inquisitorial features place heavy restrictions on the prosecutorial discretion in order to pursue the "material truth". The restricted

External Environment for Corporate Compliance 2018)," *Compliance in China*, February 5, 2019, http://complianceinchina.com/A-v.asp?ID=1703 (accessed December 5, 2020) (noting that the attention paid to favor contact in China's traditional culture discourages the fostering of compliance in China).

[231] *Ibid*; Ruihua Chen, "企业合规制度的三个维度——比较法视野下的分析 (Three Dimensions of Corporate Compliance System: Analysis from the Perspective of Comparative Law)," 61 (acknowledging that the literal meaning of compliance is not substantially different from law-abidance; however, compliance is more than law-abidance and can be understood as a means of corporate governance, a liability determinant, and a type of legal service).

[232] Jun Xue, et al, "中国企业合规管理调研报告 (Research Report on Compliance Management of Chinese Enterprises)," http://senior-rm.com/detail.aspx?nid=17&pid=155&tid=0&id=30717 (accessed December 5, 2020).

prosecutorial discretion significantly reduces the Procuratorate's bargaining chips for the negotiation with corporate defendants, and stymies the development of negotiated justice. In response to the pressure of soaring caseload on the judicial system, regimes involving the elements of negotiation and reconciliation have been developing in China. However, owing to the huge power gap between the Procuratorate and the defendants, such regimes provide only a way for the Procuratorates to consider the defendants' behavior and commitments for making the charging decisions instead of a channel for equal negotiation between the two parties. The corporations' limited control over the results of the negotiation and the destructive consequences in case of failure to settle significantly discourage corporations from voluntarily self-reporting, considering especially the credibility issue plaguing the Chinese Procuratorates.

Thirdly, China's criminal procedure is designed for the court to determine the material truth based on the public investigation. The inquisitorial understanding of criminal justice reduces the need and perceived legitimacy for the defense to conduct extensive pre-trial investigations. The defense lawyers are allowed to collect information independently in very limited circumstances. Moreover, their requests to access the Procuratorate's dossier and for the prosecuting witnesses to appear in court to stand examination are often obstructed by the authorities. Moreover, the criminal defense lawyers are exposed to a high risk of being implicated in perjury in their professional practices. Beyond the phase of criminal investigation, the corporations' incentives and ability to conduct internal investigations are seriously dampened by the absence of the common-law style legal privilege in China, and may easily run afoul of the Chinese data privacy laws and state secrets laws. As a result, corporations seldom conduct extensive internal investigations in China, which further accounts for the infrequent voluntary self-reporting and the less developed corporate compliance program.

Last but not least, a series of legal, economic and cultural factors contribute to the emerging, yet generally low-level, development of corporate compliance in China. In terms of the legal factors, the existence and effectiveness of corporate compliance program do not have a legally recognized role in the criminal context to the extent of affecting the Procuratorate's charging decisions or reducing the corporate fine following a conviction. The prevalence of SOEs in the Chinese market not only contributes to the uncontrolled bribery and corruption, but also complicates the Procuratorates' efforts to seek compliance reforms in SOEs due to their unique institutional structure and the involvement of the ruling Party. Besides, the traditional Chinese culture that advocates "rule by rites" and interpersonal relationship runs counter to the modern concept of compliance and anti-bribery laws, hindering the development of compliance culture in China's business and legal communities.

With a deep understanding of the reasons for the corporations' lack of will and ability to actively self-report, conduct internal investigations, and develop effective compliance program, the next Chapter aims to propose policy recommendations on the designing and implementation of DPAs in China. The main purpose is to effectively incentivize and facilitate corporations to join the anti-bribery movement and to foster an active state-corporation partnership in the combating of corporate bribery.

Chapter 8 Leveraging DPAs to Combat Corporate Bribery in China: Policy Recommendations

8.1 Introduction

The decade-long anti-bribery and corruption movement in China has led to a jaw-dropping high number of investigations, prosecutions and convictions and implicated even the highest-level state and Party officials.[1] As was discussed in Chapter 2, significant resources have been consumed and the entire Party-state is sometimes mobilized in the time of anti-corruption campaigns at the expense of other governance goals. However, such intensive movement fails to effectively control the endemic bribery in the society.[2] Instead, the large number of cases flooding into the criminal justice system causes great pressure on the already over-stretched judicial authorities.[3] The dilemma between the heavy caseload and the shortage of judicial personnel becomes even more pressing with the continual expansion of the Criminal Law, as well as the recent trial-centered judicial reform and the judicial personnel quota reform.[4] In addition to the concerns over the costs and effectiveness of the anti-bribery movement, the undesired collateral consequences of corporate prosecution are receiving more attention in the times of economic downturn due to the ever-heated U.S.-China trade conflicts and the Covid-19 lockdowns. The misgivings about the negative economic implications of corporate prosecution further dampen the prosecutorial incentives to prosecute bribery in the corporate context, resulting in more uncontrolled corporate bribery in reality.[5]

The booming anti-bribery enforcement actions in the U.S., UK and France can be largely attributed to the availability and prevalent use of corporate DPAs.[6] As demonstrated in Chapter 3,

[1] "Visualizing China's Anti-Corruption Campaign," *ChinaFile*, August 15, 2018, https://www.chinafile.com/infographics/visualizing-chinas-anti-corruption-campaign (accessed February 5, 2022) (using the interactive tool "Catching Tigers and Flies" to track the investigations, arrest and sentencing figures annually under the massive anti-corruption campaign launched by Xi between late 2012 and the first half of 2018); "Number of Registered Corruption Cases Involving Chinese Communist Party Officials in China from 2010 to 2020," *Statista,* https://www.statista.com/statistics/250147/number-of-curruption-cases-of-chinese-communist-party-ccp-officials-in-china/ (accessed February 55, 2022).

[2] See Chapter 2, Section 2.3.4 (finding that the sweeping and long-lasting anti-corruption movement has had little measurable effect in promoting China's ranking on the CPI, as China consistently scores around 40 out of 100 points between 2012 and 2021).

[3] Weidong Chen, "认罪认罚从宽制度研究 (On the Leniency System)," *中国法学 (China Legal Science)*, no. 3 (2016): 50-51 (describing the influx of large number of minor cases in the criminal justice system following the Criminal Law Amendments VIII and IX, and the abolishment of the labor camps); Lin Na, "案多人少：法官的时间去哪儿了 (Large Caseload versus Inadequate Persons: Where Did the Judge's Time Go)," *人民法院报 (People's Court Daily),* March 16, 2014, http://rmfyb.chinacourt.org/paper/html/2014-03/16/content_78542.htm?div=-1 (accessed March 21, 2021) (noting that with the insufficient number of judicial assistants, judges often have to devote a large amount of their valuable time to administrative work).

[4] See Chapter 2, Section 2.3.2 (discussing how the judicial reforms that aim to strengthen the court's role in the criminal proceedings and free the judges from administrative work exacerbate the existing shortage of judicial personnel).

[5] Jianming Tong, "充分履行检察职责 努力为企业发展营造良好法治环境 (Fulfill the Procuratorial Duties and Strive to Create Good Legal Environment for the Development of Enterprises)," *检察日报 (Procuratorial Daily*), September 22, https://www.spp.gov.cn/spp/llyj/202009/t20200922_480611.shtml (accessed March 30, 2021) (directing local Procuratorates to consider the pragmatic necessity of protecting business operators and promoting economic development when approving the arrest request and making charging decisions).

[6] Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," *U.C. Davis Law Review* 49, (2015): 497-565 (acknowledging that the use of NPAs and DPAs has contributed to large quantities of FCPA enforcement actions); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report United Kingdom*, 2017, para. 133 ("the 2010 Bribery Act and the introduction of DPAs in 2014, in particular, have given the SFO greater legal powers than ever before to deal with corporate offending"); OECD Working Group on Bribery, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report France*, 2021, para. 22-23 (documenting how CJIPs reinforce the France's pursuit of corporate liability for foreign bribery).

DPA presents a valuable middle ground between outright declination and the full-scale prosecution for the resolution of white-collar crimes.[7] It provides a promising solution to mitigating the challenges inherent in the enforcement of anti-bribery laws against corporations by (i) resolving corporate crimes without triggering the undesired collateral consequences of corporate conviction;[8] (ii) incentivizing corporate voluntary self-disclosure and cooperation, including cooperation in the individual proceedings;[9] (iii) extracting the corporations' acceptance of responsibility and agreement to fulfill monetary and compliance obligations;[10] and (iv) facilitating international cooperation in the fight against transnational bribery.[11] Such values of DPAs are extremely useful for Chinese enforcement authorities in terms of relieving the above-identified challenges in the combating of corporate bribery.[12] Therefore, it is proposed that the DPA mechanism should be introduced to China for the resolution of bribery and other corporate offenses.

As analyzed in Chapters 4, 5 and 6, the existence of the DPA mechanism itself does not necessarily generate the desired level of deterrence, accountability and corporate rehabilitation. Firstly, DPA, if not appropriately structured and applied to incentivize corporate self-reporting and cooperation, only offers corporations a way out of conviction without strengthening the state's ability to detect and sanction corporate crimes.[13] Secondly, the panic about the adverse consequences of corporate conviction restricts the prosecutors' choices when dealing with large corporations, thus undermining the deterrent effect of criminal enforcement.[14] Thirdly, the conclusion of corporate DPAs without holding individual wrongdoers accountable is detrimental to accountability and deterrence. Corporate executives whose own personal wealth and liberty are not at risk may perceive the DPA-imposed sanctions as merely a cost of doing business.[15] As

[7] US Justice Manual, 9-28.200 – General Considerations of Corporate Liability (noting that DPAs occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation).
[8] Assaf Hamdani, and Alon Klement, "Corporate Crime and Deterrence," *Stanford Law Review* 61, no. 2 (2008): 274 ("subjecting business entities to criminal liability carrying severe collateral consequences might, in fact, undermine deterrence").
[9] "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed July 1, 2020) ("blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme").
[10] Benjamin M. Greenblum, "What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements," *Columbia Law Review* 105, no. 6 (2005): 1882 ("deferral of corporate offenders is replacing declination, not prosecution"); Brandon L. Garrett, "Structural Reform Prosecution," *Virginia Law Review* 93, no. 4 (2007): 861 (prosecutors claim that "[w]e're getting the sort of significant reforms you might not even get following a trial and conviction").
[11] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 2019, at 37-41 (discussing the trends of settling large multi-jurisdictional cases via the non-trial resolution mechanism).
[12] See Chapter 3, Section 3.5.1 (discussing the benefits of DPAs for the authorities to the extent of overcoming the challenges in the enforcement of corporate bribery laws).
[13] Jennifer Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," in Tina Søreide, Abiola Makinwa (ed.), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Northampton, MA: Edward Elgar Publishing, 2019), 158 ("improperly designed DPA statutes can, instead, undermine deterrence if they operate primarily to reduce the sanctions imposed on companies for corporate crime").
[14] Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-first Century," *University of Pennsylvania Journal of Business Law* 15, (2013): 834 (discovering that the collapse of Arthur Andersen following conviction, which was typically used to support the corporate death penalty claim, is only possible for companies whose core business depends heavily on corporate reputation or government contracts, such as accounting firms, healthcare providers and defense enterprises); Nick Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review," *The Yale Law Journal* 128, no. 1 (2019): 1370 (contending that "when defendant companies are so large, so systemically important, and so politically powerful that prosecutors cannot credibly threaten them with a 'socially optimal' penalty, … deterrence breaks down").
[15] "IFMA's Compliance And Legal Society Annual Seminar Prepared Remarks of U.S. Attorney Preet Bharara," March 31, 2014, https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney (accessed July 22, 2020) ("[i]f a company fails to meet its revenue targets quarter after quarter, or if its stock price lags that of its peers month after month, the board will not hesitate to fire and replace the CEO. But if a company suffers compliance failure after compliance failure and faces one criminal investigation after another, the CEO might yet get a raise"); Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 8 ("[t]he

corporate criminal liability can only be incurred by the wrongdoings of individual persons, corporations would even find DPA a less attractive option if the government lacks the ability or will to establish the culpability of such individuals.[16] Lastly, corporations would have insufficient incentives to incur the costs associated with an effective compliance program if the prosecutors cannot distinguish a cosmetic compliance program from an effective one, or fail to continually monitor the company's compliance with the terms of DPA and penalize the corporations for any breaches.[17]

In order to prevent DPA from becoming a soft means that insulates corporate offenders and individual wrongdoers from criminal conviction for no substantial benefits, the U.S., UK and French authorities have introduced a series of initiatives and policies. Such initiatives aim to incentivize corporate self-reporting and full cooperation, enhance individual accountability and facilitate the assessment and monitoring of corporate compliance efforts.[18] Though none of their DPA programs can be described as perfect, the three selected jurisdictions have gained more experience in using DPAs to resolve corporate crimes than any other countries.[19] Moreover, they are undisputedly laudable in the enforcement of anti-bribery laws considering the large number of settlements involving exorbitant fines and extensive corporate compliance reform, thanks to the strategic design and implementation of DPAs, while many other jurisdictions have their foreign bribery laws and international commitments shelved and forgotten.[20] Chapters 4, 5 and 6 have respectively analyzed the corporate enforcement policies and practices in the three jurisdictions in terms of incentivizing corporate self-reporting and cooperation, holding individual wrongdoers accountable and prompting genuine corporate compliance efforts. A handful of lessons that could be valuable for China and other jurisdictions in designing and applying their own models of DPAs were identified and summarized.[21]

The success of corporate enforcement actions calls for not only the appropriate designing of the DPA mechanism itself, but also the legal system based on which the mechanism is operating.[22]

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divergence between firm-level prosecutions and the dearth of individual prosecutions has fomented a popular narrative that the government permits managers to buy their way out of trouble, using shareholder assets to avoid individual criminal penalties by agreeing to criminal settlements").

[16] "Tesco Trial Failure is Another Setback for SFO," *Financial Times*, December 9, 2018, https://www.ft.com/content/9b39865c-fba8-11e8-ac00-57a2a826423e (accessed October 8, 2021) (noting the danger of the Tesco precedent, which may discourage other companies from reaching DPAs if no real possibility of convictions exists).

[17] Dylan Tokar, "Walmart's Spend-and-Tell Strategy Paid Off in Bribery Settlement," *Wall Street Journal*, June 26, 2019, https://www.wsj.com/articles/analysis-walmarts-spend-and-tell-strategy-paid-off-in-bribery-settlement-11561585841 (accessed June 8, 2020) (Walmart had spent over $900 million in the global investigation and remediation for a period of seven years before the FCPA settlement involving $282 million in fine and restitution); Philip Inglima, "Corporate Monitors: Peace, At What Cost?" *Crowell Morning- Litigation Forecast*, January 2018, https://www.crowell.com/files/Litigation-Forecast-2018-White-Collar-Crowell-Moring.pdf (accessed October 20, 2020) ("[i]t's becoming the new normal for the costs to run well north of $30 million to $50 million over the course of three years").

[18] See Chapter 4, Section 4.5; Chapter 5, Section 5.5; Chapter 6, Section 6.5.

[19] Gibson Dunn, *2020 Year-end Update on Corporate NPAs and DPAs*, January 19, 2021, https://www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements-1.pdf (accessed June 16, 2021), at 22-23 (noting that among the jurisdictions that currently allow for DPA or DPA-like agreements, including Canada, France, Singapore, the UK and the U.S., prosecutors in Canada and Singapore have yet to enter into any agreement since their inception in 2018).

[20] OECD Working Group on Bribery, 2021 Enforcement of the Anti-Bribery Convention: Investigations, Proceedings, and Sanctions, December 20, 2022, https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2022.pdf (accessed January 10, 2023) (documenting that the U.S., France and UK have respectively sanctioned 155, 16 and 23 legal persons for foreign bribery, the top 3 of all the Parties to the OECD Anti-bribery Convention, while 19 out of the 44 member states to the OECD Anti-bribery Convention have not even sanctioned any natural or legal persons for foreign bribery despite their international commitments).

[21] See Chapter 4, Section 4.6, Chapter 5, Section 5.6, and Chapter 6, Section 6.6.

[22] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 158 ("DPAs can help deter corporate misconduct if properly structured and situated in an effective enforcement regime governing individual and corporate liability"); Jennifer Arlen, and Samuel W. Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement,"

This Chapter aims to propose policy recommendations for the designing and implementation of a Chinese model of DPAs. It also calls for the reform of relevant laws and regimes in the broader context to address the existing challenges and to combat corporate bribery in a more effective and cost-efficient way. The recommendations will refer to the U.S., UK and French experience in the application of DPAs that has proved to be effective in the enforcement against corporate crimes. Meanwhile, China's legal, economic and cultural factors identified in Chapter 7 as relevant to the state-corporation partnership, which underlies the DPA regime, will also be taken into consideration for the forming of policy recommendations.[23]

This Chapter proceeds as follows. Following the Introduction, Section 8.2 reviews the lessons drawn from the DPA policies and practices in the U.S., UK and France with special attention paid to the relevance to China's corporate enforcement practices. It reiterates the best practices identified in the previous Chapters 4-6 in terms of utilizing DPAs to induce optimal corporate self-policing measures and discusses the applicability of such practices in China. In light of the lessons drawn from the U.S., UK and France, as well as the relevant situations in China, policy recommendations are proposed in Section 8.3 regarding the improvement of China's current CNP initiative to form a Chinese version of DPA. Section 8.4 recommends the reform of the broader legal system in China, including both substantive laws and procedural basis, in order to provide a favorable environment for the smooth functioning of the CNP. Section 8.5 concludes.

8.2 Findings: Lessons from the DPA Policies in the U.S., UK and France for China

As identified in Chapter 2, the Chinese authorities are faced with many challenges in the criminal enforcement against corporate crimes. Such challenges include the shortage of the enforcement resources and judicial personnel, the scruples about the economic implications of corporate prosecutions, as well as the undeveloped corporate compliance.[24] The introduction of a Chinese version of DPA is believed to be helpful for addressing many of these challenges.[25] For developing a Chinese model of DPA, the existing CNP that was introduced to promote corporate compliance development and minimize the undesired economic consequences of corporate conviction could form a valuable basis.[26] Though the goals of China's CNP are similar to the justifications for the DPA programs in the U.S., UK and France, the CNP falls short of other rationales that are fundamental for the introduction and application of DPAs.[27] For instance, incentivizing corporate voluntary self-reporting and cooperation and seeking individual accountability are key goals of DPAs, but are not found in the CNP. Moreover, the CNP is relatively flawed in making sure that the corporations develop an effective corporate compliance program. Based on the analysis of the key elements of the U.S., UK and French corporate enforcement policies in Chapters 4, 5 and 6, this Section will reiterate some useful lessons drawn

Southern California Law Review 93, (2020): 713-27 (identifying the laws and systems governing the corporate ability to conduct efficient investigations as the background laws for the corporate liability regimes and public enforcement).

[23] See Chapter 7, Sections 7.2-7.6.

[24] See Chapter 2, Section 2.3 (identifying the practical difficulties and scruples of corporate investigations and prosecutions in China).

[25] See Chapter 3, Section 3.5.1 (discussing the potential values of DPA for tackling corporate enforcement challenges in China).

[26] See Chapter 2, Section 2.4 (discussing the introduction and design of the CNP in China).

[27] See Chapter 3, Section 3.5.2 (clarifying the key differences between China's CNP and the DPA regime).

from their experience and examine their values for designing a Chinese version of DPAs and the complementary regimes.

8.2.1 Using DPAs to Incentivize Corporate Self-reporting and Cooperation

Compared with the public enforcement agencies, corporations are generally more efficient in detecting corporate wrongdoings, identifying individual wrongdoers and gaining access to the relevant employees and information without the same level of procedural restraints.[28] By incentivizing corporations to voluntarily self-report and cooperate, the costs of public monitoring and enforcement can be reduced and the overall efficiency can be increased.[29] As discussed in Chapter 2, the Chinese authorities are suffering from an acute shortage of enforcement resources and judicial personnel, partially owing to a wave of high-scale anti-bribery campaigns.[30] If the authorities are serious about combating bribery in the corporate context, incentivizing corporations to join in the fight against bribery in the form of voluntary self-disclosure and full cooperation should be set as a major goal of China's DPA program.[31] As identified in Chapter 7, under China's individualistic criminal justice system, the corporations' potentials for assisting in the prevention, detection and investigation of corporate wrongdoings are largely overlooked and not effectively utilized.[32] The individualistic criminal justice system and enforcement practices have resulted in the corporations' inactive role in China's anti-bribery movement.[33] Therefore, recognizing the value of corporate self-policing measures and reforming the individualism-centered criminal justice system are crucial for the success in the combating of corporate bribery.

In order to effectively incentivize corporations to voluntarily self-report and fully cooperate, a carrot-stick approach is needed. Given the corporations' aversion to the lengthy criminal procedure and the destructive collateral consequences of criminal conviction, access to a DPA gives corporations great incentives to act in accordance with the authority's expectations.[34] It was discussed in Chapters 4 and 5 that the corporate self-policing measures of compliance monitoring, voluntary self-disclosure and cooperation often occur in sequential order, and the corporate cooperative and compliance efforts may differ in scope and value.[35] In order to induce corporations to take all the self-policing measures to the fullest extent, the incentives under the

[28] John C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79, no. 3 (1981): 408 ("(the firm) has an existing monitoring system already focused on (the misconduct), and it need not conform its use of sanctions to due process standards").

[29] John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," *Michigan Law Review* 80, no. 7 (1982): 1480 (noting that under the enforced self-regulation, business operators would bear more of the enforcement cost); John T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement," *Law and Society Review* 18, no. 2 (1984): 184 ("agencies can shift scarce monitoring and prosecutorial resources from cooperative firms to bad firms, thereby increasing, through deterrence, the level of compliance among bad firms").

[30] See Chapter 2, Section 2.3.2 (discussing the dilemma between the mounting cases and the chronic shortage of judicial personnel).

[31] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 165 (proposing three goals of corporate liability in order to deter corporate crimes: ensuring corporations want to prevent misconduct; inducing corporate self-reporting, full cooperation, and remediation; and deterring individuals from committing corporate misconducts).

[32] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," *法学杂志 (Law Science Magazine),* no. 1 (2021): 61-62 (noting that the individualistic nature of China's Criminal Law and incomplete and problematic entity crimes system have impeded the efforts of leveraging CNP to incentivize corporate compliance and cooperation).

[33] See Chapter 7, Section 7.2.1 (noting that China's criminal justice system remains fixed at the level of individualism).

[34] Greenblum, "What Happens to a Prosecution Deferred?" 1884-89 (discussing the advantages for firms to negotiate a DPA, including eliminating the invocation of collateral consequences following criminal conviction).

[35] See Chapter 4, Section 4.2.1 (noting that corporate self-reporting is generally expected to be followed with cooperative and remedial activities); Chapter 5, Section 5.4.3.2 (noting that unlike the binary decision of self-reporting, corporate cooperation could vary in breadth and thoroughness, impacting the distribution of enforcement costs between the state and the corporations).

DPA program should be clear, predictable and proportionate to the quality and extent of corporate self-policing measures.[36]

On the one hand, the incentives of DPAs are only appealing and effective if the alternative threats of detection and criminal conviction are credible and substantial.[37] In order to pose significant threats to the extent of forcing corporations to actively monitor and self-report bribery violations, the authority should strive to enhance its own ability and will to detect and sanction corporate bribery and penalize corporations failing to engage in effective self-policing measures.[38] In this sense, continual public efforts in improving the whistleblower mechanism, reforming the restrictive anti-bribery laws and corporate liability rules, and alleviating the excessive panic about the adverse consequences of corporate prosecution are critical to ensuring the appeal of DPAs.[39]

However, as examined in Chapter 7, neither sticks nor carrots are adequate in the Chinse legal system for the purpose of incentivizing corporate self-policing measures.[40] It was noted that corporations are faced with an extremely low probability of being prosecuted for bribery violations in China owing to the incomplete anti-bribery legal rules, restricted corporate criminal liability rule, as well as the economic and diplomatic concerns about corporate prosecution.[41] Though self-reporting is encouraged under the Chinese laws, the benefits for self-reporting corporations are rather limited and uncertain. Under the Chinese legal system, there is no formal means for corporations to escape conviction or to obtain a coordinated multi-jurisdictional settlement. Besides, the court enjoys broad judicial discretion in the sentencing stage owing to the broad law and the absence of sentencing guidelines especially designed for organizations.[42] Without credible threats and appealing benefits, corporations have few motives to incur the costs and risks associated with self-reporting and the ensuing cooperative and remedial measures.[43] In order to effectively encourage corporate self-policing activities, it is necessary to ensure that the incentives provided under the DPA regime are clear, predictable and proportionate. Besides,

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[36] Jennifer Arlen, "Corporate Criminal Liability: Theory and Evidence," in *Research Handbook on the Economics of Criminal Law*, eds. A. Harel and K. Hylton (Northampton, MA: Edward Elgar, 2012), 177 (proposing that the state shall impose a duty on the firms to monitor optimally: "firms with detected wrongdoing should face an additional special sanction if, but only if, they fail to self-report detected wrongdoing, and an additional, and very serious, sanction if, but only if, they fail to cooperate fully with the government's enforcement efforts").

[37] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 82 (the "carrot and stick" approach demonstrates that the resolution systems can only work where "a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public"); Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 165 ("absent liability, companies have little incentive to either invest in a full investigation or to incur the reputational and other risks associated with self-reporting").

[38] Ruihua Chen, "论企业合规的中国化问题 (On the Issues of the Sinicization of Corporate Compliance)," *法律科学 (Science of Law)*, no. 3 (2020): 45 (questioning the incentives of Chinese enterprises to spend energies and time in implementing or improving compliance program if they will only pay petty criminal fine after conviction).

[39] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 168-177 (stressing also the role of broad corporate liability rule, sufficient funding to the enforcement agency and effective whistleblower program in forcing firms to self-disclose and cooperate); Caroline Binham, "Call to Make Companies Liable for Failure to Prevent Fraud," *Financial Times*, June 5, 2013, https://www.ft.com/content/4900db34-cdf4-11e2-a13e-00144feab7d (accessed April 5, 2020) (David Green, the former director of the SFO, calls for the extension of the identification doctrine, and believing the form will assist in the application of DPA, claiming that "if a corporate can't be prosecuted, why should it agree to a DPA?"); Transparency International, "A Failure of Nerve: The SFO's Settlement with Rolls Royce," January 19, 2017, https://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/ (accessed November 4, 2019) (criticizing that the adverse consequents as a result of criminal conviction were vastly overplayed in the DPA consideration).

[40] See Chapter 7, Section 7.4 (addressing the question of why corporations are reluctant to self-report to Chinese authorities).

[41] *Ibid.*

[42] *Ibid.*

[43] William S. Laufer, "Corporate Prosecution, Cooperation, and the Trading of Favors," *Iowa Law Review* 87, no. 2 (2002): 644-45 (praising the carrot and stick approach in the U.S. Sentencing Guideline and Prosecution Guideline for being necessary to "encourag[e] businesses to join the government in the battle against corporate crime").

complementary regimes that pose credible threats of detection and sanctions for corporations failing to adopt full self-policing measures are indispensable.[44]

8.2.2 Taking Advantage of DPAs to Strengthen Individual Accountability

Another valuable lesson is that corporate DPAs involving hefty corporate fines and extensive corporate compliance obligations do not eliminate the necessity for seeking individual liability.[45] Holding individual wrongdoers accountable is important for the sake of deterrence, accountability and fairness, especially in the context of corporate DPAs where the corporate sanctions and reputational costs are reduced.[46] Under China's CNP, however, the significance of individual accountability has neither been realized nor actively pursued by the authorities. The CNP is designed to resolve both corporate charges and individual charges.[47] Even in the cases where the CNP is applied to the settlement of corporate charges, both corporations and responsible personnel might receive a non-prosecution decision following the successful completion of the CNP.[48] With application to individual charges and responsible personnel, the CNP risks being reduced to a soft approach to resolve corporate crimes or a tool to protect the powerful companies and executives from criminal punishment.[49] It is thus claimed in this thesis that individual accountability should be a key element of the CNP and individuals should be excluded from its scope of application.

The experience of the U.S., UK and France in the use of corporate DPAs to promote individual accountability could be valuable for the improvement of China's CNP. The relative advantages and shortcomings of the government versus the corporations in pursuing individual liability were analyzed in Chapter 5.[50] It was concluded that for the purpose of economizing on the enforcement resources, the state should foster a mixed enforcement approach involving both the public actors and corporate actors to individual accountability. With the incentives of DPAs as well as the threats of public monitoring and enforcement actions, corporations could be induced to discipline relevant individuals internally and to assist in the public investigations into individual wrongdoers.[51] In order to encourage corporations to fully cooperate, the incentives provided should be proportionate to the costs of corporate cooperative efforts.[52] In this sense, the DOJ's "all or nothing" policy could significantly increase the scope and costs of corporate internal investigations and weaken the corporate incentives to provide other forms of cooperative

[44] See Chapter 4, Section 4.4.3 (proposing a carrot-stick approach for incentivizing corporate self-reporting); Chapter 5, Section 5.4.3.2 (discussing the application of the carrot-stick approach to encourage corporate cooperation with the state in pursing individual accountability).
[45] See Chapter 5, Section 5.2.2 (noting that the DPA regimes in the three jurisdictions all demonstrate a clear emphasis on individual accountability); Section 5.3.1 (identifying the values of pursuing individual liability in the context of corporate DPAs).
[46] See Chapter 5, Section 5.3.1 (identifying the values of pursing individual liability in the context of corporate DPAs).
[47] See Chapter 2, Section 2.4.3.1 (discussing the scope of application of the CNP).
[48] See Chapter 2, Section 2.4.1 (discussing the general design of the CNP).
[49] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 63 (noting that DPAs were introduced to protect innocent third-parties from the collateral consequences of corporate conviction, instead of protecting the responsible personnel; the application of the CNP to individuals would lead to "replacing criminal penalties with administrative fine" and "the inconsistence between crimes and punishments", which would undermine China's criminal legal system); Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 85 (criticizing the application of the CNP to individual crimes, as enterprise compliance does not equate to entrepreneur compliance).
[50] See Chapter 5, Section 5.3 (discussing that the challenges confronting the government in identifying and prosecuting individual wrongdoers for corporate bribery, as well as the values and limits of relying on the corporations to sanction individuals internally).
[51] See Chapter 5, Section 5.4.
[52] See Chapter 5, Section 5.4.3 (identifying the potential costs borne by the corporations that cooperate in the individual proceedings, and arguing that corporations shall be provided with credits that are proportionate to the extent of cooperation in order to induce thorough corporate internal investigations and full cooperation in the prosecution of individual wrongdoers).

measures.[53] Though the external monitoring is necessary to ensure genuine corporate measures, prosecutors should refrain from interfering in the specific measures and steps of corporate internal investigations. Such interference risks turning corporate investigators into the *de facto* state agents and subjecting them to burdensome due process restrictions.[54] When defining and rewarding corporate cooperation, waiver of legal privileges is particularly emphasized by the authorities as it facilitates the prosecutors' access to key information and assessment of corporate cooperation.[55] However, such a waiver could lead to the loss of privileges to third parties and expose the corporation to private lawsuits and public enforcement actions, and may thus restrict the corporate incentives to be forthcoming to the prosecutors.[56] On the other hand, as identified in Chapter 7, the absence of formal acknowledgement of the attorney-client privilege in China subjects corporations to similar risks and discourages corporate internal investigations and cooperation.[57]

8.2.3 Utilizing DPAs to Promote Corporate Compliance Development

One area of common ground between China's CNP and the foreign DPA programs is the goal to promote corporate compliance development.[58] In order to force corporations to develop an effective compliance program, prosecutors not only consider the adequacy of the existing corporate compliance program in their charging or settling decisions. Also, prosecutors may directly impose compliance duties and external compliance monitorships on the corporations under the terms of DPAs.[59] As analyzed in Chapter 6, compliance obligations and monitorships are desirable to the extent that they complement corporate fine and individual liability in generating deterrence and promoting corporate rehabilitation.[60]

In terms of utilizing corporate DPAs to promote corporate compliance, two issues are critical. Firstly, prosecutors are generally trained for criminal prosecution and lack the expertise in assessing the effectiveness of a corporate compliance program.[61] They may end up crediting a window-dressing corporate compliance program or demanding excessive compliance measures, neither of which is socially desirable.[62] In response, a series of guidelines have been issued by the U.S., UK and French authorities, enumerating issues and questions that prosecutors should

[53] See Chapter 5, Section 5.5.1 (analyzing the "all or nothing" approach adopted by the DOJ, which conditions the awarding of any cooperation credits on the corporate efforts to identify all individuals involved in or responsible for the alleged wrongdoing).
[54] See Chapter 5, Section 5.4.3.2 (arguing that it is necessary to maintain appropriate distance between public enforcers and corporate investigators to ensure the individuals' motivation to cooperate with corporate investigators and to prevent the application of burdensome criminal procedural rules to corporate internal investigations).
[55] Memorandum from Deputy Attorney General Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations*, January 20, 2003, at 7 ("[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation").
[56] See Chapter 5, Section 5.5.2.
[57] See Chapter 7, Section 7.5.2.1 (noting that the absence of protections equivalent to the common-law attorney-client privilege in China dampens the corporate incentives and ability to conduct internal investigations).
[58] See Chapter 3, Section 3.5.2 (comparing China's CNP with foreign DPA programs in general).
[59] See Chapter 6, Section 6.2.1 (introducing the roles of corporate compliance program in the criminal proceedings in the U.S., UK and France, and how the authorities in these jurisdictions monitor the corporations' implementation of DPA-imposed compliance obligations).
[60] See Chapter 6, Section 6.3 (discussing the social values of compliance obligations and monitorships).
[61] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1402 (noting that prosecutors can usually evaluate corporate compliance program "only by proxy measures and through relationships of credibility and trust").
[62] K. D. Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," *Washington University Law Quarterly* 81, (2003): 491-93 (claiming that the current legal regime that "places an overwhelming and steadily increasing importance on internal compliance structures as a liability determinant" may cause two problems: "(1) an under-deterrence of corporate misconduct and (2) a proliferation of costly—but arguably ineffective—internal compliance structures").

consider when assessing a corporate compliance program.[63] Such guidelines not only help prosecutors to make informed charging decisions, but also offer corporations a valuable roadmap for building the compliance programs that conform to the authorities' expectations.[64] In contrast, although China's Procuratorates are allowed under the CNP to make a non-prosecution decision based on the enterprises' compliance commitments and efforts, there is not yet any official guideline or benchmark for the assessment of corporate compliance programs. In order to promote genuine corporate compliance reforms via the CNP, the development of compliance evaluation guidelines drawing lessons from the best practices in the international compliance world is necessary.[65]

Secondly, prosecutors rarely have sufficient resources, or the will, to continually monitor the corporate compliance progress. It normally takes a few years for corporations to develop or improve the compliance program as specified in the DPAs and test the effectiveness of the compliance program.[66] To address the prosecutorial deficiency in this aspect, corporate self-reporting and external monitorships are resorted to by prosecutors to keep track of the corporate compliance progress without significantly increasing the monitoring costs.[67] In terms of the external monitorships, special attention has been paid to the monitor's expertise, independence and incentives for carrying out high-quality monitorships, as well as the costs of monitorships.[68] Moreover, the monitorships generally last for 2 to 3 years to make sure that the corporate compliance program is reasonably designed and implemented and is proved effective in detecting and preventing relevant corporate wrongdoings.[69]

Under China's CNP, a third-party organization is responsible for inspecting and assessing the compliance progress in the relevant enterprise and reporting to the Procuratorate.[70] The third-party organization normally consists of professionals selected from a specially established directory and would inspect the compliance progress at the relevant enterprise for 1-3 months.[71] The extent to which such a short inspection period could improve the corporate compliance

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[63] See Chapter 6, Section 6.4.1 (discussing the compliance evaluation guidance or compliance program guidelines issued by the DOJ, SFO and AFA).

[64] Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (NY: Oxford University Press, 2019), 157 (noting that the guidance from enforcement authorities on the development of corporate compliance program "might serve as substitutes for individualized professional advice, particularly for small and medium-sized firms").

[65] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91-94 (calling for the issuance of special compliance guideline for enterprises in different industries, against which the assessment of corporate compliance development is possible).

[66] Jennifer Arlen, and Marcel Kahan, "Corporate Governance Regulation through Non-prosecution," *University of Chicago Law Review* 84, no. 1 (2017): 349 ("prosecutors often lack the resources or incentives to provide ongoing assessments of the policing measures they impose").

[67] See Chapter 6, Section 6.2.2 (introducing the monitoring mechanisms adopted by the three selected jurisdictions to oversee the corporate compliance enhancements required pursuant to DPAs).

[68] See Chapter 6, Section 6.5.3 (comparing public monitorships found in France with the private monitorships adopted in the U.S. and UK).

[69] Vikramaditya Khanna, "Reforming the Corporate Monitor?" in Anthony S. Barkow & Rachel E. Barkow eds., *Prosecutors in The Boardroom: Using Criminal Law to Regulate Corporate Conduct* (NY: New York University Press, 2011): 229 (noting that the duration of the monitoring assignments varies between one and three years, while some may reach up to five years); Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, on *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies*, October 28, 2021, https://www.justice.gov/dag/page/file/1445106/download (accessed November 1, 2022), at 4 ("[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship").

[70] See Chapter 2, Section 2.4.3.3 (discussing the third-party supervision system).

[71] Xiaozheng Li, "企业合规不起诉的中国实践（二） (The Chinese Practice of Enterprise Compliance Non-prosecution)", King & Wood Mallesons, January 11, 2022, https://www.kwm.com/cn/zh/insights/latest-thinking/china-s-practice-of-non-prosecution-by-enterprise-compliance-with-2.html (accessed May 19, 2022) (noting that most of cases to which the CNP applies includes an inspection period of 1-3 months with few exceptions, and no cases includes an inspection period of over 1 year).

program is questionable.[72] In order to reward only genuine compliance efforts under the CNP, it is necessary to make sure that the compliance monitorships last for a sufficiently long period of time.[73]

8.3 Policy Recommendations: Improving CNP to Form a Chinese Version of DPA

Having identified the useful lessons for China from the corporate enforcement policies and practices in the U.S., UK and France, this Section aims to propose policy recommendations for the improvement of the existing pilot program of CNP to form a Chinese model of DPA. The purpose is to empower the Chinese authority to overcome the corporate enforcement challenges and combat corporate bribery in a more cost-effective way. For the proposal of policy recommendations, the factors identified in Chapter 7 that explain the less active role played by the corporations in China's anti-bribery movement will be borne in mind.

The reasons for using CNP as the basis for a Chinese version of DPA lie not only in the similarities shared between the two mechanisms in terms of the goals and rationales. Moreover, the Chinese leadership's support for CNP, as well as the Procuratorates' accrued experience in the experimentation of CNP and the development of the ancillary third-party compliance inspection program play another important role.[74] A DPA program developed based on the existing CNP is more likely to win the support from the Chinese legal actors than a totally novel settlement mechanism, considering the traditional resistance to negotiated justice in the Chinese legal culture.[75] Notably, CNP diverts from the DPA programs in the U.S., UK and France in several key aspects. For example, the inadequate attention paid to the goals of deterrence and individual accountability, and the immature compliance monitoring mechanism may make CNP less effective to achieve the deterrent or rehabilitating goals of corporate criminal enforcement.[76] In order to improve China's CNP and make it an effective tool to resolve corporate criminal matters, the following recommendations are proposed:

8.3.1 Goals of CNP: Beyond Rehabilitation and Efficiency

As a prosecutorial tool to resolve corporate crimes, CNP should be designed to achieve the general goals of criminal law. The goals of criminal law include punishing criminals and deterring future wrongdoings, protecting the public from criminal misconduct, rehabilitating the

[72] See Chapter 2, Section 2.4.3.3 (noting that many key issues regarding the third-party supervision system remain crudely addressed or totally undefined, which is unlikely to achieve meaningful compliance changes in the enterprises at issue).
[73] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 64 (claiming that efficiency shall not be the overriding aim of the CNP, especially when it comes to the designing of the inspection period and the calculation of public enforcement costs).
[74] See Chapter 2, Section 2.4 (discussing the SPP's efforts of promoting the pilot program of the CNP around the country); See Chapter 3, Section 3.5.2 (noting that similar to the DPA program, CNP is also justified by the necessity to mitigate the negative externality of corporate prosecution and promote corporate compliance reform).
[75] See Chapter 7, Section 7.3 (discussing the skepticism over negotiated justice in China's criminal justice system with heavy inquisitorial features).
[76] See Chapter 3, Section 3.5.2 (noting that the Chinese authority shows little passion about incentivizing corporate voluntary self-disclosure and cooperation, or pursing individual liability in the context of corporate resolution, while identifying several key differences in the design between China CNP and the DPA programs in the U.S., UK and France).

bad actors, and providing restitution for the victims.[77] In view of the existing corporate enforcement challenges confronting the Chinese authorities as identified in Chapter 2, CNP should be designed and applied with the primary aim of (i) complementing the public enforcement resources, (ii) reducing the caseload pressure on the judicial personnel, (iii) minimizing the undesired collateral consequences of corporate prosecution, and (iv) promoting the development of corporate compliance programs.[78]

8.3.1.1 Rehabilitation Only is Not Enough

Some Chinese scholars have claimed that CNP is rooted in the restorative justice and rehabilitation, while dismissing retribution and deterrence as valid goals.[79] Accordingly, the pursuit of the corporate financial penalty and individual liability is considered as expendable element that can be sacrificed for the promotion of corporate compliance development.[80] However, as shown below, the sole emphasis on corporate rehabilitation through fostering compliance development is hardly enough for the prevention of corporate crimes.

Firstly, as pointed by Polinsky & Shavell, a general rule for the use of sanctions is to use the socially more expensive sanctions only if the deterrent effect of the less expensive sanctions has been exhausted and more deterrence is needed.[81] Compared with the fine that involves merely the transfer of payments, non-monetary sanctions are traditionally not favored by law and economics scholars.[82] Non-monetary sanctions are believed to be less cost-effective as they typically involve higher assessment and supervisory costs, have attenuated connection with corporate profits and trigger intrusive governmental interference in the corporate business.[83] In terms of forcing corporate compliance changes via negotiated settlements, as already analyzed in Chapter 6, prosecutors rarely have sufficient resources or expertise to continually monitor corporate compliance efforts for years or to distinguish a cosmetic compliance program from an effective one.[84]

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[77] The PRC Criminal Procedure Law, Article 2 (claiming that the objectives of the Law are to ensure the accurate and timely finding of criminal facts and correct application of law, punish criminals, ensure that innocent people are not incriminated, raise citizens' awareness of abiding by law and combating crimes, safeguard the socialist legal system, respect and protect human rights, protect the personal rights, property rights, democratic rights and other rights of citizens, and ensure smooth socialist construction).

[78] See Chapter 2, Section 2.3 (identifying the practical difficulties and scruples of corporate investigations and prosecutions in China).

[79] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," *中国法学 (China Legal Science)*, no. 6 (2020): 241-242 (claiming that the Procuratorial organ abandons the rationales of retribution and deterrence in the promotion of the CNP. Instead, the prevention of crime is emphasized as the primary goal).

[80] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 62 (justifying the seemingly excessive leniency under the CNP, compared with the U.S. DPA system, through its rationale of restorative justice instead of deterrence and the fact that most enterprises implicated in the criminal cases in China are small and medium-sized private enterprises).

[81] A. Mitchell Polinsky, and Steven Shavell, "The Optimal Use of Fines and Imprisonment," *Journal of Public Economics* 24, no. 1 (1984): 90 ("[w]hen fines and imprisonment are used together, … it is desirable to use the fine to its maximum feasible extent before possibly supplementing it with an imprisonment term. This is simply because fines are socially costless while imprisonment is socially costly").

[82] Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (1968): 193 ("probation and institutionalization use up social resources, and fines do not, since the latter are basically just transfer payments, while the former use resources in the form of guards, supervisory personnel, probation officers, and the offenders' own time").

[83] Jeffrey S. Parker, "Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties," *American Criminal Law Review* 26, no. 3 (1989): 572 ("the application of nonmonetary sanctions would be a system of regulation without specific legislative mandate, administrative expertise, or clear jurisdictional boundaries, and would employ an approach of government standard-setting that is likely to be inappropriate and ineffectual in dealing with the problem of organizational crime"), & 523 ("the corporate offenders are motivated primarily, if not exclusively, by monetary incentives and are therefore likely to be most responsive to monetary forms of punishment which directly affect financial results").

[84] David Hess, and Cristie L. Ford, "Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem," *Cornell International Law Journal* 41, no. 2 (2008): 310-11 ("[p]rosecutors and enforcers acting on their own have neither the resources nor the mandate

Secondly, prosecutors could benefit from their traditional expertise in the individual prosecutions and directly impact the incentives of corporate executives to prevent corporate crimes.[85] Individual prosecutions can be more effective in catalyzing corporate compliance reforms than the CNP-imposed compliance obligations, if the Procuratorates do not have sufficient means to ensure that the corporations would genuinely implement such compliance obligations.[86]

In a word, by mandating only corporate compliance reforms while totally abandoning corporate fines or individual accountability, CNP may turn out to be overly burdensome for the authorities with no guarantees of successful corporate rehabilitation.[87] Moreover, the imposition of compliance obligations may present an unwelcome and unwise governmental intrusion into the normal corporate operation.[88] Therefore, apart from demanding corporate compliance reforms, sufficiently high corporate monetary sanctions and individual liability should be an integral part of the CNP for the purpose of punishing individual wrongdoers, deterring future wrongdoings and properly compensating the victims.

8.3.1.2 It is Not All about Efficiency

In spite of the dilemma between the large caseload and the shortage of enforcement resources and judicial personnel, efficiency should not be designated as the overarching goal of the CNP.[89] CNP helps mitigate the problem of inadequate enforcement resources by inducing corporate self-reporting and cooperation. As discussed in Chapters 4 and 5, corporations could increase the cost-effectiveness of the public monitoring and investigative efforts by sharing the detected wrongdoings and the results of internal investigations with the state through voluntary self-reporting and cooperation.[90] Without the trial proceedings, CNP also saves the prosecutors' time and resources associated with the criminal trial, and liberates judicial personnel from the trial of the underlying corporate crimes.[91]

On the other hand, for the purpose of triggering effective corporate compliance reforms, CNP should allow a sufficiently long inspection period to monitor the corporations' implementation of the CNP-imposed compliance obligations.[92] Compared with the rather short criminal trials in China, which generally last for only two or three hours without any cross-examination, CNP with an inspection period for years is far from an efficient option.[93] The continual monitoring and

to engage in the kind of largescale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies").

[85] Garrett, "Structural Reform Prosecution," 882 ("[p]rosecutors' expertise may lie in prosecuting individual wrongdoers and not in reform of organizations or long-term implementation of structural remedies"); Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 366 ("[i]ndividual liability imposed on managers and directors who fail to implement the required policing is, in theory, the most direct way to address policing agency costs").

[86] See Chapter 5, Section 5.3.1 (identifying the values of individual prosecution in addition to the conclusion of corporate DPAs).

[87] See Chapter 6, Section 6.4.3 (expressing concerns about the effectiveness of compliance mandate in promoting corporate rehabilitation).

[88] See Chapter 6, Section 6.4.2 (discussing the costs of compliance monitorships to corporations and the impacts on business operation).

[89] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 64 (claiming that the development of the CNP shall not be based on the existing framework of the leniency system, which mainly aims to increase the efficiency of the litigation procedure).

[90] See Chapter 4, Section 4.3 (discussing the social advantages of corporate self-reporting); Chapter 5, Section 5.3.3 (discussing the corporations' potentials for cooperating with the state in the identification and investigation of individual wrongdoers).

[91] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 22 (noting that non-trial resolutions save time-consuming trials and enable the law enforcement authorities to increase the pace of enforcement investigations, thus leading to shorter proceedings).

[92] See *supra* note 69 and the accompanying text.

[93] Weimin Zuo, "认罪认罚何以从宽: 误区与正解——反思效率优先的改革主张 (Why Leniency for the Admission of Guilt and Acceptance of Punishment: Reflections on the Efficiency First Reform Proposal)," *法学研究 (Chinese Journal of Law)* 39, no. 3 (2017): 160-75 (refuting the

assessment of a corporate compliance program also calls for more input of time, personnel and resources from the Procuratorates rather than less.[94]

In a word, though CNP may to a certain extent improve efficiency and save public enforcement resources, an over-emphasis on efficiency would sabotage the Procuratorates' efforts of promoting corporate compliance and rehabilitation.

8.3.2 A More Restricted Scope of Application

Regarding the scope of application, CNP should be applied in a more restricted context to resolve a specified number of criminal offenses between the Procuratorates and corporate offenders only. Similar to the U.S. DPA program, China's existing CNP can be broadly applied to resolve both corporate charges and individual charges with regard to almost all offenses that may be committed through the corporate entities. In practice, a list of charges could be resolved via CNP, including bribery and corruption, financial, fraud and tax crimes, product quality and safety violations, environmental crimes, and crimes against intellectual property.[95] In contrast, the UK DPAs can only be applied to settle complex economic or financial offenses, while the French CJIPs are restricted to offenses against probity, tax fraud and environment offenses. In addition, prosecutors in the UK and France are only allowed to enter into DPAs/CJIPs with organizations, but not with individuals.[96] As demonstrated below, a more limited scope of application of CNP is believed to be a more appropriate and prudent move for the Chinese authorities at the initial stage of the negotiated justice.

8.3.2.1 Type of Offenses

Unlike bribery, fraud and other financial crimes, the detection and prosecution of other types of corporate crimes tend to be less challenging for the enforcement agencies and cause less devastating collateral consequences.[97] Such corporate crimes may include product quality issues, safety violations, intellectual property and environment violations. Given the inquisitorial roots of China's criminal system and the traditional focus on individual crimes, the use of negotiated settlements to resolve corporate crimes is a brand new concept for prosecutors, lawyers and the business community.[98] As noted by Kevin Davis, the expertise and experience in corporate settlements and compliance often take a long time to develop and are not easily imported from

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efficiency goal in view of the already simplified criminal trial procedure and the defective due process protection in China's criminal justice system).

[94] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 64 (noting that CNP involving years of compliance monitoring period is more time-consuming than the normal criminal procedure in China).

[95] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," *法制与社会发展 (Law and Social Development)*, no. 1 (2022): 52 (noting that regarding the appliable type of offenses, CNP is similar to the U.S. model of DPA and can be used to resolve almost all corporate offenses, including product quality offenses, smuggling crimes, financial crimes, tax crimes and environment crimes).

[96] See Chapter 3, Section 3.4.1 (comparing the DPA programs in the U.S., UK and France in terms of the scope of application).

[97] Coffee, "'No Soul to Damn: No Body to Kick'," 390-92 (discussing the higher rate of concealment, as well as the unique legal and behavior characteristics of corporate bribery and fraud when compared with other crimes, which make it extremely difficult for the authority to detect the violations and to prove the criminal intent of the suspects); Cindy R. Alexander, and Jennifer Arlen, "Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime," in *Research Handbook on Corporate Crime and Financial Misdealing*, ed. Jennifer Arlen (Northampton: Edward Elgar Publishing, Inc., 2018), 101-02 (noting that fraud may incur high reputational costs to firms as it harms outsiders, while environmental crimes that only harm the residents in the vicinity are unlikely to trigger strong responses from the customers or suppliers).

[98] See Chapter 7, Section 7.2 (noting that China's criminal justice system remain fixed at the level of individualism); Section 7.3 (discussing the traditional skepticism over negotiated justice in China and the emerging regimes involving the elements of reconciliation and settlement).

another jurisdiction.[99] The application of CNP to all types of corporate crimes is thus likely to become extremely burdensome for the legal and business actors and may fail to achieve the desired results. In order not to render CNP an easy way for corporate offenders to avoid prosecution for a broad range of offenses, it is prudent to limit its scope of application to bribery, corruption, fraud and other complex financial crimes at the initial stage. [100]

8.3.2.2 CNP only for Organizational Offenders

It is important to note that individual wrongdoers should not be eligible for CNP. Prosecution of individuals, though being a rather demanding task for the authorities, does not entail the same degree of difficulties and collateral consequences that justify corporate DPAs. [101] More importantly, as identified in Chapter 5, holding individual wrongdoers accountable for corporate crimes, regarding which a corporation has agreed to settle, promotes significant values of accountability, deterrence and fairness.[102]

Some Chinese scholars attempt to justify the use of the CNP in the individual context by the concerns that the pre-trial detention, conviction and imprisonment of individuals could paralyze business operation.[103] One argument is that most of the companies being implicated in criminal prosecution in China are small and medium-sized enterprises that depend on one or a few core persons.[104] However, when the "core and soul" of a corporation is responsible for the corporate offenses and deserves criminal prosecution, the criminal wrongdoing tends to be pervasive within the organization.[105] In this case, the protection of both the corporation and responsible individuals from criminal conviction is hardly appropriate. Another argument focuses on the high pre-trial detention rate in China, and claims that individual prosecution in China could similarly trigger serious collateral consequences. [106] The resolution of this issue calls for enhanced judicial efforts in restricting the use of pre-trial detention and protecting the rights of private entrepreneurs in the criminal proceedings.[107] The insulation of all individual criminals in

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[99] Davis, *Between Impunity and Imperialism*, 157 ("[i]t takes time for compliance advisers to develop expertise, and expertise developed in the context of one legal and commercial culture, or even one particular industry, is not necessarily transferable to other contexts").

[100] Similar concerns also impacted the choice of the UK authority in defining the scope of application of DPAs, see UK Ministry of Justice, *Government Response to DPA Consultation*, para. 43 ("[r]espondents noted that the challenges posed in prosecuting economic crime by commercial organisations are not replicated in other areas and so an extension of DPAs to other forms of offending would not be appropriate, particularly where there is direct physical harm caused to individuals or to the environment by the commercial organisation's wrongdoing").

[101] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1378 (believing that "all criminal convictions generate harmful collateral consequences", but "individual convictions rarely produce systemic risk, layoffs, or permanent shareholder losses" that could follow corporate convictions).

[102] See Chapter 5, Section 5.3.1.

[103] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 87 (noting that the responsible personnel are typically the life and soul of the medium, small or micro enterprises; seeking conviction of responsible personnel might similarly destroy the enterprises).

[104] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2020): 62 (justifying the seemingly excessive leniency of the CNP, compared with the U.S. DPA system, through its rationale of restorative justice instead of deterrence and the fact that most enterprises implicated in criminal cases are small and medium-sized private enterprises).

[105] U.S. Justice Manual, 9-28.500 – Pervasiveness of Wrongdoing Within the Corporation ("[c]harging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management").

[106] Fenfei Li, "论企业合规检察建议 (On the Procuratorial Recommendation of Enterprises Compliance)," *中国刑事法杂志 (Criminal Science)*, no. 1 (2021): 101-02 (noting that the authority frequently takes coercive investigative measures against corporate assets or take the director of privately-owned enterprises involved in the criminal cases in custody. As a consequence, "the case is solved, but the enterprise is destroyed").

[107] Jun Zhang, 最高人民检察院工作报告 (Work Report of the SPP), March 15, 2021, https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml (accessed on March 22, 2021) (reporting that the pre-trial detention rate decreased from 96.8% in 2020 to 53% in 2020).

the corporate context from prosecution is definitely not the best solution. It would only lead to weakened individual accountability, deterrence and fairness.[108] For similar reasons, both the UK DPAs and the French CJIPs are designed to exclude individuals from their scope of application.[109] Though the U.S. DPAs could theoretically be negotiated with both organizations and individuals, in very rare cases are DPAs actually employed to settle charges against individuals.[110]

In summary, excluding individuals from the application of the CNP is needed for the purpose of generating optimal deterrence, as well as promoting individual accountability and fairness.[111]

8.3.2.3 Severity of Offenses

Despite the recommendations for a more restricted scope of application, it is also proposed that CNP should be applied to resolve corporate offenses regardless of the severity. Currently, most local Procuratorates reserve CNP for offenders charged with minor offenses, for which the responsible personnel are subject to no more than 3 years imprisonment.[112] It is feared that the resolution of more severe offenses without a criminal conviction would attract criticisms for indulging crimes or the collusion between power and money.[113] Though this concern has certain validity at the pilot stage of the CNP, it could be addressed by reforming the current lenient approach to CNP and paying more attention to deterrence and individual accountability in the implementation of CNP, which will be further discussed in the following Sections.[114]

A major aim of CNP is to engage corporations in the fight against bribery through self-reporting, cooperation and compliance enhancements, and to minimize the negative collateral

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[108] See Chapter 5, Section 5.3.1 (identifying the values of sanctioning individual wrongdoers in addition to corporate DPAs, including accountability, deterrence and fairness).
[109] UK Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations, Response to Consultation* CP(R)18/2012, October 23, 2012, para. 47 (believing that DPAs should not be used as a means for individuals to avoid being prosecuted for their crimes, as criminal prosecution and different forms of sanctions including the imprisonment are effective in dealing with individuals engaged in economic crimes).
[110] Public Citizen, *Soft on Corporate Crime: DOJ Refuses to Prosecute Corporate Lawbreakers, Fails to Deter Repeat Offender*s, September 26, 2019, 11 (noting that "the proportion of noncorporate pre-trial diversions decreased from nearly 3% in 2003 to 0.6% in 2018"); Bureau of Justice Statistics, Federal Justice Statistics, 2013 - Statistical Tables, Table 2.3, 12, https://www.bjs.gov/content/pub/pdf/fjs13st.pdf (accessed June 18, 2019) (0.7% of federal suspects received diversional agreements).
[111] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 63 (noting that CNP is not created to protect the responsible personnel from conviction, and its application to individual crimes could erode the foundation of the substantive and procedural criminal law).
[112] 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), December 16, 2020, http://www.148hb.com/newsview/8572.html (accessed April 15, 2021), Article 6, para. 1 and 3 (limiting the Compliance Inspection System to offenders, where the responsible personnel are subject to no more than three-year imprisonment, with an exemption for those being subject to 3-10 year imprisonment in the case of self-reporting, meritorious service or accessory offender); Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," *法治日报 (Legal Daily)*, September 23, 2020, https://www.spp.gov.cn/spp/zdgz/202009/t20200923_480702.shtml (accessed April 15, 2021) (noting that the application of the compliance inspection system is limited to minor enterprise cases for which responsible personnel are subject to no more than three-year imprisonment).
[113] Hongjie Tian, "刑事合规的反思 (Rethinking on Criminal Compliance)," *北京大学学报 (哲学社会科学版) (Journal of Peking University (Philosophy and Social Sciences)*) 57, no. 2 (2020): 122 (noting that due to the common public concerns over the collusion between power and money, it is difficult to imagine that the authority would expand conditional non-prosecution, which is exclusive to juvenile crimes, to severe corporate crimes punishable with hefty fine); Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (explaining the choice of applying CNP to minor crimes, which is in consistence with the judicial policy of offering leniency to minor crimes and would prevent excessive leniency to major crimes).
[114] See infra-Sections 8.3.3.3, 8.3.4 - 8.3.6.

consequences of corporate prosecutions.[115] However, restricting CNP to minor corporate crimes does not help achieve the aim. Instead, it would dampen the incentives of corporations involved in severe crimes to self-report, cooperate and remediate.[116] The enforcement authorities are faced with significant challenges when dealing with big corporations, whose offenses often cause serious social harms and whose cooperation and compliance are especially valuable to the authorities.[117] On the contrary, CNP is less useful for incentivizing small and medium enterprises to self-report and cooperate. The leaders of such companies who are responsible for making such decisions are more likely to be personally implicated in the corporate misconduct than the executives of large corporations.[118] Small and medium enterprises are also faced with relatively low expected liability and thus have fewer motives or resources to improve and implement their compliance program.[119] In addition, a criminal conviction of small and medium enterprises tends to cause less damaging consequences to the innocent third parties than the prosecution of big corporations, which reduces the need for a pre-trial resolution mechanism if it is only for small and medium enterprises.[120]

Therefore, CNP that is fixated on the minor crimes involving small and medium enterprises does little to encourage corporate self-policing and to soften the blow of corporate prosecution. It is thus necessary to relax the restrictions on the CNP's scope of application in terms of the severity of offenses.

8.3.3 When will CNP be Applied: Factors and Considerations

The SPP has not yet provided a list of factors for local Procuratorates to consider when deciding whether to initiate the CNP, nor clarified the degree of leniency that corporations could obtain by adopting the expected measures.[121] In practice, local Procuratorates often consider a series of factors concerning the corporation and the wrongdoing at issue, in a haphazard fashion, when determining whether CNP should be applied.[122] The lack of the centrally-issued and systematic prosecutorial guidance over the application of CNP reduces the predictability of the incentives

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[115] See *supra*-Section 8.2 and Section 8.3.1.

[116] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 85-86 (expressing concerns that the exclusion of enterprises involved in relatively serious crimes might undermine their incentives to reform the governance and compliance program); Emma Li, "Chinese NPAs Target the Wrong Firms," *The Global Anti-Corruption Blog*, January 3, 2022, https://globalanticorruptionblog.com/2022/01/03/chinese-npas-target-the-wrong-firms/ (accessed September 9, 2022) (claiming that the prospect of obtaining a non-prosecution is helpful in incentivizing big corporations to disclose, cooperate and enhance compliance programs, while "offering NPAs to SMEs adds little value and is costly to the government").

[117] See Chapter 4, Section 4.5.2.3 (discussing the dilemma of "too big to indict" and the implications on corporate self-policing in the UK).

[118] Emma Li, "Chinese NPAs Target the Wrong Firms".

[119] *Ibid* (noting that it is less cost-effective for the state to monitor and assist the compliance reforms in small and medium enterprises); Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," 55-56 (claiming that the CNP shall be applied to cases beyond those that are punished up to three years (minor cases), as the relevant enterprises may have insufficient willingness to reform compliance program considering the low expected penalty).

[120] Transparency International, "A Failure of Nerve: The SFO's Settlement with Rolls Royce," January 19, 2017, https://www.transparency.org.uk/a-failure-of-nerve-the-sfos-settlement-with-rolls-royce/ (accessed November 4, 2019) (criticizing that the adverse consequents of criminal conviction were vastly overplayed in the DPA consideration).

[121] Yong Li, "检察视角下中国刑事合规之构建 (The Construction of Criminal Compliance in China from the Perspective of the Procuratorate)," *国家检察官学院学报 (Journal of National Prosecutors College)*, no. 4 (2020): 107 (recognizing that there are few supporting systems for the application of the leniency system to the corporate context, such as sentencing guidelines for the enterprise crimes or the use of non-prosecution conditioned on corporate compliance development).

[122] SPP, 关于印发《企业合规典型案例（第二批）》的通知 [Notice on Distributing Typical Cases of Enterprise Compliance (the Second Batch)], December 15, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202112/t20211215_538815.shtml#2 (accessed December 23, 2021) (factors considered by Local Procuratorates include the amount of tax paid annually by the company, the company's social welfare activities, number of employees, prospect of economic development, as well as the sufficiency of incriminating evidence collected by the state).

provided under CNP, which is crucial for encouraging corporate self-policing measures.[123] A clear and strategically designed corporate prosecution guideline, which sets forth the factors impacting the Procuratorate's charging or settling decisions and provides predictable and proportionate benefits for the desired corporate measures, is fundamental to the success of CNP.[124] This Section will focus on three key factors affecting the prosecutorial decisions, i.e., collateral consequences of corporate indictment, corporate compliance program, corporate self-reporting and cooperation. As shown below, these factors are unique in the context of corporate resolution yet problematically designed or overlooked in China's CNP.[125]

8.3.3.1 Collateral Consequences

Local Procuratorates should be directed to evaluate the probability and magnitude of collateral consequences of corporate prosecution and conviction based on a list of specified factors before making their charging or settling decisions. As a general and internationally-accepted rule, the decision regarding the (non-) prosecution of bribery should not be influenced by the national economic interests, which is explicitly required in the OECD Convention.[126] However, a key rationale provided by the SPP for rolling out CNP is that corporate prosecution may lead to the collapse of the corporation and ultimately hinder the goal of economic recovery.[127] Such a rationale, which is not found in the DPA programs in the U.S., UK or France, is contrary to the requirement of the OECD Convention.[128] In contrast to the focus on the economic implications, it is proposed to justify the use of the CNP on the basis of the collateral consequences of corporate prosecution to the innocent third parties including customers, employees and shareholders, and the disproportionate repercussions to the corporation itself given the nature and severity of the crime.[129]

Some local Procuratorates attempt to make settlement decisions based on the patents and technologies possessed by the firm at issue, its market share, prospect of development or charity

[123] See Chapter 4, Section 4.3.1, and Chapter 5, Section 5.4.3 (emphasizing the importance of clear, predictable and certain benefits for incentivizing corporate self-policing activities to the fullest extent and reducing the corporate costs of self-policing).
[124] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91-94 (calling for the issuance of special compliance guideline for enterprises in different industries for the purpose of assessing the corporate compliance development).
[125] Alexander, and Arlen, "Does Conviction Matter?" 117-18 (noting three factors that are essential in the prosecutor's choice between DPA and plea agreement: the potential threat to the firm and its customers of exclusion or delicensing, whether the firm self-reported, and whether the firm provided full cooperation).
[126] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, February 15, 1999, Article 5 (requiring the investigation and prosecution of foreign bribery not to be "influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved").
[127] "最高检:创新检察履职，助力构建中国特色的企业合规制度 (SPP: Innovating Procuratorial Performance to Help the Building of Enterprise Compliance System with Chinese Characteristics)," *正义网 (Justice Web)*, December 27, 2020, https://www.163.com/dy/article/FUSC9KP705346982.html (accessed April 15, 2021); "最高检下发工作方案 依法有序推进企业合规改革试点纵深发展 (SPP Issued the Work Plan to Orderly Promote the In-depth Development of Enterprise Compliance Reform Pilot in Accordance with the Law)," April 8, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202104/t20210408_515148.shtml#1 (accessed April 15, 2021).
[128] US Justice Manual, 9-28.1100 – Collateral Consequences (emphasizing the collateral consequences of corporate prosecution to "a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, have been unable to prevent it, or have been victimized by it"); *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, para. 61 (recognizing the potential disproportionate consequences of a conviction under domestic law and the law of another jurisdiction for the corporation as one public interest factor against prosecution).
[129] Albert W. Alschuler, "Two Ways to Think About the Punishment of Corporations," *American Criminal Law Review* 46, no. 4 (2009): 1367 ("[t]his punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too").

record, which are believed to reflect the firm's values to the society.[130] However, the attempt of using the criminal liability mechanism to reward technological and economic development is controversial and may erode the deterrent effect of criminal law to the economically successful corporations.[131] In light of the relevant research and foreign enforcement practices, the Procuratorates should examine the size, legal structure,[132] and ownership structure of the corporation at issue,[133] its sector of operation[134] and market position,[135] among other things, to determine the likelihood and magnitude of the collateral consequences of corporate prosecution. For example, Gabriel Markoff finds that corporate conviction, accompanied by mandatory or discretionary debarment and reputational damages, is only fatal to corporations whose core business depends on the corporate reputation or governmental contracts.[136] For such corporations, the collateral consequences of criminal prosecution are expected to be severe and a settlement decision may be warranted. Besides, the Procuratorates should also examine the pervasiveness of the criminal misconduct within the corporation, the involvement of corporate management in the criminal scheme, and the adequacy of corporate compliance program to assess the culpability of the corporation.[137] For a corporation that was engaged in widespread and long-term criminal schemes and has only a cosmetic compliance program in place, the damages to the corporation and its shareholders as a result of the criminal prosecution will be more justified.[138]

[130] 最高人民检察院第二十二批指导性案例(22nd Batch of Guiding Cases of the Supreme People's Procuratorate), December 8, 2020, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202012/t20201208_488360.shtml#2 (accessed December 8, 2021) (citing the fact that the company has no record of violations and boasts high sale volume, tax payment and technology innovation as a major reason for the application of the CNP).

[131] Werle, "Prosecuting Corporate Crime when Firms Are Too Big to Jail," 1370 (contending that "when defendant companies are so large, so systemically important, and so politically powerful that prosecutors cannot credibly threaten them with a 'socially optimal' penalty, ... deterrence breaks down").

[132] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 343-46 (documenting D/NPAs entered into by the US Attorneys' Offices or DOJ's Criminal Division from 2008 to 2014 while excluding Antitrust and Environment Divisions that applied separate policies, and discovering that 70% of DPAs are signed with public firms or firms that are controlled by public firms); Cindy R. Alexander, and Mark A. Cohen, "The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea-agreements," *American Criminal Law Review* 52, no. 3 (2017): 579-81 (claiming that by offering parent corporation a DPA with the requirements of enhanced internal control and requiring the subsidiaries directly related to the misconduct to plead guilty, the enforcement agency seems to find a balance between harsh sanctions against wrongdoings and limited collateral consequences on corporate operation).

[133] Lynn A. Stout, "The Mythical Benefits of Shareholder Control," *Virginia Law Review* 93, (2007): 789 ("[i]n a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board").

[134] Greenblum, "What Happens to a Prosecution Deferred?" 1884-89 ("[t]he adverse publicity that accompanies a prosecution can devastate a corporation, particularly one that relies heavily on its reputation in the marketplace, because of the effect on relationships with customers, creditors and the public at large"); Enterprises in the heavily-regulated industry, such as the healthcare industry, may be even debarred from governmental procurement after the conviction of bribery, see National Health and Family Planning Commission, 关于建立医药购销领域商业贿赂不良记录的规定 (Regulations on the Establishment of Commercial Bribery Records in the Field of Pharmaceutical and Medical Purchase and Sale), December 27, 2013.

[135] *Director of the Serious Fraud Office Applicant versus Airbus SE*, Southwark Crown Court, January 31, 2020, paras. 82-86 (noting that the collateral consequences of the conviction of Airbus are huge, including the creation of a monopolistic behemoth for Boeing).

[136] Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty," 823 (establishing the hypothesis based on the Core Business Model that "a conviction will only cause a corporation to go out of business when it threatens the corporation's ability to conduct its core business", which explains the demise of Arthur Andersen after conviction because its accounting practices depends on the trustworthiness of its name).

[137] US Justice Manual, 9-28.1100 – Collateral Consequences.

[138] US Justice Manual, 9-28.1100 – Collateral Consequences ("where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing"); Cindy R. Alexander, and Mark A. Cohen, "The Causes of Corporate Crime: An Economic Perspective," in Anthony S. Barkow & Rachel E. Barkow eds., *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (NY: New York University Press, 2011): 19 ("[c]orporate owners can be linked as a causal factor in criminal activity. While they may not explicitly choose to commit a crime, their decisions on the size and intensity of internal compliance programs, compensation and evaluation processes, strategic plans and so on may be thought of as choosing a 'probability' that crime will be committed by the corporation").

8.3.3.2 Corporate Compliance Program

In order to encourage corporate compliance development, the Procuratorates should consider the adequacy of the corporate compliance program and any proactive corporate measures to remediate the compliance risks within the corporation when deciding whether to apply CNP. As pointed out in Chapter 7, the concept of compliance is relatively new to the legal and business community in China. Appropriate guidance is thus needed to assist the companies and prosecutors in the implementation and assessment of corporate compliance programs.[139] Based on the analysis of the corporate enforcement practices in the U.S., UK and France, clear guidelines should be issued to set forth the factors to be considered and questions to be answered for determining whether a corporate compliance program is adequate and effective.[140] For the formulation of such guidelines, the SPP may refer to the DOJ's compliance evaluation guidelines. The Procuratorates should be directed to pay special attention to the risk profile of the corporation, the corporate management's support for compliance, as well as the evolution and implementation of a corporate compliance program in practice.[141] In addition to providing detailed guidance for the authority's assessment of a corporate compliance program, such guidelines could also assist corporations, especially small and medium-sized corporations, in designing and implementing a compliance program that conforms to the authorities' expectations.[142] This value of corporate compliance guidelines is especially important in China given the under-development of compliance in most industries, as well as the large number of small and medium-sized enterprises in the Chinese market.[143]

8.3.3.3 Corporate Self-reporting and Cooperation

As was discussed in Chapters 4 and 5, incentivizing corporate self-reporting and cooperation is a key goal of the DPA programs in the U.S., UK and France.[144] Corporate self-reporting and cooperative measures benefit the enforcement authorities and the society by complementing the limited public enforcement resources, and increasing the cost-effectiveness of the authorities' monitoring and investigating efforts.[145] Such values of corporate self-policing measures are useful for the Chinese enforcement authorities that are overburdened, understaffed, and suffering from a severe shortage of resources and technology needed to effectively enforce the anti-bribery laws.[146] Currently, CNP is mainly designed to reduce the economic consequences of corporate

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[139] See Chapter 7, Section 7.6.

[140] Yuhua Li, "有效刑事合规的基本标准 (Basic Standards for Effective Criminal Compliance)," *中国刑事法杂志 (Criminal Science)*, no. 1 (2021): 123-29 (identifying the key elements of a corporate compliance program, and proposing compliance standards of different degrees for enterprises varying in the size and regions of operation).

[141] See Chapter 6, Section 6.5.1.

[142] Davis, *Between Impunity and Imperialism*, 157 (noting that the guidance from enforcement authorities on the development of corporate compliance program "might serve as substitutes for individualized professional advice, particularly for small and medium-sized firms").

[143] Yuhua Li, "有效刑事合规的基本标准 (Basic Standards for Effective Criminal Compliance)," 115-16 (noting that most of the enterprises in China do not have compliance program but start to implement compliance program in the criminal proceedings under the supervision of the Procuratorates. Therefore, the compliance guidelines are necessary to assist small and medium-sized enterprise to develop compliance program with key elements and conforming to the expected standard).

[144] *SFO v. Sarclad Limited*, Southwark Crown Court, Case No: U20150856, July 11, 2016, para. 16 ("a core purpose of the creation of DPAs to incentivise the exposure and self-reporting of corporate wrongdoing").

[145] See Chapter 4, Section 4.3 (discussing the social benefits of corporate self-reporting, cooperation and remediation); Section 5.3.3 (discussing the benefits of relying on corporate cooperation to hold individual wrongdoers accountable).

[146] See Chapter 2, Section 2.4.2 (discussing the practical challenges suffered by the Chinese authority in the enforcement of anti-bribery laws); Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75, no. 101 (2000): 663 (acknowledging the role of private actors in the enforcement area by shouldering the agency's enforcement burden, which is greatly valuable to the understaffed and overburdened regulators).

prosecution and promote corporate compliance development without explicitly demanding corporate voluntary self-disclosure or cooperation.[147] In order to complement the public enforcement resources and prevent CNP from becoming a soft approach to corporate crimes, incentivizing voluntary corporate self-disclosure and full cooperation should be designated as a key aim of CNP.

Given the corporations' aversion to the lengthy criminal proceedings and the desire for leniency, the government may induce corporate self-reporting and cooperation by making such corporate measures a precondition for CNP. The policy governing the use of CNP should detail *ex ante* what the authority expects from the corporations regarding self-reporting, cooperation and remediation.[148] In defining voluntary self-disclosure, the current mitigation clause that lowers the bar for "voluntary surrender" in the bribery context and promises a lower penalty or exemption of punishment for bribe-givers who voluntarily confess the bribery facts before *prosecution* should be reformed.[149] Though the special clause of "voluntary surrender" gives bribe-givers more incentives to cooperate with the state's prosecution of corrupt officials, it does not help strengthen the authorities' capability of detecting bribery.[150] The Procuratorates should refer to the DPA policies in the U.S. and UK and demand corporations to come forward before the wrongdoing is exposed if they want to use CNP to detect corporate bribery more effectively.[151]

Corporations aiming for CNP should be required to conduct comprehensive internal investigations into the wrongdoings, identify and collect information in relation to the wrongdoings and individual wrongdoers, and share the information with the Procuratorates. In reality, corporations are often coerced by the Chinese authorities to cooperate with a vague allegation of impropriety and the threats of sanctions.[152] However, there is not any guidance for corporations about how to cooperate and how to conduct internal investigations. Under the CNP, local Procuratorates generally demand that the company agree to the alleged criminal facts, admits guilt and accept the proposed penalty, without explicitly requiring the company to conduct internal investigations or crediting the corporate investigative efforts.[153] The lack of clear policy encouraging corporate internal investigations and the multiple risks associated with such investigations in China, as identified in Section 7.5, could weaken the ability and incentives of corporations to fully comprehend the misconduct in question and to cooperate with the authorities.[154] In order to encourage corporate cooperative efforts, a change to the mindset that

[147] See Chapter 2, Section 2.4.3.2.
[148] OECD, *The Detection of Foreign Bribery*, 2017, at 22 ("[c]lear guidance as to the definition or criteria used to define a self-report together with any ongoing expectations relating to co-operation will be of assistance to any company in its decision whether or not to report").
[149] The PRC Criminal Law, Article 390, para. 2.
[150] Shengping Xu, "行贿罪惩治如何走出困境 (How to Get Bribery Crack-down Out of Dilemma)," *人民检察 (People's Procuratorial Semimonthly)*, no. 16 (2012): 52-53 (claiming that for the purpose of adequately punishing bribe-giving activities and effectively controlling bribery, the mitigation clause shall be reformed to exclude the exemption from punishment as an option for bribe-givers that self-surrendered).
[151] OECD, *The Detection of Foreign Bribery*, 2017, at 25 ("[t]he risk of authorities being alerted to the issues from another source may further encourage companies to report earlier and more often. This can be the case in systems that only provide credit for self-reporting if the authority is unaware of the issues").
[152] Kent D. Kedl, "Behind China's Corruption Crackdown: Whistleblowers," *Forbes*, February 12, 2015, https://www.forbes.com/sites/riskmap/2015/02/12/behind-chinas-corruption-crackdown-whistleblowers/?sh=31567bef2e89 (accessed February 25, 2022).
[153] 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度的意见 (Opinions of Ten Organs in Liaoning Province, including the People's Procuratorate, on the Establishment of the Compliance Inspection System of Enterprises Involved in Crimes), Article 6 (listing the conditions for the application of the CNP).
[154] Miriam H. Baer, "When the Corporation Investigates Itself," in *Research Handbook on Corporate Crime and Financial Misdealing, ed.* Jennifer Arlen (Northampton, MA: Edward Elgar Publishing, 2018), 308 ("[c]orporations investigate their employees for a variety of reasons: to

perceives private investigation as a danger to the state sovereignty in the administration of criminal justice, state security and data privacy is crucial.[155] The enforcement authorities should explicitly define corporate cooperation based on the thoroughness of internal investigations and the quality of information collected and provided by the corporation, and facilitate the conduct of corporate internal investigations. Policy recommendations regarding the facilitation and regulation of corporate internal investigations are outlined in the following Section 8.4.2.3.

8.3.4 Why Would Corporations Agree to the Application of CNP: Incentives Available

The development and implementation of a corporate compliance program and the decisions to self-report and cooperate are not cost-free but can be prohibitively costly. Why does a corporation decide to bring the misconduct to the authorities' attention? Why does a corporation conduct expensive internal investigations and cooperate with the enforcement authorities? Why does a corporation agree to the application of the CNP that involves burdensome terms, as will be discussed in the following Section 8.3.5? This Section will address these questions by envisaging the type of incentives, both substantive and procedural, available to corporations under the CNP. It further discusses how to design such incentives to induce full corporate self-policing measures.

8.3.4.1 Substantive and Procedural Incentives under CNP

Given the high costs and negative implications of self-disclosure, cooperation and remediation, corporations will only voluntarily self-disclose, cooperate with the public investigations and implement costly compliance programs if they are appropriately incentivized. In light of the corporations' aversion to the collateral consequences following criminal conviction and their desire for lower sanctions and better crisis management, the CNP could offer multiple forms of incentives for the corporations.[156] Such incentives could include (i) insulation from criminal conviction and the attendant life-threatening collateral consequences; (ii) reduced application of coercive investigative measures against corporate assets and relevant individuals; (iii) mitigated corporate financial and compliance obligations and exemption from external monitorships; and (iv) a quicker criminal proceeding and better control over the results of the proceeding.[157]

8.3.4.2 Reduced Individual Liability is Not an Option

In practice, local pilot CNP programs often promise a non-prosecution decision or reduced sanctions for both the corporation and the responsible personnel if the corporate compliance efforts are satisfactory at the end of the inspection period.[158] If the values of deterrence, fairness

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protect themselves from employee-directed misconduct; to assure their shareholders that the company has in place effective internal controls; and, finally, to preserve the corporation's ability to seek leniency from government enforcers who might otherwise hold the entity strictly liable for its employees' violations of law").

[155] See Chapter 7, Section 7.5 (discussing the restrictions on the investigations conducted by the defense lawyers in China's criminal justice system with strong inquisitorial features, as well as the potential risks associated with the corporate internal investigations in terms of the absence of common-law style attorney-client privileges, the restrictive data privacy laws and state security regulations).

[156] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 83-93 (listing the procedural and substantive incentives deriving from non-trial resolutions).

[157] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," *比较法研究 (Journal of Comparative Law),* no. 1 (2020): 21-23 (realizing the unique value of reduced coercive investigative measures in incentivizing corporate compliance, given the high frequency of application and their severe impacts on corporate operation in China).

[158] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)"; 辽宁省人民检察院等十机关关于建立涉罪企业合规考察制度

and accountability are pursued, reduced individual liability should not be designated as a type of incentive under the CNP.[159] The prosecution of individual wrongdoers is important in the context of corporate pre-trial resolutions involving mitigated corporate sanctions. The reduced corporate sanctions may fail to ensure that corporations are forced to internalize the full social costs of criminality and adequately discipline wayward employees.[160] If individuals suffer no consequences for their role in the corporate crimes, they are more likely to make excessive risk-taking corporate decisions or even engage in criminal schemes.[161] Moreover, as corporations can only commit crimes through natural persons, it undermines the values of accountability and fairness by protecting individual wrongdoers from criminal conviction and letting the corporation as a whole undertake the responsibility.[162]

8.3.4.3 Incentives Should be Transparent, Predictable and Proportionate

The CNP should offer clear, predictable and proportionate benefits for corporate self-policing of varying degrees in order to effectively incentivize full corporate self-policing efforts. It has been noted that corporate compliance measures and internal investigations are rather costly in financial terms.[163] The corporate decisions to self-report and cooperate may subject corporations to an increased probability of detection and sanction.[164] Corporations are unlikely to voluntarily self-report and fully cooperate if the expected costs of doing so are greater than the expected costs of the "wait and see" approach.[165] The offering of material benefits, such as a way out of criminal conviction and the devastating collateral consequences, as well as significantly reduced sanctions, is necessary to offset the potential costs and incentivize corporations to self-police themselves.[166] The leniency system that only allows the Procuratorates to propose lower criminal sentences *within the statutory range* is hardly appealing to corporate offenders.[167] In addition to

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[159] See Chapter 5, Section 5.3.1 (discussing the values of pursuing individual accountability in the context of corporate DPAs).

[160] See Chapter 5, Section 5.3.3 (discussing many situations where corporate enforcement actions could fail to incentivize corporations to adequately discipline individual wrongdoers).

[161] "SIFMA's Compliance And Legal Society Annual Seminar Prepared Remarks of U.S. Attorney Preet Bharara," March 31, 2014, https://www.justice.gov/usao-sdny/speech/sifma-s-compliance-and-legal-society-annual-seminar-prepared-remarks-us-attorney (accessed July 19, 2021) ("if a company suffers compliance failure after compliance failure and faces one criminal investigation after another, the CEO might yet get a raise").

[162] Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1790 (claiming that the conclusion of corporate settlements without accompanying individual prosecutions turns corporations into a scapegoat for the wrongdoings actually committed by individuals).

[163] Mike Koehler, "Foreign Corrupt Practices Act Ripples," *American University Business Law Review* 3, no. 3 (2014): 396 ("where a comparison is possible, it is clear that pre-enforcement action professional fees and expenses are typically the greatest financial consequence to a company resolving an FCPA enforcement action").

[164] Jennifer Arlen, and Refier Kraaman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," *New York University Law Review* 72, no. 4 (1997): 694 (demonstrating that strict corporate liability discourages corporations from taking optimal policing measures that exposures corporations to enhanced criminal liability).

[165] Robert Innes, "Remediation and Self-reporting in Optimal Law Enforcement," *Journal of Public Economics* 72, no. 3 (1999): 381 ("a firm will only be prompted to self-report if it is promised a penalty that is no greater than can be expected without self-reporting"); Louis Kaplow, and Steven Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," *Journal of Political Economy* 102, no. 3 (1994): 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not").

[166] Sharon Oded, "Coughing Up Executives or Rolling the Dice? Individual Accountability for Corporate Corruption," *Yale Law & Policy Review* 35, no. 1 (2016): 74 ("[w]hen corporations self-report wrongdoing, the probability of detection increases (one hundred percent probability), and so does the expected liability. Therefore, in the absence of other sources of motivation (e.g., a reduction of the severity of the fine due to self-reporting), one should not expect rational corporations to voluntarily self-report bribery and to cooperate with public investigations"); Charles J. Walsh, and Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?" *Rutgers Law Review* 47, no. 2 (1995): 633 (noting that corporations are typically viewed as calculating actors, who presumably act in the economic best interests and are more likely than individuals to weigh costs and benefits before undertaking an action).

[167] Liuquan Xie, "现实主义考量下实证完善认罪认罚从宽制度的建议 ——以试点单位广州市 N 区人民检察院的司法实践为视角 (Suggestions on Improving the Leniency System in the Context of Realism: From the Perspective of the Judicial Practice of the People's

the magnitude of incentives, the authority can best mitigate the corporate misgivings about self-reporting and cooperation by enhancing the certainty and predictability of such incentives.[168] It was noted that CNP is based on the Procuratorate's unilateral decision to take corporate actions into consideration when exercising its prosecutorial authority, rather than the result of equal negotiation.[169] Even so, the Procuratorates could still enhance the certainty of incentives through a clear policy and consistent application of CNP to reward corporate compliance, voluntary self-disclosure and cooperation.[170] The CEP, which promises a presumption of declination for corporations that have met all the self-policing requirements in the absence of aggravating factors, presents a great example for boosting the corporate incentives to self-police themselves.[171]

The benefits under CNP should be proportionate to the quality and values of corporate self-policing efforts. It has been noted that the corporate measures of compliance monitoring, voluntary self-disclosure and cooperation occur in sequential order, and the compliance and cooperative efforts may vary in the extent.[172] To make sure that corporations have sufficient motives to take all policing measures, the maximal benefits under CNP should be reserved for corporations that have timely self-reported, fully cooperated and remediated. Meanwhile, partial credits should be available for corporations that only start to cooperate at a later stage in order to secure the social benefits of corporate cooperation in the absence of voluntary self-reporting.[173] If the same leniency is offered to corporations with or without voluntary self-disclosure, corporations would have few incentives to self-report unless the wrongdoings are exposed through other means.[174]

8.3.5 Corporate Obligations under CNP

Referring to the DPA policies and practices in the U.S., UK and France, China's Procuratorates should employ CNP to extract both monetary and non-monetary obligations from the corporations for the purpose of advancing the values of deterrence and rehabilitation. Such obligations may include (i) acceptance of responsibility for the misconduct at issue, (ii) a

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Procuratorate in N District of Guangzhou as a Pilot)," http://www.gzns.gov.cn/nsjcy/dcyj/201806/t20180622_370379.html#_ftn1(accessed June 28, 2019) (documenting one case where the corporate suspect withdrew its affidavit and claimed innocence before the trial for fear of the disqualification from biddings following the criminal conviction).

[168] OECD, *The Detection of Foreign Bribery*, 2017, at 22 ("[c]lear guidance as to the definition or criteria used to define a self-report together with any ongoing expectations relating to co-operation will be of assistance to any company in its decision whether or not to report"); Peter R. Reilly, "Incentivizing Corporate America to Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure under the Foreign Corrupt Practices Act," *Florida Law Review* 67, no. 5 (2016): 1725 (concluding that "the federal government needs to be more transparent and forthcoming regarding exactly what the benefits will be when corporate entities elect to self-report FCPA violations").

[169] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (arguing that the enterprise's attitude is only an important consideration of the Procuratorate's charging decision; CNP shall not be interpretated as a reconciliation or agreement between the procuratorial organ and the enterprise suspect).

[170] Chun Wang, "浙江宁波：涉罪企业合规考察制度护航民企健康发展 (Ningbo, Zhejiang: Compliance Inspection System of Enterprises involved in Crimes Escorts the Healthy Development of Private Enterprises)," (Shenming Pan, associate professor of the School of Law in Ningbo University, argued that the Compliance Inspection Order shall explicitly state the legal consequences of the successful assessment of the compliance development to enhance the protection of the reliance interests of the target enterprise).

[171] See Chapter 4, Section 4.5.1.1 (analyzing the reasons for the U.S.'s success in incentivizing corporate self-reporting).

[172] Arlen, "Corporate Criminal Liability: Theory and Evidence," 177 (noting that "firms make policing decisions sequentially (with monitoring preceding self- reporting, which in turn precedes cooperation").

[173] See Chapter 4, Section 4.4.3.1 (proposing measures to incentivize corporate self-reporting through DPAs); Chapter 5, Section 5.4.3.2 (discussing how to encourage corporate cooperation in pursing individual accountability).

[174] House of Lords Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-legislative Scrutiny*, March 14, 2019, para. 301 ("[i]f self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not").

sufficiently large corporate fine, (iii) on-going cooperation with the state's investigation and prosecution of individual wrongdoers, and (iv) supervised compliance reforms, if necessary.[175]

8.3.5.1 Corporate Acceptance of Responsibility for Criminal Wrongdoings

The resolution of corporate criminal matters through CNP should include a statement of facts giving a succinct description of the criminal facts at issue, and require the corporation to admit the criminal facts and accept responsibility (not a guilty plea) for the allegation. The inclusion of a statement of facts and the requirement for the corporate acceptance of responsibility help to guarantee a successful conviction of the corporation in case it fails to comply with the terms of CNP and the corporate prosecution is triggered.[176] A credible threat of prosecution is necessary to ensure the corporation's incentives to genuinely carry out the obligations imposed via CNP. In addition, a statement of facts acts as a useful check to the Procuratorate's discretion in the application of CNP by ensuring that sufficient evidence has been collected to establish the criminal facts and to identify the individual wrongdoers and their role in the criminal scheme.[177] Moreover, it also maintains the perceived legitimacy of CNP in China's criminal justice system, which pays particular attention to the substantive truth.[178]

8.3.5.2 Corporate Monetary Sanctions

Corporations should be generally required to pay sufficiently large monetary sanctions under CNP. In experimenting with CNP, local Procuratorates tend to base their non-prosecution decision only on the corporate compliance efforts, without requiring the payment of a corporate fine.[179] In some cases, the Procuratorates might hand over the cases to the relevant regulatory agencies for imposing an administrative penalty after making a non-prosecution decision.[180] However, both strategies run the risks of inadequately sanctioning and deterring corporate crimes. The former completely ignores the value of monetary sanctions, while the latter places hope on

[175] "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," September 13, 2012, https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association (accessed November 16, 2021) ("when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability").

[176] Brandon L. Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (2011): 1845 (noting such admission has served a moral purpose and also "a practical purpose to bind the firm should it breach the agreement or deny having engaged in the prohibited conducts"); Christopher A. Wray, and Robert K. Hur, "Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice," *American Criminal Law Review* 43, no. 3 (2006): 1105 ("the government would proceed to trial, armed with the company's admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion").

[177] Peter Spivack, and Sujit Raman, "Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements," *American Criminal Law Review* 45, no. 2 (2008): 188-89 (citing anecdotal evidence about "prosecutors who, in their haste to compel the company's cooperation in pursuit of individuals, have pressed the entity to enter into a diversion agreement before any particular individual's guilt could definitively be established").

[178] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 60-61 (claiming that given China's traditional understanding of justice and the Procuratorate's role as legal supervision agency, allowing the Procuratorates to negotiate with the corporations without sufficient evidence and clear criminal facts would encourage the corporate opportunistic psychology of "replacing criminal penalty with civil fine" and is detrimental to deterrence and the authority of the Procuratorate).

[179] SPP, 关于印发《企业合规典型案例（第二批）》的通知 [Notice on Distributing Typical Cases of Enterprise Compliance (the Second Batch)], December 15, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202112/t20211215_538815.shtml#2 (accessed December 23, 2021) (four of the five cases ended with a non-prosecution decision or the withdrawal of criminal cases under the CNP, while none demanded the payment of corporate fine).

[180] 最高人民检察院第二十二批指导性案例(22nd Batch of Guiding Cases of the Supreme People's Procuratorate), December 8, 2020, https://www.spp.gov.cn/spp/xwfbh/wsfbt/202012/t20201208_488360.shtml#2 (accessed December 8, 2021) (in the guiding case released by the SPP concerning Wuxi F Police Equipment New Technology Co., Ltd for tax violations, the Procuratorates made a non-prosecution decision together with the recommendations for improving the corporate operation and governance system, and then handed over the case to the public security bureau and tax authority for imposing administrative sanctions).

the regulatory agencies to seek the corporate financial penalty. As there is no hierarchical relationship between the Procuratorates and regulatory agencies, the regulatory agencies may conclude that no corporate misconduct occurred and/or no corporate fine is necessary.[181] The inadequate corporate sanctions could hamper the efforts of depriving the corporation of the illegal proceeds derived from the misconduct, incentivizing corporate prevention measures and adequately compensating the victims.[182] Therefore, it is necessary to reform CNP to ensure that a sufficiently large corporate financial penalty is pursued.

For the purpose of adequately sanctioning corporate defendants and compensating the victims in the context of CNP, it is crucial to enhance the prosecutorial control over the final penalty imposed on the corporation. It was already noted that China's Procuratorates were designed by the PRC Constitution to exercise the legal supervision authority. They are thus not allowed to impose a final and substantive penalty.[183] It is unrealistic to reform the nature of the prosecutorial agency in the near future to allow it to directly impose corporate sanctions for crimes resolved via CNP. However, the Procuratorates may strengthen their control over the corporate sanctions by taking into consideration the penalty imposed by the regulatory agencies and the compensation paid to the victims when making the prosecuting or settling decision.[184] Such an arrangement also calls for a better coordination between the prosecutorial agency and the regulatory agency to achieve a common understanding about the nature of the corporate misconduct in question and the amount of penalty that is appropriate.[185]

8.3.5.3 Continual Corporate Cooperation in the Pursuit of Individual Liability

Corporations should be explicitly required under CNP to continually cooperate with the enforcement authorities in the investigation and prosecution of individual wrongdoers during and after the resolution, if such individual prosecutions are deemed necessary. In practice, the application of CNP tends to lead to a non-prosecution decision awarded to both the corporation and the responsible personnel.[186] The requirements for continual corporate cooperation in identifying and prosecuting individual wrongdoers, which are the core elements of the DPA programs in the U.S., UK and France, are not found anywhere under CNP.[187] Offering leniency to both the corporation and the responsible personnel is detrimental to the criminal enforcement

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[181] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 91 (noting that the regulatory authorities are not responsible for sanctioning enterprises involved in criminal activities, and are not subordinate to the Prosecutorial authority).

[182] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 237 (arguing that the lack of criminal fine in the context of the CNP triggers the concern of indulging corporate crimes and failing to achieve either retribution or specific deterrence, ultimately undermining the adequacy of the CNP as a substitute for criminal prosecution and sanctions).

[183] See Chapter 2, Section 2.4.3.2.

[184] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 81-82 (noting that though the Procuratorates have no authority to impose corporate fine directly, they could take into consideration the corporate's voluntary payment to victims when making charging decisions); Yuhua Li, "企业合规本土化中的 '双不起诉' ('Double Non-Prosecution' in the Domestication of Corporate Compliance)," *法制与社会发展 (Law and Social Development)*, no. 1 (2022): 27-29 (noting that the Procuratorates could use prosecutorial recommendations to require the regulatory agencies to impose administrative sanctions, which can be even severer than criminal sanctions).

[185] Shaojun Liu, "企业合规不起诉制度本土化的可能及限度 (Possibility and Limits of Localization of Corporate Compliance Non-Prosecution System)," 62-63 (claiming that the authority shall reform the administrative laws to promote the development of corporate compliance, and explore the cooperation between the prosecutorial agency and the administrative agency).

[186] See *supra* note 158.

[187] See Chapter 5, Section 5.5 (introducing and analyzing the different strategies employed by the agencies in the U.S., UK to incentivize corporate cooperation with the government in the investigation and prosecution of individuals).

goals of deterrence, accountability and rehabilitation.[188] If such goals are indeed desired and actually pursued, individual accountability should be a key element of the CNP.

In order to strengthen individual accountability, corporate cooperation in the identification and prosecution of individual wrongdoers should be demanded and actively incentivized in the application of CNP. It is a daunting challenge for the enforcement authorities to disentangle who did what or to link the senior managers with a particular bribery scheme within the complex corporate organization.[189] By disciplining wayward employees internally and assisting in the individual prosecutions, corporations could increase the individual wrongdoers' likelihood of being detected and sanctioned, and help complement the public enforcement resources.[190] In order to effectively incentivize corporate cooperation in the individual proceedings, CNP should provide incentives that are clear and proportionate to the scope and quality of corporate cooperation in terms of identifying and investigating relevant individuals, and penalize corporations that fail to fully cooperate.[191]

8.3.5.4 Corporate Compliance Obligations

Promotion of corporate compliance is used as a primary justification for CNP in its diversion from the traditional prosecution procedure.[192] In addition to factoring in the adequacy of a corporate compliance program in the application of the CNP, the Procuratorates could also promote corporate compliance development by directly demanding specific compliance measures.[193] Although China's Procuratorates are not authorized to impose substantive sanctions as a legal supervision organ, it is within their inherent authority to issue procuratorial suggestions to private entities in the course of the supervision of legal proceedings and the execution of judgments.[194] The corporation at issue should be directed by the Procuratorates through procuratorial suggestions to implement or improve an effective compliance program, provided that the compliance program is absent or deemed inadequate, and the pursuit of a corporate fine and individual liability is unlikely to trigger the desired corporate compliance measures.[195] If the corporation complies with the procuratorial suggestions and has an effective compliance program in place at the end of the inspection period, and no other serious breaches have occurred,

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[188] See Chapter 5, Section 5.3.1 (discussing the values of pursuing individual liability in the context of corporate DPAs).
[189] "Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference," May 10, 2016, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association (accessed July 1, 2020) ("blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme").
[190] See Chapter 5, Section 5.3.3 (discussing the benefits and limits of relying on corporations to sanction individual wrongdoers).
[191] See Chapter 5, Section 5.4.3.2 (calling for the application of the carrot-stick approach to encourage corporate cooperation with the state in the pursuit of individual accountability).
[192] See Chapter 2, Section 2.4.2 (discussing the background for the introduction of the CNP in China).
[193] Sean J. Griffith, "Corporate Governance in an Era of Compliance," *William & Mary Law Review* 57, no. 6 (2016): 2086-92 (noting that the prosecuting agency could impose compliance mandate "by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts").
[194] 中华人民共和国人民检察院组织法 (The PRC Law on the Organization of the People's Procuratorate), revised on October 26, 2018, Articles 20 and 21; SPP, 人民检察院检察建议工作规定 (Regulations on Work of Procuratorial Suggestions of People's Procuratorates), promulgated and effective as of December 25, 2018, Articles 8-12. See also Fenfei Li, "论企业合规检察建议 (Procuratorial Suggestions on Enterprise Compliance)," 100 (arguing that using prosecutorial suggestion to promote corporate compliance is not incompatible with the legal status of the Procuratorial organ, but an integral part of its position as the protector of public interests).
[195] See Chapter 6, Section 6.5.2 (believing that compliance obligations are only justified in the cases where the use of corporate fine and individual liability is insufficient to force the corporations to internalize the full social costs of criminality and trigger voluntary compliance measures, and the agency costs of corporate policing are salient in the corporate organization).

the Procuratorates should make a non-prosecution decision.[196] Considering the fact that prosecutors generally lack the knowledge about how to design an effective compliance program tailored to a particular corporation, it is recommended that the prosecutorial suggestions include only the general and minimum elements of the desired compliance program.[197] As will be further detailed in the following Section 8.3.6, the Procuratorates may resort to the corporation itself or external monitors to map the corporate risk profile and propose a concrete plan for the implementation of an effective corporate compliance program.

8.3.6 Compliance Monitoring Mechanism

The success of CNP in promoting corporate compliance development hinges on the will and the ability of Procuratorates to impose targeted compliance measures and to ensure the corporations' genuine implementation of the compliance obligations. Otherwise, corporations might incur an enormous expenditure adopting all types of compliance measures or implement only a window-dressing compliance program in order to win a non-prosecution decision, neither of which is socially desirable.[198] It has been noted that the Procuratorates rarely have sufficient knowledge about how to build an effective compliance program, or the resources to continually monitor the corporate compliance efforts for years.[199] Apart from issuing general compliance evaluation guidelines and conducting training for individual prosecutors, the prosecutorial deficiencies in this aspect could be addressed by demanding post-resolution corporate self-reporting obligations and engaging compliance monitors.[200] To be specific, for firms that have low compliance risks and were implicated in the criminal activities by several rogue employees, the Procuratorates may require them to provide a workable plan for the improvement of their compliance programs and self-report on the progress at specified intervals.[201] For corporations with pervasive compliance failures and high agency costs of self-policing, the Procuratorates should consider resorting to external compliance monitorships.[202] External monitors may be delegated to work with the corporations to propose a work plan to identify and address the corporate compliance

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[196] Fenfei Li, "论企业合规检察建议 (Procuratorial Suggestions on Enterprise Compliance)," 103 (noting that the soft procuratorial suggestion issued by the Procuratorate before a charging decision is made may produce similar effect as the CNP in terms of forcing the target enterprise to improve its compliance program).

[197] Arlen, and Kahan, "Corporate Governance Regulation through Non-prosecution," 349 (noting that most prosecutors designing the compliance mandate have no experience with the type of violations involved, and they may lack the expertise needed to design and impose an optimal compliance program tailored to firms in a particular industry or with a particular organizational structure); Veronica Root, "Modern-Day Monitorships," *Yale Journal on Regulation* 33, (2016): 128 ("[t]he necessary remediation effort in these instances-which involves an overhaul of the organization's corporate compliance program with respect to the area of misconduct- is difficult for the government to delineate at the outset").

[198] Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance," 491-93 (claiming that the current legal regime that "places an overwhelming and steadily increasing importance on internal compliance structures as a liability determinant" may cause two problems: "(1) an under-deterrence of corporate misconduct and (2) a proliferation of costly—but arguably ineffective—internal compliance structures").

[199] Hess, and Ford, "Corporate Corruption and Reform Undertakings," 310-11 ("[p]rosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of largescale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies").

[200] See Chapter 6, Section 6.5 (analyzing several strategies adopted by the U.S., UK and French authorities to assist prosecutors in assessing the effectiveness of corporate compliance program and monitoring company's compliance with the terms of DPAs).

[201] See Chapter 6, Section 6.2.2.1 (claiming that the self-reporting requirement is desirable when prosecutors have reasonable trust in the genuineness of corporate commitments to compliance enhancements, as it is less costly for the corporation than external monitorships, yet more effective than compliance monitoring by merely prosecutors).

[202] See Chapter 6, Section 6.5.2 (calling for a more selective use of compliance obligations and monitorships, which shall be imposed only in cases where the use of corporate fine and individual liability is insufficient to achieve optimal deterrence, and where the agency costs of self-policing are so salient that other types of corporate sanctions will not efficiently induce firms to take effective self-policing measures).

risks, advise on and monitor the corporate compliance measures, and prepare periodical and final reports to the Procuratorates on the corporate compliance progress.[203]

In terms of the compliance monitoring mechanism, the SPP has been actively promoting the third-party organization, consisting of registered private professionals and representatives of public agencies, to inspect and assess the corporate compliance efforts.[204] As identified in Chapter 2, the mechanism may have an unsettling effect on the goals of the CNP owing to a number of deficiencies. Such deficiencies include the questionable incentives for other public authorities to undertake the extra burden of compliance monitoring, the short inspection period, and the absence of a benchmark for the assessment of the corporate compliance program.[205] As the release of compliance evaluation guidelines was proposed in Section 8.3.3.2, this Section will focus on the choice of compliance monitoring body and the designing of the inspection period.

It is proposed that a special public agency should be established to assist in and monitor the corporation's implementation of the CNP-imposed compliance obligations. The strategy of having a public agency rather than a private party to act as the compliance monitor is adopted in the French CJIP program, which has led to the creation of AFA.[206] Designating a special public agency to act as the compliance monitor precludes the criticism of cronyism that is prevalent in the selection of private monitors. Also, it is accustomed to the Chinese legal culture that shows great reluctance to entrust private actors with the administration of criminal justice.[207] A special agency dedicated to compliance monitorship can be expected to accumulate more expertise and experience in the monitoring and assessment of corporate compliance program over time, thus mitigating concerns over the monitor's expertise in compliance.[208] As the concepts of compliance and monitorship are relatively novel to the legal practitioners in China, a fixed monitoring body is more likely to build up expertise than private actors chosen on an *ad hoc* basis.[209] It is worth to note that the independence of such an agency, financially, institutionally and politically, is crucial to the success of the monitoring mechanism. Undue political influence or financial restraints on the agency could affect the quality of its compliance monitoring and

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[203] See Chapter 6, Section 6.2.2 (discussing the compliance monitoring mechanisms adopted in the U.S., UK and France).

[204] See SPP, Ministry of Justice, Ministry of Finance, Ministry of Ecological Environment, State-owned Assets Supervision and Administration Commission, State Administration of Taxation, SAMR, All-China Federation of Industry and Commerce, China Council for the Promotion of International Trade, 关于建立涉案企业合规第三方监督评估机制的指导意见（试行）[Guidelines on the Implementation of Third-party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved in the Criminal Cases (Trial Implementation)], June 3, 2021, https://www.spp.gov.cn/spp/xwfbh/wsfbh/202106/t20210603_520224.shtml (accessed June 20, 2021).

[205] Mingliang Ma, "论企业合规监管制度——以独立监管人为视角 (On Enterprise Compliance Monitoring System: From the Perspective of Independent Monitor)," *中国刑事法杂志 (Criminal Science)*, no. 1(2021): 142-143 (claiming that the use of compliance monitors under the CNP is unlikely to promote corporate compliance owing to the high monitoring cost, ambiguous role of the compliance monitors, the lack of assessment standard, effective supervision and remedy procedure).

[206] For the mission of the agency, see the AFA website at https://www.agence-francaise-anticorruption.gouv.fr/fr/missions (accessed June 3, 2022).

[207] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 59 (believing that given the China's legal system and legal culture, delegating private agencies to exercise the authority of monitoring and supervision is yet difficult for the public and the target enterprise to accept). This "cultural reluctance to entrust a traditional government oversight role to a private party" is actually observed in other East Asian jurisdictions as well, see Jason J Kang, et al, Kobre & Kim, "Monitorships in East Asia," in *The Guide to Monitorships – Second Edition,* by Global Investigation Interview, May 7, 2020, https://globalinvestigationsreview.com/guide/the-guide-monitorships/second-edition/article/9-monitorships-in-east-asia (accessed April 24, 2021).

[208] See Chapter 6, Section 6.5.3 (claiming that the French regime presents an ideal model of compliance monitoring for jurisdictions that do not have a thriving compliance market or are reluctant to allow private actors to exercise the authority in the criminal justice).

[209] Davis, *Between Impunity and Imperialism*, 157 ("[i]t takes time for compliance advisers to develop expertise, and expertise developed in the context of one legal and commercial culture, or even one particular industry, is not necessarily transferable to other contexts").

assessment work, reducing the Procuratorates' ability to promote corporate compliance development through the CNP.[210]

In order to ensure that a corporate compliance program is reasonably designed and implemented and is proved effective in detecting and preventing relevant wrongdoings, which could take several years, the inspection period should be set for a sufficiently long time.[211] Under the PRC Criminal Procedure Law, there is no explicit legal basis for the Procuratorates to suspend the criminal proceeding for the purpose of allowing the corporation at issue to demonstrate its willingness to improve the compliance program.[212] The inspection period under CNP is currently set within the timeframe available to the Procuratorates for examination and prosecution, which can be no longer than one year.[213] As the corporate cases are generally rather complicated and the Procuratorates may need a long time to make a charging decision, the time left for the improvement and assessment of the corporate compliance program is even shorter.[214] Therefore, the reform of the PRC Criminal Procedure Law to set a longer inspection period, independent from the time available to the Procuratorates for examination and prosecution, is needed to enhance the effectiveness of the CNP in fostering corporate compliance improvement.[215]

8.4 Policy Recommendations: Promoting a Favorable Environment for CNP

CNP cannot function alone in the legal system. First of all, the mechanism that offers pre-trial resolution and reduced sanctions to corporations engaging in effective self-policing measures goes hand in hand with broad and credible liability for corporations that fail to do so. Corporations have few incentives to incur the costs of self-reporting and cooperation, unless they are subject to material threats of detection, conviction and substantial sanctions.[216] Secondly, CNP involving the settlement between the Procuratorate and corporate defendants can only work well if both parties have enough bargaining chips to bring to the table.[217] Therefore, in order to establish a favorable environment for the smooth functioning of the CNP, the Procuratorates should enjoy a broader yet guided discretion in crediting desired corporate measures and demanding specific corporate obligations. Meanwhile, corporations should possess sufficient ability and the will to conduct extensive internal investigation, which is an essential element of

[210] See Chapter 6, Section 6.5.3 (noting that the reliance on a public agency to deliver the service of compliance monitoring could fail due to the agency's lack of independence and resources).
[211] For example, the length of the compliance obligations imposed under the CJIP program is required to be set at least two years "to allow the AFA to be assured of the effectiveness and robustness of the measures implemented", see CJIP Guidelines, at 14; Hess, and Ford, "Corporate Corruption and Reform Undertakings," 310-11 (noting that "the interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies" are largescale and ongoing).
[212] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 83 (acknowledging that there is no explicit legal basis for the procuratorial organ to set up such long-term compliance period in the prosecution stage and base the charging decision on the corporate compliance progress).
[213] Fenfei Li, "论企业合规检察建议 (Procuratorial Suggestions on Enterprise Compliance)," 106 (noting that there is no legal barrier to the provision of inspection period of six months to one year in cases where suspects are not detained; even when suspects have been detained, the Procuratorates can set an inspection period after altering the coercive measure of detention).
[214] Ruihua Chen, "刑事诉讼的合规激励模式 (Models of Criminal Justice Incentives for Compliance)," 237 (arguing that the insufficient compliance inspection period has become a major bottleneck in the CNP endeavors).
[215] *Ibid* (calling for the reform of the criminal justice system to legitimize the CNP and provide a relatively long inspection period to effectively monitor the compliance development in the target enterprise).
[216] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 168-77 (stressing the role of broad corporate liability rule, sufficient funding to the enforcement agency and effective whistleblower program in forcing firms to self-report and cooperate).
[217] See Chapter 7, Section 7.3.2 (acknowledging that CNP, similar to other settlement mechanisms in China, still bears strong inquisitorial features and operates in the context of huge power imbalance between the Procuratorate and the defense).

the corporate compliance program and the basis for the corporate decisions to self-report and cooperate.[218]

The recommendations proposed in this Section will consider the substantive legal factors that ensure the credible threats of detection and sanction for corporations engaged in bribery and deficient self-policing measures. It also aims to contribute to the procedural rules that facilitate the negotiation between the Procuratorate and corporations. However, this Section does not intend to provide an exclusive list of all legal factors that may affect the application of CNP, which is also not very realistic given the space limitations. Instead, it attempts to identify several prominent elements that merit particular attention for the designing and implementation of the CNP.

8.4.1 Substantive Threats for the Application of CNP

It is identified by the OECD Working Group on Bribery that "resolution systems can only work where a country has the capacity to successfully carry out enforcement actions and impose real sanctions, and that capacity is known to the public".[219] The ability of the enforcement agencies to detect, investigate and successfully prosecute corporate bribery depends on a number of legal and practical factors. This Section chooses to propose policy recommendations for the whistleblower program, the anti-bribery laws and corporate criminal liability rule in China, as well as the international cooperation. The goal is to explore ways for strengthening the Chinese authorities' capability of enforcing anti-bribery laws in the corporate context.

8.4.1.1 Enhancing the Protection and Reward for Whistleblowers

The enforcement authorities can strengthen their ability to detect and sanction corporate crimes, thus forcing corporations to self-report, by actively promoting whistleblowing.[220] An effective whistleblower program that increases the threats of detection is useful to force corporations to improve their internal compliance program and self-report. By designing an effective compliance program, corporations hope to induce informative individuals to ring the internal reporting hotline first.[221] If such a hope does not materialize, corporations would be pressured to timely self-disclose to the authority in "the race to the courthouse" against individual whistleblowers.[222]

Though Chinese authorities generally hold a negative view about investigations conducted by private persons, whistleblowing is actively encouraged, especially regarding the allegations of

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[218] Arlen, and W. Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," 713-27 (identifying the laws and systems governing the corporate ability to conduct efficient investigations as the background laws for the corporate liability regimes and public enforcement strategy); Davis, *Between Impunity and Imperialism*, 155 (noting that "laws that promote private regulation are most likely to be cost-effective when they are complemented by laws that place few restrictions on private actors' ability to engage in investigation").

[219] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 82-83.

[220] Kaplow, and Shavell, "Optimal Law Enforcement with Self-Reporting of Behavior," 583 ("parties voluntarily report their behavior because they fear more severe treatment if they do not").

[221] Iskra Miralem, "Comment, the SEC's Whistleblower Program and Its Effect on Internal Compliance Programs," *Case Western Reserve Law Review* 62, no. 1 (2011): 346-47 (noting that the threats of external reporting induce firms to strengthen their own internal compliance program to make it more attractive for whistleblowers in the competition with the SEC).

[222] Daniel Fisher, "SEC Whistleblower Rule Means More Work for Lawyers," *Forbes*, May 26, 2011, https://www.forbes.com/sites/danielfisher/2011/05/26/sec-whistleblower-rule-means-more-work-for-lawyers/#172c984c4a8a (accessed April 9, 2020) (noting that "the company that is alerted to unusual revenue-recognition practices…might have dismissed it as immaterial before but now will feel compelled to run to the SEC before one of its employees gets there first").

bribery and corruption.[223] Under the PRC Constitution and PRC Criminal Procedure Law, it is explicitly stated that individuals have both the right and the duty to report criminal misconduct to the authorities.[224] Beyond the abstract promise of protection offered to whistleblowers in general, enhanced protection and incentives are available for whistleblowers on crimes involving public officials, referring mainly to bribery and corruption.[225] Those reporting what is later established as a criminal offense involving public officials can receive monetary rewards of up to ¥500,000 (€65,000) or a higher amount with the SPP's approval.[226] Whistleblowers and their near relatives are entitled to broad anti-retaliation protection of their personal safety, assets, reputation, career development and other legitimate interests.[227]

Despite the availability of formal rules for rewarding and protecting whistleblowers, the leakage of whistleblower information and the retaliation against whistleblowers are common in reality.[228] Such privacy violations and retaliation are rarely punished, owing to the lack of rules detailing the specific measures and procedures for the protection of whistleblowers, the actionable acts of retaliation and the punishment.[229] The admonishment issued by the Wuhan Police to Li Wenliang, the doctor who warned his alumni about the SARS-like infection before the Covid-19 pandemic, for spreading rumors online provides an alarming insight into how whistleblowing is actually handled by the Chinese authorities.[230] Considering the high likelihood of retaliation, the monetary incentives under the SPP whistleblowing policy are rather low. It is especially so when compared with the SEC whistleblower program that regularly rewards whistleblowers with tens of millions of dollars.[231] As a result of the high frequency of retaliation and the low monetary incentives, a great number of insiders are discouraged from coming forward, thus undermining the authorities' ability to detect bribery and corruption.[232]

In order to effectively incentivize the whistleblowing of bribery violations, the authorities should strengthen the anti-retaliation protection and increase the monetary rewards for whistleblowers. Relevant laws should clearly provide the protection measures, applicable procedures and the

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[223] Davis, *Between Impunity and Imperialism*, 155 ("[i]t is not that Chinese law is completely hostile to private regulation, it simply favors a different model from the one prevalent in the United States").

[224] The PRC Constitution, Article 41 (entitling citizen's the right to report to the relevant authorities of the illegal actions or dereliction of duty by stage organs or public officials); The PRC Criminal Procedure Law, Articles 110 and 111 (specifying that it is both the right and duty of any entity or individuals to report to the competent authorities of any criminal facts or suspects, while requiring the relevant authorities to protect the personal safety, and confidentiality, if requested, of the reporters and their close relatives).

[225] SPP, Ministry of Public Security, and Ministry of Finance, 关于保护、奖励职务犯罪举报人的若干规定 (Several Provisions on Protecting and Rewarding Whistleblowers of Occupational Crimes), March 30, 2016, unofficial English translation available at http://lawinfochina.com/display.aspx?id=22248&lib=law (accessed February 21, 2022).

[226] *Ibid*, Article 16 (specifying that the amount of the reward shall be based on the nature and circumstances of the offense and the value of the tips, and shall generally be no more than ¥ 200,000 in one case and no more than ¥ 500,000 with the approval of the provincial-level Procuratorate if the tip has a significant value, and uncapped reward applies with the approval of the SPP if the value is especially significant).

[227] *Ibid*, Article 7 (listing behaviors or activities that could be identified as retaliation).

[228] "举报人遭遇打击报复事件频繁发生 业内人士呼吁专门立法保护举报人安全 (Retaliation Frequent Against Whistleblowers, Insiders Call for Special Legislation to Protect the Safety of Whistleblowers)," *法制日报 (Legal Daily)*, September 23, 2019, http://www.chinapeace.gov.cn/chinapeace/c54219/2019-09/23/content_12290125.shtml (accessed February 21, 2022); "匿名举报遭报复, 谁在伤害'提问题的人' (Anonymous Whistleblowers Retaliated, Who is Harming the 'Problem-Raiser')," *Xinhua News Agency*, February 4, 2021, http://www.xinhuanet.com/local/2021-02/04/c_1127061545.htm (accessed February 21, 2022).

[229] "Whistleblowing in the People's Republic of China," May 1, 2015, https://www.simmons-simmons.com/en/publications/ck0aq3zhunhvq0b85qvlmon08/24-whistleblowing-in-the-peoples-republic-of-china (accessed February 21, 2022) (noting that there is "no guidance under PRC law as to what constitutes an actionable act of retaliation").

[230] Chris Buckley, "Chinese Doctor, Silenced After Warning of Outbreak, Dies from Coronavirus," *The New York Times*, https://www.nytimes.com/2020/02/06/world/asia/chinese-doctor-Li-Wenliang-coronavirus.html (accessed February 21, 2022).

[231] See Chapter 4, Section 4.5.1.3 for the introduction and discussion of the SEC whistleblower policy.

[232] OECD, *The Detection of Foreign Bribery*, 2017, at 29-30 (blaming the lack of effective legal protections of whistleblowers in many jurisdictions for the relatively low percentage of whistleblowing directly to the enforcement authorities).

agency in charge. On the other hand, it is necessary to detail the forms of retaliation, as well as the penalty against those that fail to protect the confidentiality of whistleblowers and those engaging in retaliatory or discriminatory acts.[233] Beyond the existence of anti-retaliation laws, the laws should be actively enforced to protect and encourage whistleblowing. In addition, increasing the monetary rewards is another useful measure for incentivizing more whistleblowing, considering the high psychological burdens and possible financial loss suffered by the whistleblowers.[234]

8.4.1.2 Expanding the Scope of Anti-bribery Laws

Corporations will have few incentives to implement a costly anti-bribery compliance program or incur the financial and reputational costs associated with self-reporting and cooperation if they cannot be held accountable for the bribery offenses.[235] Unlike the prevailing concerns among the U.S. scholars about the over-criminalization of the FCPA, the anti-bribery provisions in the PRC Criminal Law are often criticized for the limited scope of bribery offenses.[236] In order to induce companies to actively monitor, prevent and investigate all types of bribery violations, the current anti-bribery rules should be expanded to cover a broader range of bribery schemes. For instance, the law should not only criminalize the actual giving of bribes, but also the "promising or offering" of bribes in conformity with the UNCAC.[237] In addition, bribes in the form of non-property benefits that cannot be directly measured in the scale of money, such as a job offer or sex service, should also be included in the PRC Criminal Law as these forms of bribes are no less harmful than bribes in cash.[238] Moreover, it is proposed to abandon the prosecutorial threshold for the prosecution of bribery offenses. The prosecutorial threshold creates the illusion that bribes below the threshold are permitted.[239] It further contributes to the differential sanctions on individuals based on the nature of the bribery charges, as the responsible personnel associated with corporate bribery are subject to significantly higher prosecutorial threshold compared with

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[233] *Ibid,* at 45 ("[w]histleblower protection systems need to contain measures to protect against reprisals if confidentiality mechanisms fail … Sanctions for reprisals against whistleblowers must consider the full range of retaliatory and discriminatory conduct").

[234] *Ibid*, 36 ("[n]ot only might financial payments incentivise whistleblowers to report information about misconduct, they can also provide financial support, such as living and legal expenses, following retaliation"); Alexander Dyck, Adair Morse and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" *The Journal of Finance* 65, no. 6 (2010): 2213-53 (the analysis of all reported fraud cases in large US corporate from 1996 to 2004 found that employees, media and industry regulator play a major role in fraud detection, while monetary incentives can best explain employee whistleblowing).

[235] Jennifer Arlen, "The Potentially Perverse Effects of Corporate Criminal liability," *Journal of Legal Studies* 23, no. 2 (1994): 835–36 (noting that corporate criminal liability would affect the corporate expenditures on detecting and investigating employee's wrongdoings, and higher enforcement expenditure increases employee's probability of detection).

[236] See Chapter 2, Section 2.2.1.2 on the elements of bribery offenses under the PRC Criminal Law. Steven R. Salbu, "Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense," *American Business Law Journal* 55, no. 3 (2018): 491-493 (noting that the widespread use of DPAs to settle FCPA cases leads to the shortage of judicial interpretation of the vagaries of the FCPA, which enhances the discretionary power of prosecutors and the harshness of FCPA).

[237] United Nations Convention against Corruption, Article 15 (requiring the state Party to criminalize "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties").

[238] Critics have constantly called for bringing bribes in the form of non-property benefits under regulation, see Hongxian Mo, Yu Zhang, "我国刑法中的商业贿赂犯罪及其立法完善 (Crime of Commercial Bribery in China's Criminal Law and the Legislative Improvement)," *国家检察官学院学报 (Journal of National Prosecutors College)* 21, no. 2 (2013): 105-111; Pengxiang Wang, "当代中国贿赂犯罪的刑法治理——以《联合国反腐败公约》为参照 (Criminal Law Governance of Bribery Crime in Contemporary China)," *河北法学 (Hebei Law Science)* 32, no. 2 (2014): 78-79. However, the proposal was met with strong opposition in view of the difficulties in the investigation and measurement of penalty for bribery cases involving non-property interests, see Kechang Ma, "受贿罪客观要件探讨 (Discussion on Objective Elements of Acceptance of Bribery)," in *刑法运用问题探讨 (Discussion on the Application of the Criminal Law),* (Beijing: Law Press, 1992), 248 (citing indeterminate connotation, lack of operability and difficulty in conviction and sentencing as reasons against the criminalization of bribes in the form of non-property interests).

[239] Jianping Lu, "贿赂犯罪十问 (Ten Inquires into Bribery Crime)," *人民检察 (People's Procuratorial Semimonthly)*, (2005): 24-26.

pure individual offenders.[240] Lastly, the anti-bribery provisions should drop the requirements of "seeking improper benefits" about the wrongdoer's mental state, and criminalizes all acts of bribery that undermine the integrity of fiduciary duty.[241]

8.4.1.3 Reforming Corporate Criminal Liability Theory and Rules

A great barrier to the strategy of employing CNP to strengthen individual accountability with corporate cooperation is the debatable understanding of the nature of corporate criminal liability in China based on the corporate personality theory. Unlike the traditional understanding that a corporation only assumes vicarious liability for the associated individuals that actually commit the crimes, the corporate personality theory believes that corporate offenses are committed by the corporation *per se* that has its own independent personality.[242] It is thus reasonable to question the justifictions for the double sanctioning mechanism under the PRC Criminal Law, which holds both the corporation and the responsible personnel accountable for the bribery offenses. The proponents of the corporate personality theory claim that the responsible personnel share the corporate liability as they are corporate constituents.[243] Under this rationale, the responsible personnel can only be held criminally liable if the corporation is convicted, while a non-prosecution decision awarded to the corporation would eliminate the basis for pursuing the individual liability.[244] In the context of CNP, such an understanding of individual liability hinders any attempts to use a non-prosecution decision to induce corporate cooperation against individual targets.[245] In order to activate corporate criminal enforcement and ensure that the corporate settlement does not impede the pursuit of individual accountability, the reform of the double sanctioning mechanism based on the corporate personality theory is essential.[246] The authority should acknowledge the independence of the individual liability for wrongdoings

[240] For example, individual bribery involving bribes of over ¥30,000 (€3,846) will trigger criminal prosecution, while entity bribery will only pass the prosecuting threshold if the bribes involved are higher than ¥200,000 (€25,641). See SPC and SPP, *The 2016 Judicial Interpretation*, Articles 7 and 10.

[241] Jian Zhang, and Xiaohai Yu, "行贿犯罪的司法实践反思与优化应对 (Reflection on Judicial Practice of Bribery Crime and Improved Responses)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2015): 71-73 (arguing for an expansive interpretation of the mental elements of bribery as to seeking illegal benefits based on the violation of the integrity of office duty).

[242] Xihui Li, "论单位犯罪的主体 (On the Subjects of Entity Crime)," *法学论坛 (Legal Forum)* 19, no. 2 (2004): 67-69 (noting that the subject of entity crime is only entity, which makes independent decisions, has independent assets and can bear legal responsibility itself).

[243] Zhidong Xie, "单位犯罪中个人刑事责任根据之探讨——走出我国传统单位犯罪理论之迷思 (Discussions on the Basis of Individual Criminal Liability in Entity Crimes)," *刑法论丛 (Criminal Law Review)*, no. 4 (2011): 48-50 (introducing the basis for the criminal liability undertaken by the responsible personnel according to the unitary entity subject theory, which believes that only entity alone is the subject committing crimes).

[244] Bingsong He, ed., *法人犯罪与刑事责任 (Crime of Legal Persons and Criminal Responsibility)*, (Beijing: 中国法制出版社 (China Legal Publishing House), 2000), 486 (noting that in the context of crime involving legal persons, the criminal liability of the constitutes of legal persons is not the condition for pursing the criminal liability of such legal persons. In contrary, the fact that the legal persons have committed crimes is the basis and necessary condition for pursing the criminal liability of the individuals); Jun Zhang, et al., *刑法纵横谈 (On Criminal Law)*, (Beijing: 法律出版社 (Law Press), 2003), 306 (believing that the criminal liability for entity crimes shall primarily adopt double sanctioning mechanism. The criminal liability of individuals is based on the fact that the entity committed crimes and is held criminally accountable. If the entity did not commit crimes or undertake criminal liability, there is no basis for pursing the criminal liability of responsible personnel).

[245] Liangfang Ye, "论单位犯罪的形态结构—兼论单位与单位成员责任分离论 (On the Morphological Structure of Entity Crimes: Also on the Separation of Entity Liability and Personnel Liability)," *中国法学* (*Law Science*), no. 6 (2008): 97-99 (criticizing the understanding of individual liability based on corporate personality theory for failing to account for the judicial practices of separating the individual proceedings from corporate proceedings).

[246] Yuhua Li, "企业合规本土化中的 '双不起诉' ('Double Non-Prosecution' in the Domestication of Corporate Compliance)," 30-34 (attributing the practice of double non-prosecution in CNP to the confusion of individual liability and corporate liability in legal theory and law, as well as the confusion between the leniency system and CNP).

committed by individuals within the corporate context, and separate such individual criminal liability from corporate criminal liability.[247]

A broad corporate liability rule is necessary to hold corporations, especially large corporations, vicariously liable for the bribery acts committed by the rank-and-file employees.[248] With *de facto* immunity from criminal conviction, large corporations are unlikely to fall for the bait offered by CNP, considering the attendant sanctions and obligations.[249] The current corporate criminal liability in China is extremely narrow as it combines the management-based doctrine and the compliance defense, while requiring the corporation to actually benefit from the individual's wrongdoings.[250] For the smooth functioning of CNP, the reform of the corporate criminal liability rule to allow corporations to be held criminally liable for a broad range of employees' wrongdoings committed within the scope of employment is crucial.[251] The "failure to prevent" model introduced in the UKBA, which holds corporations strictly liable for all employees' wrongdoings while allowing an affirmative defense of "adequate procedures", can be a promising approach.[252] A similar corporate liability rule has already been adopted in the 2017 revision to the AUCL, which penalizes commercial bribery with civil and administrative liability. The reform of the corporate liability rule in the administrative context demonstrates the Chinese authorities' eager search for a broader corporate liability rule and the preference for the model of strict corporate liability coupled with compliance defense.[253]

8.4.1.4 Introducing Sentencing Guidelines for Organizations

Incentives offered under CNP are never appealing without the benchmark indicating the penalty that a corporation would have received were it not for CNP.[254] The absence of sentencing

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[247] Liangfang Ye, "论单位犯罪的形态结构—兼论单位与单位成员责任分离论 (On the Morphological Structure of Entity Crimes: Also on the Separation of Entity Liability and Personnel Liability)," 102-05 (arguing for the separation of individual liability from corporate liability and the understanding of the basis for individual liability as the criminal wrongdoings committed by such individuals, while corporations undertake responsibility vicariously for such wrongdoings committed by individuals within the scope of employment and for the benefit of corporations).

[248] Arlen, "The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.," 165 (noting that broad corporate criminal liability is effective to ensure that corporations do not profit from corporate crimes and have incentives to prevent corporate crimes, while also makes DPA more effective to encourage self-reporting and cooperation); Edward B. Diskant, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," *Yale Law Journal* 118, no. 1 (2008): 150-69 (believing that the *respondeat superior* standard gives US prosecutors a comparative advantage in threatening to prosecute and forcing the corporation to cooperate).

[249] Caroline Binham, "Call to Make Companies Liable for Failure to Prevent Fraud," *Financial Times*, June 5, 2013, https://www.ft.com/content/4900db34-cdf4-11e2-a13e-00144feab7d (accessed August 15, 2021) (David Green, the former director of the SFO, calls for the extension of the identification doctrine in order to assist in the application of DPA, claiming that "if a corporate can't be prosecuted, why should it agree to a DPA?").

[250] Hong Li, "单位犯罪中单位意思的界定 (Defining the Intent of the Unit in Unit Crime)," *法学 (Legal Science)*, no. 12 (2013): 153-160 (criticizing the requirement of collective or leadership decision as improperly expanding or limiting the responsibility of entity, and unsuitable for large modern enterprises; the use of *ex post* distribution of illegal proceeds to determine the nature of the crime is inapplicable to cases generating no illegal proceeds; and those crimes that do economically benefit the entities may not be committed in the name of the entities, especially when there is no transaction counterparty).

[251] Benqi Ouyang, "我国建立企业犯罪附条件不起诉制度的探讨 (On the Establishment of Conditional Non-prosecution System for Enterprise Crime in China)," *中国刑事法杂志 (Criminal Science)*, no. 3 (2020): 69-71 (claiming that the basis for the introduction of the deferred prosecution system in China is the expansion of corporate criminal liability).

[252] Bribery Act 2010, c. 23, Section 7, Failure of Commercial Organisations to Prevent Bribery; Criminal Finances Act 2017, c. 22, Sections 45 and 46 (extending the failure to prevent model to the tax evasion).

[253] See Chapter 7, Section 7.6.1 (discussing the attempts to promote compliance through the reform of corporate liability rules under the AUCL).

[254] Bingzhi Zhao, *中国刑法案例与学理研究(第一卷)* (*Chinese Criminal Law Case and Theoretical Study (Volume 1)*), (Beijing: *Law Press China*, 2001), 497 (refuting the existence of corporate self-reporting based on the practical impossibility of mitigating or lowering the corporate sanctions); Yunxia Yin, Yanjun Zhuang, and Xiaoxia Li, "企业能动性与反腐败'辐射型执法效应'——美国 FCPA 合作机制的启示 (Enterprise Initiative and 'Radiative Effect of Anti-corruption Law Enforcement': Lessons from the Cooperative Regime under the U.S. FCPA)," *交大法学 (SJTU Law Review)*, no. 2 (2016): 38-39 (claiming that the lack of detailed and uniform sentencing calculation standard discourages corporate self-reporting and cooperation as corporations cannot reasonably predict the leniency for such policing measures).

guidelines specifically designed for organizational criminals in China, as discussed in Chapter 7, reduces the effectiveness of CNP in incentivizing corporate self-reporting and cooperation.[255] The organizational sentencing guideline is not an inherent element of a pre-trial corporate resolution mechanism. However, it serves as a useful reference for the negotiation between the prosecutors and corporations, and increases the predictability of benefits offered under the resolution mechanism.[256] In support of the application of CNP, it is necessary for the SPC to release an organizational sentencing guideline that sets the base fine for different crimes, enumerates relevant factors affecting the amount of the corporate fine, and specifies the method of calculation of the corporate fine.[257]

The organizational sentencing guideline should reform corporate criminal liability to allow for a higher corporate fine and more types of corporate sanctions. Specifically, a larger base penalty should be set to significantly increase the corporate criminal fine for bribery offenses.[258] Only in this way would corporations be forced to internalize the full social harms of criminality and actively prevent employees' wrongdoings.[259] In addition, the corporate efforts to voluntarily self-report, cooperate and improve the compliance program should be considered as positive factors showing the corporations' repentance and defined as mitigating circumstances for determining the corporate penalty.[260] Considering the oversimplified penalty regime for the entity offenders under the PRC Criminal Law, the releasing of organizational sentencing guidelines should be accompanied by the legal reform of the entity penalty mechanism. For the sake of rehabilitation and deterrence, the court should be authorized to impose corporate probation and compliance obligations following a conviction.[261]

8.4.1.5 Strengthening the Inter-agency and Inter-national Cooperation

A major uncertainty for corporations when deciding whether to self-report and cooperate is the risk of triggering investigations by multiple agencies and in different jurisdictions. The costs of "piling-on" enforcement actions may easily outweigh the benefits obtained from self-reporting to

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[255] See Chapter 7, Section 7.4.2.

[256] Garrett, "The Corporate Criminal as Scapegoat," 1848 (noting that though the U.S. organizational sentencing guidelines is only advisory in nature and not used in cases negotiated out of court in D/NPA, it has a major effect on the negotiations between prosecutors and companies).

[257] Yong Li, "检察视角下中国刑事合规之构建 (The Construction of Criminal Compliance in China from the Perspective of the Procuratorate)," 109-112 (calling for the release of Sentencing Guidelines specially for organizational offenders, taking into consideration the unique features of corporate offenders and the existence and effectiveness of corporate compliance program).

[258] Brandon L. Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014), 6 (noting that the U.S. prosecutors had few motives to prosecute corporations given the modest fine in the past, while corporate fine only significantly grew after the introduction of the U.S. organizational sentencing guidelines); Darryl K. Brown, "American Prosecutors' Powers and Obligations in the Era of Plea Bargaining," in *The Prosecutor in Transnational Perspective, ed.* Luna, Erik, Marianne Wade, and Bojańczyk Antoni (Oxford: Oxford University Press, 2012), 209 ("federal sentencing law gives prosecutors formal control over the most common means of obtaining sentence discounts within the guidelines—acceptance of responsibility expressed through guilty pleas and cooperation with the government in other cases").

[259] Alan O. Sykes, "The Economics of Vicarious Liability," *Yale Law Journal* 93, no. 7 (1984): 1246 (identifying the ability of corporate vicarious liability to force the enterprise to "internalize" the full cost of its actions).

[260] Yunxia Yin, et al, "企业能动性与反腐败 '辐射型执法效应'——美国 FCPA 合作机制的启示 (Enterprise Initiative and 'Radiative Effect of Anti-corruption Law Enforcement': Lessons from the Cooperative Regime under the U.S. FCPA)," 40-41 (appealing for the authority to adopt clear rules to encourage corporate self-policing measures and credit corporate efforts in implementing effective compliance program and self-reporting).

[261] Yuhua Li, "我国企业合规的刑事诉讼激励 (Criminal Procedure Incentives for Corporation Compliance in China)," 31-32 (calling for the introduction of a separate penalty system for entity offenders in the PRC Criminal Law, adopting additional forms of criminal penalty for entities such as forced suspension of business, the revocation of license or honorary title, and confiscation of property).

one agency, thus discouraging corporations from coming forward in the first instance.[262] Such concerns are especially prominent in China, considering the controversial Social Credit System and the rarity in the coordination between China and other jurisdictions in corporate settlements.

In order to boost the incentives offered under CNP, the Social Credit System needs to be reformed to allow for a "joint leniency approach" among China's Procuratorates and other regulatory authorities, apart from the "joint sanctions approach".[263] As lower social credits could greatly affect the corporation's ability to conduct business and maintain financial viability, the corporation should be allowed to negotiate with the Procuratorates on the impacts of CNP on its social credit rating apart from other general terms.[264] In order to avoid double jeopardy and enhance the certainty of the benefits offered under CNP, the Procuratorates should attempt to involve the relevant agencies in negotiations with the corporation for a coordinated settlement. If it is not feasible to do so, the Procuratorates could send prosecutorial suggestions to the relevant regulatory agencies, requesting them to consider the corporate self-policing measures and the conclusion of CNP before sanctioning the corporation for the same corporate misconduct. To ensure the smooth inter-agency cooperation in practice, the impact of CNP on corporate credits should be included in the Memoranda of Understanding signed by the SPP with other top bureaus under the "joint punishments and rewards" framework for the enforcement of the Social Credit System.[265]

In modern society, bribery is seldom a domestic issue, nor is the fight against bribery. The domestic resolution mechanism will be less effective in incentivizing corporate self-policing measures without effective international cooperation as a result of the weak threats of sanctions or/and the uncertainty of incentives.[266] Generally speaking, China is not an active player in the global fight against transnational bribery, except when international cooperation is needed for the extradition of fleeing corrupt officials and the recovery of stolen assets.[267] In order to combat transnational bribery and enhance the appeal of CNP for international corporations, the Chinese authorities should strengthen the cooperation with relevant jurisdictions in the bribery investigation and settlement.[268] For this purpose, it is necessary for the Chinese enforcement

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[262] See Chapter 4, Section 4.4.2 (discussing the corporate costs associated with self-reporting, especially when the potential violations involve multiple jurisdictions and agencies).

[263] See Chapter 2, Section 2.3.3 (discussing the controversial Social Credit system, which complicates and worsens the collateral consequences of corporate prosecution and conviction).

[264] "China Corporate Social Credit System (Part 3): Consequences for Businesses (Punishments & Rewards)" September 29, 2019. https://www.msadvisory.com/china-corporate-social-credit-system-part-3/ (accessed February 2, 2023) ("[a]lthough China's Corporate Social Credit System is built on the joint punishments and rewards mechanism, it is argued that in the system the emphasis is on punishments and that rewards are fewer in number and hard to quantify").

[265] *Ibid* (noting that the "unified rewards and punishments" framework is "supported by a range of Memoranda of Understanding (MoUs) signed by multiple government agencies, promising to enforce each other's blacklists and redlists").

[266] See Chapter 4, Section 4.5.1.2 and Section 4.5.2.2 (discussing how international cooperation between different enforcement authorities boosts corporate self-reporting by enhancing the authority's ability to detect and penalize bribery schemes on the one hand, and protecting the corporation from unfairly duplicative sanctions on the other hand).

[267] Konstantinos Tsimonis, "China and the UN Convention Against Corruption: a 10-year Appraisal," August 6, 2016, http://theasiadialogue.com/2016/08/06/china-and-the-united-nations-convention-against-corruption-a-10-year-appraisal/ (accessed February 27, 2021) ("[i]nternational anticorruption cooperation for Xi refers exclusively to repatriating fleeing officials and stolen funds"); Bertram Lang, "Engaging China in the Fight against Transnational Bribery: 'Operation Skynet' as a New Opportunity for OECD Countries," *2017 Global Anti-Corruption and Integrity Forum*, 8-13 (noting that "China's approach to date has been one of attentively observing and selectively transposing transnational anti-bribery standards without showing any signs of enforcement", while claiming that China's focus on extraditing corrupt officials provides the western country with an opportunity to engage China in the fight against transnational bribery).

[268] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, 37-38 (noting that multi-jurisdictional non-trial resolutions enhance the finality of resolution and provide greater certainty for corporate defendants); Weibin Zhang, "跨国公司商业贿赂法律规制的实践模式及借鉴 (The Practice Pattern and Lessons of the Regulation of Commercial Bribery Conducted by Multinational Enterprises)," *法学 (Law Science)*, no. 9

agencies to demonstrate their will to work together with their foreign peers and foster the trust between each other through information sharing, fair distribution of corporate penalty, and continually improving CNP.[269] Such transnational cooperation should not only target bribery committed by foreign corporations in China, but also the corrupt officials and the non-compliant Chinese companies operating overseas.[270]

8.4.2 Procedural Basis for the Negotiation Between the Prosecution and Corporation

In addition to the substantive liability rules and threats, the legitimacy and efficacy of the CNP are also based on the procedural rules that regulate and support the negotiation between the Procuratorates and corporations. Regarding the procedural basis for the CNP, this Section will focus on two key elements, i.e., the prosecutorial discretion and the corporations' ability to conduct internal investigations.

8.4.2.1 Broader Prosecutorial Discretion

As was discussed in Chapter 7, sufficiently broad prosecutorial discretion is crucial to the smooth functioning of the DPA programs in terms of incentivizing corporate self-policing measures and searching for custom-tailored settlement terms.[271] However, China's Procuratorates are faced with severe restrictions when making charging decisions within the PRC Criminal Procedure Law. They can only make a non-prosecution decision based on their discretion when the circumstances of the crime are so minor that no penalty is necessary according to the PRC Criminal Law or the suspect is likely to be exempted from penalty.[272] Notably, prior good conduct, having an effective compliance program in place and proactive rectification are not legally recognized reasons for a non-prosecution decision under the PRC Criminal Procedure Law.[273] Due to the serious restrictions on the prosecutorial discretion, China's Procuratorates have few means to negotiate with the corporate offenders or to incentivize corporate self-policing measures.

For the sake of the legitimacy of CNP and the effectiveness in incentivizing optimal corporate self-policing measures, it is imperative to expand the existing scope of prosecutorial discretion.[274] Specifically speaking, the PRC Criminal Procedure Law should be reformed to explicitly allow the Procuratorates to make a conditional non-prosecution decision in

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(2014): 115 (recommending the Chinese anti-corruption agencies to enhance cooperation with the international communities to strengthen the global fight against commercial bribery).

[269] Chong Yu, "在华外国公司商业贿赂犯罪的实证研究与刑法规制 (Empirical Research and Criminal Law Regulation of Commercial Bribery Crime Committed by Foreign Companies Operating in China)," *犯罪研究 (Criminal Research)*, no. 1 (2013): 55-57 (claiming that the Chinese authority should strengthen its will and capability to combat commercial bribery involving foreign corporations).

[270] *Ibid,* 56 (arguing that the Chinese authorities should actively strengthen the judicial assistance with the host countries in combating overseas bribery, and that the FCPA and other enforcement cases offer valuable basis for the Chinese authorities to initiate the investigations into Chinese corrupt officials and foreign bribers).

[271] See Chapter 7, Section 7.3.1.

[272] The PRC Criminal Procedure Law, Article 177, para. 2. Apart from the discretionary non-prosecution, the Procuratorates can also make a non-prosecution decision for six statutory reasons (Article 177, para. 1) and a non-prosecution decision with doubts on evidence (Article 175, para. 3).

[273] The PRC Criminal Law has provided a number scenarios that may warrant an exemption from punishment, including discontinuation of crime with no harms caused, excessive self-defense, coerced accomplice, and in specific to bribery offenses, bribe-giver that voluntarily confesses his/her bribery before being prosecuted, plays a key role in the detection of major cases, or has made significant meritorious service and and the crime is relatively minor.

[274] Yong Li, "检察视角下中国刑事合规之构建 (The Construction of Criminal Compliance in China from the Perspective of the Procuratorate)," 109-12 (noting the necessity of reforming the PRC Criminal Procedure Law for the development of the compliance-based non-prosecution regime).

consideration of a number of factors. Such factors could include, among other things, (i) the adequacy of the corporate compliance program, (ii) the timeliness and quality of corporate self-reporting and cooperation, (iii) the payment of monetary sanctions, and (iv) the corporation's commitment to improve its compliance program under inspection. Besides, the Procuratorates should be allowed to make a final non-prosecution decision or resume the prosecution proceeding based on the assessment of the post-resolution corporate cooperative and compliance efforts.[275]

8.4.2.2 Oversight of Prosecutorial Discretion and Transparency

Wielding the big threat of criminal prosecution, prosecutors have substantial leverage over the corporation in the negotiation process in terms of deciding whether to settle, the terms of settlement, whether any breach has occured and the appropriate remedies.[276] Excessive prosecutorial discretion may lead to a sub-optimal level of deterrence and even rent extraction and corruption, discouraging corporations from voluntary self-disclosure and cooperation.[277] The issue is of greater concern in China, given the serious power imbalance between the Procuratorate and corporations in reality, the lack of judicial oversight over CNP, and the novel concept of corporate compliance to the legal community as identified in Chapter 7.[278] In order to ensure that CNP is applied to effectively advance the values of deterrence and rehabilitation, meaningful guidance and oversight of the Procuratorates' application of CNP is essential. For similar purposes, foreign legal scholars and lawmakers have proposed a number of strategies to improve the DPA programs, including mainly (i) ensuring meaningful judicial scrutiny in the form of approving DPAs, monitoring the implementation of DPAs, and adjudicating any potential breach;[279] (ii) enhancing internal guidance and control over prosecutorial discretion within the prosecutorial branch;[280] and (iii) promoting the transparency of the DPA process to allow for public oversight.[281]

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[275] Ruihua Chen, "企业合规不起诉制度研究 (Research on Enterprise Compliance Non-Prosecution System)," 85 (acknowledging the lack of legal basis for the CNP for the Procuratorates to defer prosecution to allow the improvement of corporate compliance program and make a non-prosecution decision based on the corporate compliance efforts under the existing law, which shall be reformed in order to maintain the legitimacy of the CNP).

[276] SFO and CPS, DPA Code of Practice, Article 2.6 (noting that the application of the public interest is "an exercise of discretion. Which factors are considered relevant and what weight is given to each are matters for the individual prosecutor. It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction"); Gibson Dunn, *2017 Year-end Update on Corporate NPAs and DPAs*, January 4, 2018, https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf, 4 (noting that DPAs often include provisions which allow government to act as the sole decider as to whether a breach has occurred).

[277] Anthony Ogus, "Corruption and Regulatory Structures," *Law & Policy* 26, no. 3-4 (2004): 341 (noting that greater discretion to regulatory rule-makers creates more opportunities for corruption in a developing country where instruments of accountability may be weak).

[278] See Chapter 7, Section 7.3.3 (discussing the credibility issue of China's Procuratorates); Section 7.6 (discussing the emerging concept of compliance in China). Hans-Bernd Schaefer, "Legal Rules and Standards," in Rowley C.K., Schneider F. eds. *The Encyclopedia of Public Choice* (Boston, MA: Springer, 2004): 348 (noting that the mechanism of granting broad discretionary power to those in administration of justice "requires a civil service and a judiciary which is well trained to cope with unstructured decision situations and has the skill and the information to arrive at precise and efficient decisions on the basis of unclear rules").

[279] Greenblum, "What Happens to a Prosecution Deferred?" 1896 ("[j]udicial involvement in the corporate deferral process can curb the prosecutorial power that creates these new negative externalities, and it can reshape corporate deferred prosecution into a more effective and accountable mechanism for reforming delinquent corporations"), and 1904 (claiming that enhanced juridical oversight is even more urgent for "the implementation of the agreement, where dissolution of the agreement can result in prosecution and the stakes are highest"); Robert J. Ridge, and Mackenzie A. Baird, "The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements," *University of Dayton Law Review* 33, no. 2 (2008): 203 (noting that judicial oversight in the form of approving the DPAs as to the justness of the conditions and sanctions and determining the breaches of the agreement is needed to provide a backstop against the abuse of prosecutorial discretion).

[280] Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements," *Journal of Legal Analysis* 8, no. 1 (2016): 229-30 (arguing for clearer *ex ante* guidelines governing compliance mandates to be issued by the DOJ to reduce the rule of law concerns over the prosecutors' use of DPAs in imposing corporate mandates); Gerard E. Lynch, "Our Administrative System of

In order to ensure an accountable and effective exercise of the prosecutorial discretion in the application of CNP, the following suggestions are proposed. Firstly, the authorities should introduce laws, accompanied by relevant judicial interpretations,[282] to offer a detailed delineation of the local Procuratorates' scope of authority in the application of CNP. Such laws and judicial interpretations should clearly list the factors affecting the charging decisions and the type of obligations that can be imposed via the CNP as proposed in the previous Sections.[283] Secondly, as explained in detail in the following paragraph, the negotiation, implementation and termination of settlements should be subject to the supervision from a higher-level Procuratorate. Meanwhile, the victims of the underlying corporate crimes should be granted the right to appeal to a higher-level Procuratorate against the application of CNP. The corporate defendant should be allowed to appeal if the Procuratorate improvidently declares a breach and refuses to make a non-prosecution decision at the end of the inspection period. Thirdly, the Procuratorates should be formally required to publicly announce their decisions to resolve corporate cases via CNP, together with the criminal facts (subject to redactions for privacy and fairness purposes), considerations and terms. Besides, a public hearing should be held by the Procuratorates involving all relevant parties and the compliance inspection agency to assess the corporate compliance developments before a final non-prosecution decision is made.[284] The combination of *ex-ante* guidance, *ex-post* supervision and increased transparency is expected to provide a significant safeguard for an accountable exercise of prosecutorial discretion in the application of CNP, promote the public interests and advance the goals of criminal law.[285]

The proposition of relying on the supervision within the prosecutorial branch, instead of external judicial scrutiny, to provide oversight of prosecutorial discretion in the application of CNP is made in consideration of two general factors.[286] First of all, involving judiciary oversight in the CNP process adds another layer of costs for few observable benefits, which is even more

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Criminal Justice," *Fordham Law Review* 66, no. 6 (1998): 2143-44 (claiming that prosecutorial self-regulation of discretion through clear standard released in advance and internal supervision by supervisory authority offers the most practical responses to the reality of prevalent plea-bargaining).

[281] Lawrence A. Cunningham, "Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform," *Florida Law Review* 66, no. 1 (2015): 48-49 (calling for the prosecutors to "prepare a corporate governance profile *ex ante* as part of their investigation of corporate targets," and "publicly articulate the rationale for corporate governance terms in DPAs"); Sean J. Griffith, "Corporate Governance in an Era of Compliance," *William & Mary Law Review* 57, no. 6 (2016): 2137-39 (calling for mandatory compliance disclosure by public corporations, which would allow a better understanding of compliance and force corporations to adopt strong compliance program).

[282] Given the abstract nature of Chinese laws in general, the judicial interpretations issued by the SPC and SPP are important in practice in terms of interpreting the law and providing clear, concrete and binding guidance for local courts and Procuratorates.

[283] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (arguing for a clear definition of the scope of application and preconditions for CNP to guide the Procuratorates' exercising of legal supervision power).

[284] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," 57-58 (auguring for a more transparent process for the CNP, including a public hearing, and the publishing of the non-prosecution decision and corporate compliance reforming measures).

[285] Arlen, "Prosecuting Beyond the Rule of Law," 194 (noting that the modern society relies on two different mechanisms to ensure the rule of law: limiting the scope of authority granted, as well as providing external and/or internal oversight over the exercising of authority); John T. Scholz, "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory," *Law and Contemporary Problems* 60, no. 3 (1997): 266-67 (offering to deal with the accountability of regulatory agencies by using four mechanisms: formal procedural requirements, legislative and executive oversight, independent monitors and external boards, and interest representation).

[286] It is worth to note that there are some concerns regarding the supervision within the prosecuting agency, see Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 57 (noting that building CNP within the framework of the Procuratorate's authority to make non-prosecution decisions may invite challenges due to the possible negative impacts on the attempts to promote trial-centered litigation system); Jennifer Arlen, "Prosecuting Beyond the Rule of Law," 194 ("[o]versight often is most effective when allocated to a separate branch of government, such as the judiciary, but in some cases may be effectively imposed by actors in a different division of the same branch of government").

problematic given the acute shortage of judicial personnel in China as discussed in Chapter 2.[287] The court hardly has sufficient resources and expertise to review the prosecuting decisions to ensure that the public interests are served and the legitimate rights of the corporate defendants and the individual targets are protected in the application of CNP.[288] The notion about the judicial involvement in China's leniency system and the UK DPA program provide real examples that raise considerable doubts about the effectiveness of judicial oversight. Though judicial approval is an inherent element of China's leniency system, it has been observed by practitioners that the court trials generally take less than ten minutes.[289] The extremely short proceeding includes also the routinary process, such as the notification of procedural rights and the identity check of the defendant. Therefore, the court has little time to assess the defendant's willingness to accept the responsibility and the appropriateness of the sentences suggested by the Procuratorate. Even the UK DPA model that provides a substantial role for the judiciary in all the stages of the DPA process is subject to concerns that the court's approval of DPAs may be only a "rubber-stamping" exercise.[290]

In contrast, resorting to the internal control mechanism to supervise the Procuratorates' exercising of authority under CNP is a more pragmatic approach in line with China's judicial institutional setting.[291] As described in Chapter 2, the Procuratorate is designed in the Constitution as a legal supervision organ, and considered as a judicial agency just like the court.[292] The Procuratorate's goal is not to seek a conviction of the defendant, but to discover the truth and protect the public interests.[293] The institutional design of the Procuratorate precludes the efforts of turning to the court for the oversight of procuratorial authority.[294] Instead, China's criminal justice system generally relies on the internal control mechanism to supervise the prosecutorial discretion.[295] Under the PRC Criminal Procedure Law, the higher-level

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[287] See Chapter 2, Section 2.3.2 (discussing the shortage of judicial personnel to dispose the booming criminal cases).

[288] Cunningham, "Deferred Prosecutions and Corporate Governance," 47 ("[i]t would put judges, individuals with limited investigative resources and institutional competence, in the difficult position of second-guessing prosecutors who have conducted an investigation and engaged in negotiations with targets. Drawbacks also include adding a layer of costs"); Sean J. Griffith, "Corporate Governance in an Era of Compliance," *William & Mary Law Review* 57, no. 6 (2016): 2128 (noting that "judges are as ill-equipped to assess the quality of settlement reforms as the prosecutors are in imposing them, perhaps even more so").

[289] 最高检召开"准确适用认罪认罚从宽制度"新闻发布会 (The SPP Held Press Conference on the Accurate Application of the Leniency System), October 24, 2019, https://www.spp.gov.cn/spp/zgrmjcyxwfbh/zqsyrzrfckzd/index.shtml (accessed December 29, 2021) (releasing that from January to September 2019, 14.5% of all cases concluded through the leniency system took an ordinary procedure, 49.8% summary procedure and 35.6% fast-track procedure); Huapeng Wei, "刑事速裁程序之检视 (Reflections on the Fast-track Sentencing Procedure)," *国家检察官学院学报 (Journal of National Prosecutors College)* 25, no. 2 (2017): 128-129 (noting that the fast-track trial proceeding generally takes 5 to 10 minutes, inclusive of the routinary rights notification and identity check, therefore few time is left to review of voluntariness of defendants).

[290] Transparency International, "Strengthening the UK's Deferred Prosecution Agreement Regime," February 13, 2020, https://www.transparency.org.uk/sites/default/files/pdf/publications/Strengthening-the-UK%E2%80%99s-Deferred-Prosecution-Agreement-regime-Joint-letter-to-SFO-Director-Lisa-Osofsky_0.pdf (accessed February 20, 2022), Article 5 ("[w]e are also concerned that the final approval process by UK courts of a DPA could come to be seen as a 'rubber-stamping' exercise").

[291] Yan'an Shi, "单位刑事案件的附条件不起诉与企业治理理论探讨 (On the Conditional Non-prosecution in Entity Criminal Cases and Theories of Enterprise Governance)," 55-58 (noting that the non-prosecution decision made by the Procuratorate is in essence the exercising of their inherent legal supervision power, rather than a compromise between the prosecution and defense).

[292] See Chapter 2, Section 2.4.3.2.

[293] See Chapter 7, Section 7.5.1 (discussing the goals of criminal enforcement and the position of the Procuratorates in China's criminal justice system with strong inquisitorial features).

[294] Binbin Tang, "检察机关合规不起诉裁量权限制的三种模式 (Three Models on Restraining the Prosecutorial Discretion in Compliance Non-prosecution)," 54 (noting that China does not have the judicial review system).

[295] Benqi Ouyang, "我国建立企业犯罪附条件不起诉制度的探讨 (On the Establishment of Conditional Non-prosecution System for Enterprise Crime in China)," 11-12 (noting the oversight mechanism under the CNP shall not be the same as the UK model as none of the prosecuting decisions under the PRC Criminal Law is subject to judicial review, while the US model that grants unfettered prosecutorial discretion is also not advisable).

Procuratorate is authorized to adjudicate any disputes deriving from the local Procuratorate's charging decisions.[296] Therefore, the oversight of the prosecutorial discretion in the application of CNP by the higher-level Procuratorate, instead of the court, conforms to the institutional design and the tradition of China's criminal justice system.

8.4.2.3 Facilitating and Regulating Corporate Internal Investigations

The initiation and conduct of comprehensive internal investigations whenever a potential wrongdoing is detected is a key element of an effective corporate compliance program.[297] Meanwhile, the results of corporate internal investigations form an important basis for the corporate self-reporting decisions and cooperative efforts. Sufficient corporate ability and incentives to conduct internal investigations are thus crucial to the strategy of utilizing CNP to incentivize the corporations to develop an effective corporate compliance program, voluntarily self-disclose and fully cooperate.[298]

For the purpose of encouraging and facilitating corporate internal investigations, it is proposed that the attorney-client privilege should be formally acknowledged in China. In view of the corporate enforcement practices in the U.S. and UK, excessive legal privileges could complicate the authorities' investigation into corporate offenses. The authorities are often more suspicious of the authenticity of cooperation from corporations that assert legal privileges, and thus less willing to grant cooperation credits.[299] However, the problem in China is not excessive legal privileges but the absence of legal privileges. Acknowledging legal privileges gives a corporation more control over key information generated in regular business or during internal investigations. Knowing that the information will be kept confidential unless they choose otherwise, corporations would have more incentives to seek legal advice from lawyers in the daily business and involve lawyers in the internal investigations.[300] In addition, corporations would be more willing to conduct extensive internal investigations in order to get a thorough understanding of the potential misconduct and raise their bargaining chips in the later interaction with the state.[301] Accordingly, the benefits offered under CNP would be more of the results of

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[296] The PRC Criminal Procedure Law, Article 179 (in the case of a non-prosecution decision, allowing the public security organ to appeal to the higher-level Procuratorate if its objection against the non-prosecution decision was not accepted by the Procuratorate); Article 180 (allowing the victims to appeal to the higher-level Procuratorate or sue in the court regarding the Procuratorate's non-prosecution decision); Article 181 (allowing the suspect to appeal to the higher-level Procuratorate against a discretionary non-prosecution decision based on the minor criminal circumstances).

[297] Todd Haugh, "The Criminalization of Compliance," *Notre Dame Law Review* 92, no. 3 (2017): 1238-39 (noting three spheres of corporate compliance program, including the education, monitoring- investigation, and enforcement).

[298] Davis, *Between Impunity and Imperialism*, 155 (noting that "laws that promote private regulation are most likely to be cost-effective when they are complemented by laws that place few restrictions on private actors' ability to engage in investigation"); Baer, "When the Corporation Investigates Itself," 308 (noting that "the investigation has become an integral component of the firm's compliance department … [g]overnment prosecutors and regulators … encourage and rely upon their corporate counterparts' information-generating activities").

[299] Louis Kaplow, and Stephen Shavell, "Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability," *Harvard Law Review* 102, no. 3 (1989): 565-615 (examining the effects and social desirability of legal service provided in the course of litigation, concluding that legal advice provided when acts are contemplated tends to channel behavior in a more socially desirable manner when compared with legal advice given during litigation); Bruce A. Green, and Ellen S. Podgor, "Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents," *Boston College Law Review* 54, no. 1 (2013): 98 (noting that legal privileges are narrowly construed because "they denigrate the public interest in disclosure of relevant information in legal proceedings").

[300] Julie R. O'Sullivan, "Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary 'No'," *American Criminal Law Review* 45, (2008): 1279-85 (noting that waiver issue is one consideration in the complex of factors considered by the corporations in deciding whether to undertake internal investigations).

[301] Arlen, and W. Buell, "The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement," 721-23 (noting that the broad attorney-client privilege and work product doctrine in the U.S. assist the corporate internal investigations by giving the corporations more control over the information and leading employees to speak more frankly).

equal negotiation rather than a condescending mercy granted by the Procuratorates, which is a major criticism against China's resolution mechanisms.[302]

Secondly, it is recommended that the authorities should formally acknowledge the evidential status of the information collected by the corporations through internal investigations and verified by the Procuratorates in the criminal proceedings.[303] The formal acknowledgement helps to clear the legal barrier for such information to be used in the criminal prosecution or settlements. The Procuratorates would have no motives to credit corporate cooperation if they have to spend the limited enforcement resources conducting full-range criminal investigations into the same wrongdoing all over again.[304] Moreover, a formal recognition of such information also induces corporations to improve the quality of the internal investigative measures for the purpose of proving the values of their cooperation to the Procuratorates.[305]

As discussed in Chapter 5, a primary concern about the strategy of using corporate cooperation to pursue individual accountability is the risk of trampling on the individuals' rights.[306] In order to reduce such concern, the legal recognition and regulation of the private system of justice within the corporation is fundamental.[307] Given the low-level awareness and respect for due process and data privacy in the Chinese society, placing the corporate internal investigative activities under formal regulation is of particular importance.[308] The interviewing of employees and the collection, review and distribution of documents and data are currently subject to a patchwork of laws in China, such as the labor laws, data privacy laws and state secrets laws. The PRC Criminal Law could also apply if the investigative measures seriously encroach on the individuals' personal privacy, freedom and property rights.[309] The development of procedural rules specially for the conduct of corporate internal investigations is crucial to the protection of the rights of individuals exposed to corporate internal investigations and disciplinary

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[302] Samuel W. Buell, "Criminal Procedure Within the Firm," *Stanford Law Review*, no. 59 (2007): 1632 (listing several objectives of corporate internal investigation, including "to enable the firm to conduct business, such as by sanctioning its agents for wrongdoing and taking steps to prevent recurrence; to situate the firm in a position of superior knowledge for decision making and advocacy in its dealings with regulators and, if necessary, courts; and to give the firm factual materials that have value to regulators and can be used to bargain over legal sanctions"); Xiaona Wei, "完善认罪认罚从宽制度：中国语境下的关键词展开 (Improving the Leniency System: A Keyword Expansion in the Chinese Context)," *法学研究 (Chinese Journal of Law)*, no. 4 (2016): 83 (criticizing the leniency system for being more of "a mercy shown to the defendant in a condescending manner rather than equal negotiation").

[303] Similarly, the evidential status of the information collected by the administrative authorities in the criminal proceedings was a controversial issue among legal scholars until the 2013 Amendment to the PRC Criminal Procedure Law, which explicitly allows such information to be used as evidence in the criminal proceedings. See Han Zhang, "行政执法与刑事司法衔接之证据转化制度研究——以《刑事诉讼法》第 52 条第 2 款为切入点 (Research on the Evidence Transformation System in the Convergence from Administrative Law Enforcement to Criminal Justice: By Using the Second Section of Article 52 of Criminal Procedure Law as the Breakthrough Point)," *法学杂志 (Law Science Magazine)*, no. 4 (2015): 122 (discussing the challenges raised by the legal researchers as to the necessity and legitimacy of the evidence transformation from administrative to criminal proceedings).

[304] Freeman, "The Private Role in Public Governance," 663 (acknowledging the role of private actors in the enforcement area by shouldering the agency's enforcement burden, which is greatly valuable to the understaffed and overburdened regulators).

[305] Brent Fisse, and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1983), 18-87 (noting the importance of recognizing and regulating corporate internal investigations in order to promote private systems of justice and provide minimum protection of individual targets).

[306] See Chapter 5, Section 5.5.2.

[307] *Ibid*, 184 ("[t]he failure of the legal system to recognise the nature and operation of private systems of justice within corporations has permitted scapegoating to flourish").

[308] See Chapter 2, Section 2.3.2 (noting that due process procedures are not restricting the Chinese public investigators the same way as in western countries); Section 2.3.3 (describing the development and implications of China's social credit system).

[309] Hexuan Zhao, "公司内部调查中应如何收集、处理证据 (How to Collect and Process Evidence in the Corporate Internal Investigation)," *Wusong*, July 6, 2016, http://victory.itslaw.cn/victory/api/v1/articles/article/19ec8a85-0086-450e-be2e-f6c294a98229?downloadLink=2 (accessed August 20, 2020).

measures.[310] To be specific, corporate investigators should be required to keep the targets informed by issuing the so-called “Upjohn-warning”. The warning should clarify their role as the counsel to the corporation only. The targets should be fully informed that the corporation owns the legal privilege over the communication between the investigators and the employees, and may decide to waive the privilege in order to cooperate with the authorities.[311] Individuals being identified as responsible for the corporate wrongdoing should also be provided with the opportunity to be heard by the Procuratorates in the corporate settlement stage.[312] Those who believe that they are scapegoated for the fault of others or that their procedural rights or data privacy is violated in the course of corporate internal investigations should be able to seek damages before the court.[313]

As identified by Tom Tyler, the procedural justice experienced by the employees largely determines their motives to adhere to the corporate rules and policies.[314] The regulation of the private system of justice in the corporate context is thus needed not only to protect those whose rights are affected by the state-corporation partnership, but also to promote the level of compliance within the corporation.

8.5 Conclusion

The introduction of DPAs in China presents a promising approach for the Chinese authorities to address the challenges confronting them in the criminal enforcement of anti-bribery laws in the corporate context. As demonstrated in the analysis of the corporate enforcement policies and practices in the U.S., UK and France, DPAs offer the authorities a pragmatic way to resolve corporate criminal matters in the pre-trial stage. The mechanism not only protects corporation from the stigma of being labelled as a convicted criminal, but also minimizes the undesired collateral consequences of corporate conviction to the innocent third parties, including the customers, employees, shareholders, etc. Considering the corporations’ aversion to the protracted criminal proceedings, the authorities could employ DPA, a pre-trial resolution mechanism, to mobilize corporations to join in the fight against bribery for the purpose of advancing the criminal law goals of deterrence and rehabilitation. DPAs could be strategically structured to incentivize corporations to adopt an effective compliance program to monitor, prevent and detect

[310] Buell, “Criminal Procedure Within the Firm,” 1614-17 (claiming that the doctrine and theory of the traditional criminal procedure developed between individuals and state enforcement personnel is inadequate for the criminal investigation into white-collar criminals within the corporate organizations involving a third party, the legal entity); Green, and S. Podgor, “Unregulated Internal Investigations,” 73-78 (claiming that corporate investigators have the incentives, and face little restraints, to “develop and take advantage of individuals’ expectation that the corporation’s interests are aligned with their own and that the corporation, including its lawyers, will protect them”).

[311] O'Sullivan, “Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary ‘No’,” 1290 (noting that the Upjohn Warning essentially includes the following aspects: (1) the legal counsel represents the company-not the employee and is interviewing the employee to gather information in order to provide legal advice to the company; (2) the interview is confidential and covered by the attorney-client privilege; (3) the privilege belongs to and is controlled by the company; (4) the company, not the employee, may elect in future to waive the privilege).

[312] Fisse, and Braithwaite, *Corporations, Crime and Accountability*, 184-85 (addressing the “particular significance of participatory self-determination of responsibility, coupled with minimum procedural protections for individuals exposed to internal disciplinary proceedings”).

[313] Buell, “Criminal Procedure Within the Firm,” 1640-49 (however, noting the undesirability of granting “Garrity immunity” to employees coerced by the corporate investigators during the internal investigations that are conducted for the purpose of seeking cooperation credits, warning that it may impede corporate internal investigations, privilege white-collar offenders over common offenders, and increase the risk that employee manipulate the internal investigations to gain immunity).

[314] Tom R. Tyler, “Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches,” *Brooklyn Law Review* 70, no. 4 (2004):1312 (“corporate actors are motivated in their rule following by their ethical values concerning legitimacy and morality, their judgments about the procedural fairness of their workplace, and by their assessments of process aspects of procedures”).

wrongdoings, timely self-report any detected wrongdoings, and cooperate with the state's investigations by undertaking comprehensive internal investigations. Such features and potentials of DPAs are of great value to Chinese authorities, which are suffering from the severe shortage of enforcement resources and judicial personnel and greatly troubled by the broader implications of corporate prosecution. In addition, the availability of DPAs offers the Chinese authorities a useful means to strengthen the compliance programs of overseas Chinese enterprises to the extent of helping such enterprises to better deal with the increasingly active corporate enforcement actions at home and abroad.

In order to make sure that the introduction of DPAs in China will achieve the desired effects in promoting corporate deterrence and rehabilitation, it is necessary to appropriately design the mechanism itself and situate it in a favorable environment. Regarding the channel for the introduction of DPAs in China, it is proposed to leverage the SPP's existing attempts in the experimentation of CNP and build the Chinese version of DPAs on the basis of CNP with substantial reforms. Inspired by the DPA programs in foreign jurisdictions, CNP was introduced as a prosecutorial tool to bypass the criminal trial in order to minimize the economic implications of corporate conviction and to promote compliance development. However, no due attention has been paid to the goal of deterrence or individual accountability, while the effectiveness of CNP on the compliance compliance development is questionable. CNP thus runs the risks of insulating corporations with just a window-dressing compliance program from criminal conviction, without enhancing the authorities' ability to prevent and sanction corporate crimes. In order to improve CNP, this Chapter envisages the structural design of CNP in seven key aspects, including the general goals, scope of application, considerations, incentives, obligations, as well as the compliance monitoring and oversight mechanism. The purpose is to enhance the effectiveness of CNP in terms of mitigating the current corporate enforcement challenges and promoting the values of deterrence, accountability and rehabilitation.

Apart from an appropriate legal design of the CNP mechanism itself, it is equally important to reform the criminal justice system in a broader context in order to provide a favorable environment for the smooth functioning of CNP. The current Chinese criminal justice system impedes the strategy of employing CNP to form a government-corporation partnership in the fight against bribery in two major ways. Firstly, both the PRC Criminal Law and the Criminal Procedure Law remain fixed at the level of individualism, paying little attention to the prosecution of corporate crimes or the corporate leniency mechanisms. In light of the low risks of criminal prosecution and the uncertain benefits for voluntary self-disclosure, it is not surprising that corporations in China have few incentives to implement costly compliance programs or to actively self-report. Secondly, China's criminal justice system shows strong inquisitorial features, such as the reliance on the public enforcement agencies to collect evidence and the strict restraints on the prosecutorial discretion for the fear of sabotaging the substantive truth. The corporations' role in the fight against bribery through conducting internal investigation is marginalized and severely restricted, while the Procuratorate's ability to incentivize desired corporate self-policing measures is limited.

For the purpose of providing a favorable context for encouraging corporations in the fight against bribery and facilitating the negotiated settlement, it is proposed that the criminal justice system should be reformed. Corporations engaged in bribery should be subject to credible threats of detection and sanctions, while sufficient room should be available for the negotiation between the Procuratorates and the corporations. In order to strengthen the Chinese authorities' ability to detect and sanction corporate crimes, it is recommended to (i) improve the whistleblower protection and reward program, (ii) expand the scope of anti-bribery laws and the corporate criminal liability rule, (iii) release criminal prosecution and sentencing guidelines especially for organizations, and (iv) strengthen the cooperation with foreign authorities in the anti-bribery enforcement actions and coordinated resolution. Regarding the procedural basis for CNP, it is recommended that the prosecutorial discretion be expanded to allow for flexible and effective prosecutorial responses proportionate to the varying levels of corporate self-policing measures. Meanwhile, it is also necessary to encourage and regulate the corporate internal investigations by (i) acknowledging the attorney-client privileges, (ii) recognizing the evidential status of the information collected by the corporate investigators and validated by the Procuratorates, and (iii) developing due process rules for the conduct of corporate internal investigations and the protection of the individuals' rights.

Final Concluding Remarks

Should DPAs be introduced into China to resolve corporate bribery crimes?

DPA has become a primary way of resolving corporate bribery in the U.S., UK, and France. Owing to the clandestine nature of bribery schemes and the cloak of corporate organizations, it is often a burdensome and challenging task for the public agencies to detect corporate bribery and hold corporate and individual criminals accountable via the traditional indict-charge-convict process. As demonstrated by the "Arthur Andersen" effect, criminal prosecution of corporations may cause irreversible harms to the corporate viability and inflict painful collateral consequences on the innocent third parties, including the customers, suppliers, employees and shareholders. As a "middle ground" between outright declination and full-scale prosecution, DPA presents a pragmatic way for the prosecutors to resolve corporate criminal matters. It protects the corporations from the reputational loss and mandatory debarment following conviction, which may become the *de facto* corporate death penalty. In return, corporations are generally incentivized or required under DPAs to self-report and fully cooperate in the state's investigations into the corporate wrongdoings and relevant individuals, and to commit to improve their compliance program under supervision. Considering that corporations are generally better situated than the state to detect and investigate employees' wrongdoings, the government-corporation partnership enables the authorities to prosecute corporate criminal cases that would be otherwise unnoticed, economize on the often-limited enforcement resources, and promote corporate rehabilitation to minimize recidivism. If the DPA is breached, the prosecutors reserve the right to prosecute the corporation based on the confessions and evidence provided by the corporation itself. Benefiting from the pre-trial resolution vehicle, the U.S., UK and French authorities have significantly ramped up their corporate enforcement actions and are now leading the global fight against bribery.

Inspired by the success of DPAs in the U.S. and other jurisdictions, China's SPP is actively promoting the corporate resolution mechanisms by experimenting with CNP nationwide. The attempts of CNP were triggered by factors largely similar to the concerns underlying the introduction of DPAs in foreign countries, including the high costs of corporate investigation and prosecution, the adverse collateral consequences of corporate prosecution, and the necessity to encourage proactive corporate compliance. Designed to mitigate the negative externalities of corporate prosecution and to encourage corporate compliance development, CNP requires the Procuratorates to consider and promote the development of corporate compliance program in the prosecution of crimes involving private enterprises. The Procuratorates are directed to refrain from holding the responsible personnel in pre-trial custody, filing criminal charges of corporate offenses or recommending jail sentences if the corporation agrees to the inspection of its compliance progress by a third-party organization.

The comparison of the DPA programs in the U.S., UK and France and China's CNP in Chapter 3 discovers that CNP shares many similarities with the DPA programs. Howeverm, CNP pays little attention to the imposition of corporate monetary sanctions, the incentivization of corporate self-

reporting and cooperation, or the pursuit of individual accountability. Moreover, the third-party organization is questionable in terms of its effectiveness in ensuring genuine corporate compliance efforts, considering (i) the unguaranteed expertise and will of the parties involved in the inspection and assessment of corporate compliance efforts, (ii) the short inspection period, which lasts for 1-3 months only, and (iii) the absence of benchmark or guideline for the assessment of a corporate compliance program. CNP is thus likely to offer corporate and individual offenders an easy way out of criminal conviction, failing to deter the commission of corporate crimes in the future or rehabilitate the troubled corporate organizations.

Considering the proved values of DPAs in strengthening corporate enforcement actions in the selected jurisdictions, this study proposes that DPAs should be introduced into China to tackle the challenges confronting the Chinese authorities in the corporate anti-bribery enforcement. It was identified in Chapter 2 that China's individual-centered, enforcement-oriented and public-enforcers only anti-bribery approach fails to effectively control bribery or foster corporate compliance. Instead, it turns out to be burdensome for the under-staffed and ill-equipped anti-bribery agencies and judicial authorities, while the intrusive investigative measures could distort the business operation and even endanger corporate viability. A Chinese model of DPA, if appropriately structured, would strengthen the authorities' ability to detect and sanction corporate bribery. Moreover, it helps reduce the pressure on the overstretched public enforcement and judicial agencies, and minimize the adverse collateral consequences of corporate prosecution and conviction. DPAs with due focus on corporate monetary sanctions, compliance reforms and monitorships are useful to force corporations to develop effective compliance programs to monitor and prevent employees' wrongdoings, reducing the authorities' pressure in combating corporate crimes. Moreover, the introduction of DPAs into China would enable Chinese authorities to combat bribery involving foreign corporations more effectively. The authorities' fear of driving foreign investment away would be reduced by the corporate resolution mechanism, which opens the door for international cooperation against corruption and coordinated settlement of foreign bribery cases.

What lessons can be learned from the DPA policies and practices in the U.S., UK and France?

China's CNP and the foreign DPA regimes share a lot of similarities in terms of the policy goals and rationales. Given the evidently positive role of DPAs in strengthening the corporate enforcement actions in the U.S., UK and France, their lessons and experience in the application of DPAs can be valuable for China in reforming its CNP. Based on the discussion and analysis in Chapters 4, 5 and 6, several key lessons can be drawn from the DPA policies and practices in the three selected jurisdictions.

Firstly, it is beneficial for the public enforcement agencies to engage corporate actors in the fight against bribery. Compared with the state enforcers, corporations are generally more capable of detecting corporate wrongdoings, identifying wayward employees and gaining access to witnesses and information without the same level of procedural restraints. By encouraging corporations to prevent, detect and investigate corporate bribery schemes, the authorities can save the public enforcement resources, and increase the overall cost-effectiveness of the monitoring and investigating efforts. The government-corporation partnership allows the finite

public enforcement resources to be more efficiently deployed to prosecute non-cooperating corporations and individual offenders, thus increasing the general level of deterrence and compliance. Therefore, a major goal of China's CNP should be set as incentivizing corporations to join in the fight against bribery in the form of effective compliance programs, timely self-disclosure, full cooperation and remediation if the authorities are serious about combating bribery in the corporate context.

Secondly, the conclusion of corporate DPAs does not eliminate the need for pursuing individual liability. As corporate crimes are actually committed by human beings, seeking individual liability helps to assign the blame, enhance deterrence and uphold people's trust in the criminal justice. On the other hand, as corporations only assume liability vicariously for individuals' misconducts, the dearth of individual prosecutions could undermine the basis of corporate DPAs and discourage future corporate cooperation. Regarding the means of seeking individual liability, internal corporate discipline and external prosecution differ in the probability of application, the severity and types of sanctions, the due process requirements and the perceived fairness of outcome. Compared with the corporate investigators, the government agents face a great deal of challenges in identifying individual wrongdoers in the corporate context, establishing the *mens rea* of individual wrongdoers and accessing the privileged information. In view of the corporations' relative advantages in identifying and investigating wayward employees, DPAs should be applied to induce corporations to adequately discipline relevant individuals and cooperate with the state in the individual prosecutions if internal disciplinary measures are insufficient to ensure individual accountability.

Thirdly, the imposition of appropriate corporate monetary sanctions and compliance obligations via DPAs is necessary for the sake of deterrence and rehabilitation. Substantially high monetary sanctions force corporations to internalize the full social costs of the criminal acts, inducing corporations to take effective preventive measures and strengthen internal controls. Prosecutors can further promote corporate rehabilitation by factoring the status of corporate compliance program into the charging or settlement decisions and the negotiation of the terms of DPAs, accompanied by periodical self-reporting requirements and external monitorship. In order to promote genuine corporate compliance, appropriate assessment of the corporate compliance program and continual monitoring of corporate compliance progress are critical. In order to address the prosecutorial deficiencies in terms of compliance assessment and monitoring, compliance evaluation guidelines and external compliance monitorships should be integral elements of the DPA program. In light of the prosecutors' general lack of expertise in compliance and the high monitoring costs, it is socially desirable to directly impose compliance duties only when the use of a corporate fine and individual liability is insufficient to generate optimal deterrence. The necessity and scope of external monitorships should be determined based on the cost-benefit analysis. Depending on the legal culture and the maturity of the compliance market, authorities in different jurisdictions can resort to private professionals or a specially-designated public agency to monitor the company's compliance with relevant laws and the terms of DPAs. In any case, the authorities should pay special attention to the monitor's expertise, independence and incentives for carrying out high-quality monitorship, while providing a sufficiently long duration of the monitorship.

Lastly, a carrot-stick approach is needed to effectively incentivize corporations to timely self-report, fully cooperate and implement effective compliance programs. Notably, corporate self-policing measures, such as voluntarily self-reporting, cooperation and compliance reforms, are not free of costs but can be prohibitively expensive. The costs include the expenses of corporate internal investigations, reputational loss following the exposure of corporate scandals, fees paid to compliance monitors and other professionals, distortion to business operation, as well as the ensuing corporate fine, disgorgement and civil liability. In order to induce corporations to incur the costs and take full self-policing measures, the incentives offered by the DPA programs should be substantial, predictable and proportionate to the values of corporate self-policing measures. Given the corporations' aversion to the lengthy criminal proceedings and the desire for leniency, such incentives could take the form of, among others, a DPA or declination, fine reductions and exemption from external monitorships. On the other hand, the incentives offered under the DPA programs can only be appealing and effective if the corporations are otherwise faced with credible and perceivable risks of detection and punishment. In order to effectively incentivize corporate self-policing measures via DPAs, the enforcement agencies should reinforce their own capability to detect and sanction corporate misconduct. To that end, the authorities should improve the whistleblowing program, reform the restrictive anti-bribery laws and corporate liability rules, and increase the public enforcement resources.

Policy Recommendations: How to design the Chinese model of DPA and complementary regimes?

In view of the lessons drawn from the foreign experience in the application of DPAs, the following recommendations are proposed for the reform of CNP to establish a Chinese version of DPAs:

(i) Regarding the general goals of CNP, the program should also be designed to advance the goal of deterrence and corporate rehabilitation. Importantly, an excessive emphasis on efficiency may undermine the efforts of promoting effective corporate compliance reforms, which calls for a sufficiently long inspection period.

(ii) As to the scope of application, considering the Procuratorates' general lack of expertise and experience in corporate settlements and compliance, CNP should be applied to a more restricted scope of offenses at the initial stage. Such offenses could include bribery, corruption, fraud and other financial crimes. Besides, it is inappropriate to negotiate CNP with individual offenders if deterrence and individual accountability are to be pursued. On the other hand, CNP should be used to resolve not only minor corporate crimes, but also more serious offenses involving big corporations given the greater challenges and collateral consequences in the criminal prosecution of major corporations.

(iii) In terms of the considerations for the application of the CNP, it is proposed that the Procuratorates should include three main factors in the evaluation of circumstances when making charging or settling decisions in corporate criminal cases. Such factors include (a) the probability and magnitude of adverse collateral consequences of corporate prosecution, (b) the effectiveness of the corporate compliance program and any pro-active corporate measures to address the compliance risks, and (c) the existence and

quality of corporate self-reporting and cooperation. A clear and strategically designed corporate prosecution guideline, which sets forth the factors affecting the Procuratorate's charging or settling decisions and provides clear benefits for corporations taking specific measures, is fundamental to the success of CNP. It is also beneficial to guide the local Procuratorate's assessment of the adequacy and effectiveness of the corporate compliance program by listing all the factors to be considered and all the questions to be answered.

(iv) Regarding the incentives offered under CNP, the SPP should provide clear, predictable and proportionate benefits, both substantive and procedural, to effectively incentivize corporations to incur the full costs of corporate self-policing measures. Notably, a non-prosecution decision or reduced sanctions for responsible personnel is not a valid option as it is detrimental to the values of fairness, accountability and deterrence.

(v) As for the obligations imposed under CNP, the Procuratorates should employ CNP to extract (a) corporate acceptance of responsibility, (b) a sufficiently large corporate fine, (c) continual corporate cooperation in the investigation of individual wrongdoers, and (d) genuine corporate compliance reforms. As China's Procuratorates are by nature a supervision agency rather than an enforcement agency, they are not authorized to impose a final and substantive penalty. The Procuratorates may take into consideration the penalty imposed by the regulatory agency and compensation paid to the victims when determining whether to apply CNP. The goal is to strengthen the Procuratorates' control over the final corporate sanctions and to ensure that the corporate offenders do not benefit from bribery violations.

(vi) In terms of the compliance monitoring mechanism, the Procuratorates may allow companies with low compliance risks to self-report on their compliance efforts, and resort to external monitorships for corporations with serious compliance failures and high agency costs. It is proposed that a special public agency, provided with adequate funding and independence, be established to undertake the task of compliance monitoring following the example of the French AFA. Such an arrangement mitigates the concerns over cronyism in the selection of private monitors or the monitors' expertise in compliance. It also conforms to the Chinese legal culture that shows general preference for entrusting public actors with the administration of criminal justice. Moreover, a sufficiently long inspection period is necessary to ensure that only corporations successfully fulfilling their compliance duties are exempt from conviction under CNP. For this purpose, it is recommended that the PRC Criminal Procedure Law be reformed to set a long period for the improvement and assessment of corporate compliance programs, independent from the time available to the Procuratorates for making charging decisions.

In addition to the recommendations regarding the improvement of CNP itself, this study further considers the legal factors affecting the threats of corporate sanctions as an alternative to CNP and the procedural basis for the state-corporation partnership in the fight against bribery. Both aspects are crucial to the legitimacy and efficacy of CNP. For the purpose of providing a favorable environment for the smooth functioning of CNP, the following suggestions are made:

(i) In order to ensure the appeal of CNP to corporations, the enforcement authorities should strengthen their ability to detect, investigate and prosecute corporate bribery to pose credible threats for corporations that fail to prevent the occurrence of bribery. To this end, it is suggested that the Chinese authorities should (a) reinforce the anti-retaliation protection and financial rewards for whistleblowers, (b) expand the scope of the prohibited acts of bribery under the anti-bribery law, (c) reform the restrictive corporate criminal liability rule, (d) provide harsher corporate fines and more types of corporate criminal sanctions, and (e) enhance the inter-agency and inter-national cooperation against corporate bribery.

(ii) The smooth functioning of CNP is contingent upon broad and guided prosecutorial discretion in making charging and settlement decisions, as well as the adequare corporate ability to conduct internal investigations efficiently. The PRC Criminal Procedure Law should be reformed to expand the discretion available to the Procuratorates. Sufficiently broad prosecutorial discretion underlies the legitimacy of CNP, and allows the Procuratorates to determine whether and how to structure a tailored agreement to resolve corporate crimes properly. On the other hand, it is of vital importance to ensure that the prosecutorial discretion is exercised in a transparent and accountable way in the application of CNP. For this purpose, it is proposed that (a) *ex-ante* guidance be issued to detail the Procuratorates' scope of authority in the application of CNP; (b) all stages of CNP be subject to the supervision from the higher-level Procuratorate, and (c) the settlement agreements be published, and public hearings involving all stakeholders be held at the end of the inspection period before a non-prosecution decision is made. For the sake of facilitating the conduct of corporate internal investigation, the authorities should formally acknowledge the legal professional privileges and the evidential status of the information provided by the corporations and verified by the Procuratorates. Meanwhile, it is necessary to develop procedural rules regulating corporate internal investigations to protect the rights of individuals exposed to internal investigations and disciplinary proceedings, and to ensure the procedural justice within the corporations.

Summary

While bribery is designated as a criminal offense in most jurisdictions, the enforcement of anti-bribery laws in the corporate context, which is crucial to the fight against bribery in general, is far from satisfactory. The weak enforcement can be mainly attributed to the challenges of doing so, given the secrecy of bribery schemes, the complexity of modern corporate organizations, as well as the destructive collateral consequences of corporate prosecutions to the innocent third parties. Benefiting from deferred prosecution agreements (DPAs), which allow prosecutors to resolve corporate matters in the pre-trial stage, the U.S., UK and French authorities have significantly ramped up their anti-bribery enforcement actions, imposing hefty fines and extensive structural changes on a large number of corporations. On the other hand, China's individual-centered, enforcement-oriented and public-enforcers only anti-bribery approach fails to effectively control bribery. Instead, it turns out to be burdensome for the under-staffed and ill-equipped enforcement and judicial authorities, and intrusive in the business operations.

China's Supreme People's Procuratorate has been actively promoting the compliance non-prosecution pilot program (CNP) since October 2020. Introduced amid the Covid-19 pandemic and the ever-intensive U.S.-China trade conflicts, CNP aims to mitigate the adverse economic implications of corporate criminal enforcement and to foster corporate compliance development. A comparative analysis of the DPA regimes in the U.S., UK and France and China's CNP discovers that CNP shares key rationales and goals with the DPA regimes. However, CNP falls short of the mechanism to incentivize corporate self-reporting and cooperation, or to enhance individual accountability. It also lacks in a mature and well-defined compliance monitorship mechanism. It is thus questionable whether CNP presents an adequate substitute for the full-scale criminal prosecution. Against this background, the Chinese authorities are faced with a major question: *Should DPAs be introduced into China to resolve corporate bribery and, if so, how to design the Chinese model of DPA and the complementary regimes?* Addressing this question empowers the Chinese authorities to better control bribery at home and abroad, and to contribute to the global fight against bribery.

The analysis of the corporate enforcement policies and practices in the U.S., UK and France shows that DPA presents a pragmatic and efficient way for the resolution of corporate bribery cases. It allows the prosecutors to avoid criminal trials and undesired collateral consequences of corporate conviction, to impose heavy corporate monetary and compliance obligations, and to induce corporate self-disclosure, cooperation and remediation. It is believed that the introduction of DPAs in China, if appropriately designed and situated, could improve China's anti-bribery efforts in many ways. A Chinese version of DPAs could help economize on the public enforcement resources, mitigate the authorities' misgivings about the spill-over effects of corporate criminal enforcement, promote long-term corporate compliance and open the door for international cooperation in the anti-bribery field.

Notably, the availability of the DPA mechanism itself does not necessarily lead to enhanced deterrence or rehabilitation. Instead, a DPA program could be counter-productive if it operates

only to reduce the expected costs for corporate offenders without enhancing the capability of public enforcement agencies of detecting and sanctioning corporate bribery. To prevent DPAs from becoming an easy way for corporate criminals to escape conviction, the U.S., UK and French prosecutors have placed great emphasis on corporate self-reporting and cooperation, including cooperation in the individual prosecutions, and genuine compliance efforts in the offering and negotiation of DPAs. From a law and economics perspective, corporate self-reporting, cooperation and compliance enhancements are valuable in terms of increasing the cost-effectiveness of the authorities' monitoring and investigative efforts, and upholding the values of accountability, deterrence, and rehabilitation. In order to incentivize corporations to incur the full costs associated with such measures, enforcement authorities shall embrace a carrot-stick approach to provide substantial, predictable and proportionate benefits for corporations that opt to do so, and credible threats of detection and sanctions for others.

As a result of a series of legal and cultural reasons, corporations have not played an active role in China's anti-bribery enforcement. The criminal justice system that remains fixed at the level of individualism does not pay enough attention to corporate criminal liability and the prosecution of corporate crimes. Corporations with low expected liability would naturally find it more attractive to engage in detection avoidance activities rather than to implement costly compliance program and voluntarily self-report. In addition, China's criminal procedure with strong inquisitorial features is mainly designed for the court to determine the material truth based on the public investigative results. Accordingly, the prosecutorial discretion is restricted according to the "Legality Principle", and negotiated justice is generally viewed with skepticism. Moreover, the investigation conducted by private actors is subject to severe restraints and risks in China due to concerns over state sovereignty and data security. The restrictions on prosecutorial discretion and privately-conducted investigations reduce the incentives and ability of corporations to join in the fight against bribery.

In view of the anti-bribery challenges confronting the Chinese authorities and the lessons drawn from the U.S., UK and French corporate enforcement experience, it is recommended that the existing CNP should be improved to form a Chinese version of DPA for the resolution of corporate cases. Regarding the designing and application of CNP and the complementary regimes, the following recommendations are proposed for the Chinese policy makers:

- First of all, CNP should not be merely used to enable an efficient resolution of corporate cases or to minimize the economic implications of corporate prosecutions. Instead, it should be designed and applied to promote the criminal enforcement goals of deterrence and rehabilitation by enhancing the authorities' ability to detect and sanction corporate crimes, pursue individual liability and force meaningful corporate compliance reforms.
- To enhance the authorities' ability to detect and investigate corporate crimes, corporations should be required to timely self-report and fully cooperate with the authorities in order to be eligible for the application of CNP.
- For the sake of individual accountability and deterrence, CNP should not be offered to individual offenders but utilized to induce continual corporate cooperation in the relevant individual proceedings.

- A sufficiently large corporate fine is needed to prevent corporations from benefiting from the bribery schemes and to force corporations to take adequate preventive measures.
- For the purpose of promoting meaningful corporate compliance reforms via CNP, the authorities should issue formal compliance evaluation guidelines modelled on the DOJ policy and explore external monitoring mechanism. Regarding the identity of compliance monitors, a special public agency, following the example of the French Anti-corruption Agency, is proposed instead of private monitors found in the U.S. and UK DPA programs. The public monitoring approach is in line the Chinese legal culture that is reluctant to entrust private actors with the administration of criminal justice, while taking into consideration the fact that the emerging concept of corporate compliance is still novel to the Chinese legal community.
- CNP can only work well to incentivize corporate self-policing measures when the authorities have the capacity to successfully detect and sanction corporate crimes via alternative ways. In this aspect, it is suggested that the Chinese authorities should improve the whistleblower protection and reward program, expand the restrictive anti-bribery laws and corporate liability rule, reform corporate sentencing practice, and strengthen international cooperation in the anti-bribery enforcement and resolution.
- To improve the incentives and latitude for both the Procuratorates and the corporations to negotiate under CNP, the authorities should provide broader and guided prosecutorial discretion, and facilitate the conduct and regulation of corporate internal investigations.

Samenvatting

Hoewel omkoping in de meeste rechtsgebieden als een strafbaar feit wordt aangemerkt, is de handhaving van anti-omkopingswetten in de bedrijfscontext, die cruciaal is voor de strijd tegen omkoping in het algemeen, verre van bevredigend. De zwakke handhaving kan voornamelijk worden toegeschreven aan de uitdagingen die dit met zich meebrengt, gezien de geheimzinnigheid van omkopingsconstructies, de complexiteit van bedrijfsorganisaties en de destructieve neveneffecten van vervolgingen van bedrijven voor onschuldige derden. Door gebruik te maken van deferred prosecution agreements (DPA's), die aanklagers in staat stellen om zaken met betrekking tot bedrijven op te lossen in de fase voorafgaand aan het proces, hebben de Amerikaanse, Britse en Franse autoriteiten hun handhavingsacties tegen omkoping aanzienlijk opgevoerd, waarbij forse boetes en uitgebreide structurele veranderingen werden opgelegd aan een groot aantal bedrijven. Aan de andere kant slaagt China's op het individu gerichte, op handhaving gerichte en uitsluitend op de overheid gerichte anti-omkopingsaanpak er niet in om omkoping effectief te bestrijden. In plaats daarvan blijkt deze aanpak belastend te zijn voor de onderbemande en slecht uitgeruste handhavings- en gerechtelijke autoriteiten en inbreuk te maken op de bedrijfsactiviteiten.

Het Chinese Opperste Volksparket bevordert sinds oktober 2020 actief het proefprogramma voor compliance non-prosecution (CNP). CNP, dat werd geïntroduceerd te midden van de Covid-19 pandemie en de altijd intensieve handelsconflicten tussen de VS en China, is bedoeld om de nadelige economische gevolgen van strafrechtelijke handhaving van bedrijven te verzachten en naleving door bedrijven te bevorderen. Uit een vergelijkende analyse van de DPA-regimes in de VS, het VK en Frankrijk en de CNP van China blijkt dat de CNP belangrijke rationale en doelstellingen deelt met de DPA-regimes. De CNP schiet echter tekort als het gaat om het stimuleren van zelfrapportering en samenwerking door bedrijven of het vergroten van de individuele verantwoordingsplicht, en het ontbreekt aan een volwassen en goed gedefinieerd mechanisme voor toezicht op de naleving, waardoor het twijfelachtig is of de CNP geschikt is als vervanging voor strafrechtelijke vervolging op grote schaal. Tegen deze achtergrond staan de Chinese autoriteiten voor een belangrijke vraag: Moeten DPA's in China worden ingevoerd om omkoping door bedrijven op te lossen en, zo ja, hoe moeten het Chinese model van DPA en de aanvullende regelingen worden ontworpen? Het beantwoorden van deze vraag stelt de Chinese autoriteiten in staat om omkoping in binnen- en buitenland beter te controleren en draagt bij aan de wereldwijde inspanningen om omkoping te bestrijden.

De analyse van het handhavingsbeleid en de handhavingspraktijken van bedrijven in de VS, het VK en Frankrijk toont aan dat DPA een pragmatische en efficiënte manier biedt voor het oplossen van gevallen van omkoping door bedrijven. Het stelt de aanklagers in staat om strafrechtelijke processen en ongewenste bijkomende gevolgen te vermijden, zware financiële en nalevingsverplichtingen op te leggen aan bedrijven en zelfrapportage, samenwerking en herstel door bedrijven te stimuleren. Aangenomen wordt dat de invoering van DPA's in China, mits op de juiste wijze ontworpen en geplaatst, China's anti-omkopingsinspanningen zou kunnen

verbeteren door te bezuinigen op de openbare handhavingsmiddelen, het verminderen van de twijfels van de autoriteiten over de overloopeffecten van strafrechtelijke handhaving van bedrijven, het bevorderen van naleving door bedrijven op de lange termijn en het openen van de deur voor internationale samenwerking op het gebied van de bestrijding van omkoping.

De beschikbaarheid van DPA's leidt niet noodzakelijkerwijs tot een betere afschrikking of rehabilitatie. Integendeel, het DPA-mechanisme zou contraproductief kunnen zijn als het alleen werkt om de verwachte kosten voor overtreders van bedrijfsverplichtingen te verlagen zonder de capaciteit van openbare handhavingsinstanties om bedrijfsomkoping op te sporen en te bestraffen te vergroten. Om te voorkomen dat DPA's een gemakkelijke manier worden om onder een veroordeling uit te komen, hebben de aanklagers in de VS, het VK en Frankrijk grote nadruk gelegd op zelfrapportage en medewerking van bedrijven, inclusief medewerking bij individuele vervolgingen, en oprechte nalevingsinspanningen bij het aanbieden van en onderhandelen over DPA's. Vanuit een juridisch en economisch perspectief zijn zelfrapportage door bedrijven, samenwerking en nalevingsverbeteringen waardevol om de kosteneffectiviteit van de monitoring- en onderzoeksinspanningen van de autoriteiten te vergroten en de waarden van verantwoording, afschrikking en rehabilitatie hoog te houden. Om bedrijven aan te moedigen om de volledige kosten te dragen die met dergelijke maatregelen gepaard gaan, moeten handhavingsinstanties een "wortel en stok"- aanpak hanteren om substantiële, voorspelbare en evenredige voordelen te bieden aan bedrijven die daarvoor kiezen, en geloofwaardige en waarneembare dreigingen van opsporing en sancties voor anderen.

Als gevolg van een reeks juridische en culturele redenen spelen bedrijven geen actieve rol in de Chinese handhaving tegen omkoping. Het strafrechtsysteem dat gefixeerd blijft op het niveau van individualisme, besteedt te weinig aandacht aan de vervolging van bedrijfsmisdrijven. Bedrijven met een lage verwachte aansprakelijkheid zouden het natuurlijk aantrekkelijker vinden om zich bezig te houden met het ontplooien van opsporingsontwijkende activiteiten in plaats van dure nalevingsprogramma's te implementeren en vrijwillig zelfrapportage te doen. Bovendien is China's strafrechtelijke procedure met sterke inquisitoire kenmerken voornamelijk ontworpen voor de rechtbank om de materiële waarheid vast te stellen op basis van de openbare onderzoeksresultaten. Dienovereenkomstig is de discretie van de aanklager beperkt volgens het "legaliteitsprincipe", en wordt onderhandelde gerechtigheid over het algemeen met scepsis bekeken. Bovendien in China is het onderzoek dat wordt uitgevoerd door particuliere actoren onderworpen aan strenge beperkingen en risico's vanwege zorgen over de soevereiniteit van de staat en de veiligheid van gegevens. De beperkingen op de discretionaire bevoegdheid van de aanklager en privé-onderzoeken onderdrukken de stimulans en het vermogen van bedrijven om mee te doen in de strijd tegen omkoping.

Met het oog op de uitdagingen op het gebied van de bestrijding van omkoping waarmee de Chinese autoriteiten worden geconfronteerd en de lessen die zijn getrokken uit de handhavingservaringen van de Amerikaanse, Britse en Franse bedrijven, worden de volgende aanbevelingen voorgesteld voor Chinese beleidsmakers met betrekking tot het ontwerp en de toepassing van de CNP en de aanvullende regimes:

- Ten eerste mag de CNP niet alleen worden gebruikt om een efficiënte oplossing van

ondernemingszaken te bevorderen of om de economische gevolgen van de vervolging van ondernemingen tot een minimum te beperken. In plaats daarvan wordt CNP ontworpen en toegepast om de strafrechtelijke handhavingsdoelstellingen van afschrikking en rehabilitatie te bevorderen door de autoriteiten beter in staat te stellen om bedrijfsdelicten op te sporen en te bestraffen, individuele aansprakelijkheid te vervolgen en zinvolle hervormingen van de naleving van de regels door ondernemingen af te dwingen.

- Om de autoriteiten beter in staat te stellen bedrijfsdelicten op te sporen en te onderzoeken, moeten bedrijven tijdig zelf aangifte doen en volledig samenwerken met de staat om in aanmerking te komen voor de toepassing van de CNP.
- Met het oog op individuele verantwoordingsplicht en afschrikking wordt de CNP niet aan individuele overtreders aangeboden, maar wordt deze gebruikt om bedrijven aan te zetten tot voortdurende medewerking in de relevante individuele procedures.
- Voldoende hoge geldboetes zijn nodig om te voorkomen dat bedrijven profiteren van omkopingsovertredingen en om bedrijven te dwingen adequate preventieve maatregelen te nemen.
- Met het oog op het bevorderen van zinvolle hervormingen van de naleving door bedrijven via de CNP, zullen de autoriteiten formele richtlijnen voor de evaluatie van de naleving uitvaardigen naar het model van het DOJ-beleid en moeten zij externe controlefuncties onderzoeken. Met betrekking tot de identiteit van toezichthouders wordt voorgesteld een speciaal openbaar agentschap op te richten, naar het voorbeeld van het Franse agentschap voor corruptiebestrijding, in plaats van particuliere toezichthouders zoals in de DPA-programma’s van de VS en het VK, rekening houdend met het opkomende concept van naleving door bedrijven in China en de Chinese rechtscultuur die terughoudend is om private actoren de strafrechtspleging toe te vertrouwen.
- CNP kan alleen goed werken om zelfregulerende maatregelen van bedrijven te stimuleren wanneer de autoriteiten de capaciteit hebben om bedrijfsmisdrijven op alternatieve manieren op te sporen en te bestraffen. In dit verband wordt voorgesteld dat de Chinese autoriteiten de bescherming en het beloningsprogramma voor klokkenluiders verbeteren, de restrictieve anti-omkopingswetgeving en de aansprakelijkheidsregeling voor bedrijven uitbreiden, de strafrechtelijke sancties voor bedrijven hervormen en de internationale samenwerking bij de handhaving en oplossing van omkopingszaken versterken.
- Om de stimulansen en speelruimte voor beide partijen om te onderhandelen in het kader van de CNP te verbeteren, zullen de autoriteiten zorgen voor een ruimere maar geleide vervolgingsbevoegdheid en de uitvoering en regulering van interne bedrijfsonderzoeken vergemakkelijken.

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Curriculum vitae

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Short bio

I am a PhD candidate at Erasmus School of Law (ESL), co-supervised by Prof. Dr. Yuwen Li and Prof. Dr. Sharon Oded. I received my master's degree in law at China University of Political Science and Law, and my bachelor's degree in law in Hunan University. My current research interests include corporate bribery, criminal resolution mechanism, public-private partnership, and comparative law.

In the final years of my PhD trajectory, I have been working in the Compliance Department of Viterra B.V. as a compliance analyst. I am responsible for the compliance training and awareness program.

Education	
PhD candidate, Erasmus University Rotterdam	2017-2023
Master of Law, China University of Political Science and Law	2014-2017
Bachelor of Law, Hunan University	2010-2014
Work experience	
Training and Awareness Specialist at FMO	2023-
Compliance Analyst at Viterra B.V.	2022-2023
Member of PhD in Law Association Rotterdam (PILAR)	2019-2021
Publication	
公司犯罪追诉的新路径: 以美国暂缓起诉协议为中心 (A Novel Way of Corporate Criminal Prosecution: Focusing on Deferred Prosecution Agreements in the United States). *Journal of Suzhou University (Law Edition)*, no. 3 (2020): 119-133.	2020

ERASMUS UNIVERSITY ROTTERDAM
PHD PORTFOLIO
Yayi Zhang

Description	Organizer	EC
Required		
EGSL - Lunch Lectures 1 (2017)		0.00
EGSL - Lunch Lectures 2 (2017)		0.00
EGSL - Review Day (2018)		0.00
EGSL - Writing Clinic (2018)		5.00
EGSL - Research Lab (2018)		10.00
EGSL - Academic Writing in English (2018)		5.00
Business Crime: US Enforcement Against Multinational Corporations for Corruption and Fraud (2019)		5.00
EGSL - Managing your PhD (2019)		3.00
EGSL - Poster Presentation (2019)		0.00
EGSL - Academic Integrity (2019)		1.00
		------ +
Total EC		**29.00**