

THE POTENTIAL PROMISE AND PERILS OF INTRODUCING DEFERRED PROSECUTION AGREEMENTS
OUTSIDE THE U.S.

Jennifer Arlen

Abstract

Countries around the world are reforming their corporate criminal liability regimes to introduce deferred prosecution agreements (DPAs). DPAs can help deter crime when properly structured. But otherwise they can increase the risk of corporate misconduct. This chapter identifies the steps countries need to take in order to use DPAs to deter corporate crime. It then evaluates the recent reforms adopted in the U.K. and France. Both reforms are a significant step forward, yet further reform is needed. Neither the U.K. nor France can effectively deter corporate crime because both countries have excessively restrictive corporate criminal liability laws that let companies to profit from many crimes. These laws also undermine efforts to use DPAs to induce firms to self-report or cooperate. France's reforms raise particular concern because French law provide no genuine incentive to self-report and appears to let companies enter into DPA-like agreements without promptly and fully cooperating with authorities. In addition, concerns remain about whether France is committed to bringing the individuals responsible for corporate crimes to justice. As a result, French DPAs could be counter-productive if they operate primarily to reduce sanctions imposed on companies without enhancing French prosecutors' ability to sanction those responsible for corporate misconduct.

THE POTENTIAL PROMISE AND PERILS OF INTRODUCING DEFERRED PROSECUTION AGREEMENTS OUTSIDE THE U.S.

Jennifer Arlen*

1. Introduction

Corporate criminal liability,¹ combined with effective enforcement against companies and individuals, is vital to deterring corporate crime.² Yet, even two decades after the OECD countries agreed to pursue corporations engaged in corruption,³ most countries still do not have the corporate liability laws, enforcement practices or other institutions needed to deter corporate misconduct effectively.⁴

One country, the United States, has enjoyed unparalleled success in pursuing enforcement actions against multinational firms for corruption and other offenses. These actions brought billions of dollars into the U.S. Treasury, including from foreign firms.⁵ They also have led countries around the world to improve their compliance programs. The U.S. success is attributable, at least in part, to several distinctive features of the U.S. system. The U.S. takes an expansive approach to corporate

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¹ This chapter uses the term corporate criminal liability to refer to any form of corporate liability for criminal misconduct that requires that the company admit guilt, potentially imposes a substantial monetary sanction, and could trigger presumptive or mandatory collateral sanctions, like debarment or exclusion, unless liability is imposed through a deferred or non-prosecution agreement. *See infra* note 25.

² *See, e.g.,* Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith Hylton & Alon Harel eds., Edward Elgar Pub. 2012) (discussing why criminal liability should be imposed on both individuals and companies); *see also* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984) (showing that joint individual and corporate liability is optimal when strategic judgement-proofing of companies is a concern).

³ Organisation for Economic Cooperation and Development (OECD), OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999) (recognizing the importance of corporate and individual liability).

⁴ OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016) [hereinafter, OECD, *Liability of Legal Persons*]; *see also* OECD, *Country Reports on Implementation of the OECD Anti-Bribery Convention*, <http://www.oecd.org/investment/countryreports/ontheimplementationoftheoecdanti-briberyconvention.htm>.

⁵ Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409 (2014); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011).

criminal liability, holding companies criminally liable for any crime committed by any employee in the scope of employment. In addition, the U.S. Department of Justice embraced and utilized two forms of non-trial corporate criminal resolutions—deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs)⁶—to simultaneously resolve corporate criminal cases and potentially incentivize companies to conduct exhaustive internal investigations whose results are shared with prosecutors for potential uses against the individuals responsible for the misconduct. Companies are willing to cooperate to obtain a D/NPA—notwithstanding the resulting admission of misconduct, fines, restitution, and mandated reforms—in order to avoid the potential mandatory or presumptive collateral sanctions (e.g., debarment) that can result from a company’s formal conviction for a crime.⁷

Countries around the world have introduced DPAs or are considering such legislation,⁸ responding in part to both pressure from the OECD and to the U.S.’s success in obtaining large resolutions against multinational companies.⁹ Countries also are reconsidering their corporate criminal liability regime. The U.K. expanded corporate criminal liability relating to corruption in 2010 and introduced DPAs in 2014. France recently introduced DPA-like agreements. Other countries are following suit.

Yet this multinational effort to embrace DPAs is not necessarily a step in the right direction. Countries need to ensure that their laws and enforcement policy are structured to reduce corporate crime—and the harm it causes. DPAs can help deter corporate misconduct if properly structured and situated in an effective enforcement regime governing individual and corporate liability. But improperly designed DPA statutes can, instead, undermine deterrence if they operate primarily to reduce the sanctions imposed on companies for corporate crime. In this case, DPAs not only undermine deterrence but could weaken the public’s faith in the criminal justice system. This

⁶ Under a DPA, the prosecutor files charges but agrees to dismiss the charges, without conviction, if the corporation complies with the terms of the agreement. Under an NPA, the prosecutor agrees not to file charges against the firm if the corporation fulfills the bargain. *See* SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA’S CORPORATE AGE* (W.W. Norton & Co. 2016); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 893–902 (2007).

⁷ *See* Garrett, *supra* note 6; Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-prosecution*, 84 U. CHI. L. REV. 323 (2017). Non-prosecution agreements are similar, only formal charges are not filed and the agreements are not filed in court.

⁸ *See, e.g., Deferred Prosecution Agreements*, SERIOUS FRAUD OFF., <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements>; *Guidance on Corporate Prosecutions*, SERIOUS FRAUD OFF., <https://www.sfo.gov.uk/?wpdmdl=1457>; Loi no. 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 Dec. 9, 2016 Regarding Transparency, the Fight Against Corruption, and Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016 (“Sapin II”).

The under-enforcement around the world results from other factors, in addition to the dearth of negotiated corporate criminal resolutions. *See infra* Section 2 and 3. In addition, governments may benefit from adopting but not enforcing laws prohibiting crimes, such as corruption. Tina Søreide, *Regulating Corruption in International Markets: Why Governments Introduce Laws They Fail to Enforce*, THE OXFORD HANDBOOK OF INSTITUTIONS OF INTERNATIONAL ECONOMIC GOVERNANCE AND MARKET REGULATION (Eric Brousseau et al. eds., 2019).

⁹ *See* Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROB. 193 (2017); *see also* KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY* (forthcoming 2019). For an analysis of why deterring corruption is vital to economic development see, e.g., Susan Rose-Ackerman, *The Economics of Corruption*, 4 J. PUB. ECON. 187 (1975).

potential peril is real, but far from inevitable.

This chapter analyzes how to structure both corporate criminal liability and DPAs in order to effectively deter corporate misconduct. It shows that countries cannot effectively deter misconduct unless corporations are liable for all their employees' crimes committed in the scope of employment. Broad liability is needed to ensure that companies do not profit from (and thus do not want to encourage) their employees' crimes.¹⁰ Broad potential criminal liability also makes DPAs more effective. The threat of criminal liability motivates companies to take the actions needed to obtain a DPA. Specifically, DPAs should be used to help enforcement authorities detect and sanction corporate crime. DPAs thus should only be offered to firms that self-report misconduct or fully cooperate by providing prosecutors with material information about nature and extent of the misconduct and the identity of those responsible for it.¹¹ In turn, companies that self-report or fully cooperate (by providing the government with actionable evidence about misconduct) and remediate should be confident of obtaining a DPA. Countries must ensure that enforcement authorities use the evidence obtained to identify and sanction the individuals responsible for the misconduct.

Of course, DPAs will not induce corporations to step forward unless corporations face a substantial threat that enforcement officials can detect and sanction corporate misconduct even if companies do not self-report or cooperate. Countries thus must adequately fund corporate criminal enforcement. They also need to promote alternate sources of information about misconduct, for example by adopting effective whistleblowing laws that protect and incentivize whistleblowing.

This analysis enables us to assess the reforms adopted in the U.K. and France. Both reforms are a significant step forward in the fight against corporate crime. Yet neither country has adopted a truly effective regime for deterring corporate crime. First, both countries have embraced excessively restrictive laws governing when a company can be liable for crimes committed in the scope of employment. These laws enable companies to profit from many corporate crimes and undermine efforts to use DPAs to induce self-reporting and cooperation. Companies in both countries are further insulated from liability by under-funding of enforcement and the absence of effective whistleblower legislation. France's "DPA" legislation is undermined by additional problems. The provisions governing use of these negotiated settlements does not provide companies with any material incentives to self-report. It also is not reliably designed to induce companies to fully cooperate by providing prosecutors with material information about unsubstantiated

¹⁰ See *supra* note 1.

¹¹ Throughout this chapter, the term self-reporting is restricted to companies that report to the government that the firm has engaged in misconduct prior to the government being aware that the firm committed a crime. Cooperation refers to all information provided to the government by the firm after the government has started its investigation into potential misconduct by the firm. Cooperation can include information that in effect operates as self-reporting. This occurs when the firm provides information about detected misconduct that falls outside the scope of the government's investigation—for example, because it falls outside the specific division of the firm, geographical region or type of crime that is within the purview of the government's investigation. Cooperation also can include providing actionable evidence about the crime under investigation, and the complicity of the individuals responsible for it, that the government otherwise would have been unlikely to obtain. These two forms of cooperation are the most valuable.

Cooperation also can refer to firms that do nothing more than voluntarily provide documents or witness interviews that the government has the right to obtain. This should not be treated as adequate cooperation when determining whether a company is entitled to cooperation credit. For a good definition of full cooperation see United States Department of Justice, 9-28.700 - The Value of Cooperation, Justice Manual, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>.

misconduct when this information is most needed. Finally, it is far from clear that France is committed to bringing the individuals responsible for corporate crimes to justice. As a result, these reforms may be ineffective. Indeed, French reforms could be counter-productive if they operate primarily to enable French prosecutors to insulate French firms from overseas prosecutors, without also enhancing French prosecutors' ability to detect and sanction corporate misconduct. This concern reveals the importance of ensuring that reforms are appropriately designed to enhance deterrence.

This chapter proceeds as follows. Section 2 explains how corporate liability can help deter corporate crime, even when individuals are held liable for their misconduct. Section 3 identifies the conditions that must be met for DPAs to enhance deterrence. Section 4 evaluates the two most recent reforms, in the U.K. and France, to assess whether they were successfully designed to genuinely enhance deterrence. This section provides reasons to doubt that these reforms—especially in France—will be effective in deterring corporate misconduct, unless additional reforms are implemented. This analysis is relevant to other countries adopting reforms governing corporate liability and non-trial corporate resolutions.¹² Section 5 concludes.

2. Using Corporate Liability and Negotiated Resolutions to Deter Corporate Misconduct

This section examines how large companies can deter corporate crime and explains how corporate liability must be structured to induce companies to deter misconduct effectively. It also discusses the essential role of individual liability and why adequate deterrence depends on implementing measures, such as whistleblowing programs, that improve enforcement authorities' ability to obtain information about misconduct when companies are not forthcoming.

2.1 How to Deter Corporate Crime: Role of Private Prevention and Private Policing

Corporations are treated as legal persons, but they are not like natural persons whose actions are controlled by a single mind. Whether a corporation violates the law depends on decisions taken by individual employees, who often can act independently of the firm's board of directors. Companies generally cannot cross the line if its employees refuse to do so.

This observation has important implications for the effort to deter corporate crime. First, it reveals that deterrence requires that criminal liability be targeted at the employees¹³ who were responsible for the crime.¹⁴ Indeed, corporate crime would cease if all employees expected to be

¹² This chapter thus disagrees with the conclusion of the EU Commission that "EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption." *EU Anti-Corruption Report*, at 2, COM (2014) 38 final (Mar. 2, 2014), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

¹³ Employees responsible for misconduct can include managers who played a material role in causing the misconduct or enabling it to persist.

¹⁴ Corporate misconduct, in other words, is an agency cost. *E.g.*, Jonathan Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B. UNIV. L. REV. 315 (1991); Jennifer Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it*

imprisoned immediately should they violate the law.¹⁵

Second, it reveals that corporate criminal liability should be structured to deter corporate crime, rather than simply punish the firm.¹⁶ In order to deter, corporate liability must ensure that companies have reason to directly or indirectly encourage misconduct. They also must be motivated to implement cost-effective measures to make crime harder to commit (hereinafter “prevention measures”).¹⁷ Companies also deter through actions that help enforcement officials detect crime and prosecute the people responsible for it. Employees are less likely to commit crimes if their companies undertake effective “corporate policing” designed to help prosecutors detect crime and punish the individuals responsible. These policing efforts include compliance measures designed to detect misconduct (e.g., internal reporting systems), internal investigations, self-reporting and full cooperation that provides the government with actionable evidence about the misconduct and the identity of those involved.¹⁸

The threat of individual criminal liability for corporate misconduct generally is not effective when government officials are the only parties seeking to detect misconduct. Employees reasonably do not expect their misconduct to be detected unless their companies (and others) help detect crime.¹⁹

Serve?, 109 HARV. L. REV. 1477 (1996); see also Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982).

¹⁵ Polinsky & Shavell, *supra* note 14; Arlen, *supra* note 14; see Kornhauser, *supra* note 14.

¹⁶ Corporate liability for companies that are not owner-managed should focus on deterrence, instead of blame, for two reasons. First, deterrence should be a priority because corporate crime imposes enormous costs on victims and society—harms that can be reduced by deterring corporate misconduct. Second, corporate criminal liability for firms that are not owner-managed is hard to justify on grounds of retribution because liability ultimately falls on shareholders who are powerless to prevent the crime.

By contrast, corporate liability for closely-held owner-managed firms may be justified on the basis of both deterrence and retribution. The analysis of this chapter does not apply to these firms. DPA regimes targeted at corporate self-reporting and cooperation will not undermine the effectiveness of corporate liability as applied to these firms because owner-managed firms will not seek a DPA if the owner-manager is implicated. Should they do so, this would promote deterrence and the resulting corporate cooperation could be used to convict the owner-manager responsible for the crime. See *infra* note 37.

¹⁷ Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); see Arlen, *supra* note 2; see also Kornhauser, *supra* note 14 (discussing how vicarious liability can induce corporate monitoring).

Corporations directly control employees’ incentives to commit corporate crimes. Unlike theft or embezzlement, employees do not profit directly from corporate crimes. Corporate crimes directly profit the firm. Employees benefit indirectly, through the enhanced career prospects, bonuses, or improved job security that result from committing crimes that benefit the firm. This means that companies control employees’ incentives to commit crimes. They can reduce the benefit by altering compensation, promotion and retention policies to reduce employees’ incentives to commit crimes to achieve performance goals. *Id.*; see Arlen, *supra* note 2.

¹⁸ Arlen & Kraakman, *supra* note 17. Throughout this chapter, self-reporting refers to companies that reveal misconduct to government authorities believing that the government is unaware that any misconduct has occurred. Cooperation refers to the provision of information to the government after the government has started investigating the firm for misconduct. Cooperation can closely resemble self-reporting, however, if the government is investigating isolated misconduct and the company provides it with evidence of other instances of misconduct that the government would have been unlikely to discover. For a discussion of the concept of “full cooperation” see *supra* note 18 and accompanying text.

¹⁹ For example, analysis of confidential corporate records on substantiated misconduct for three publicly-held firms revealed that the amount of substantiated corporate misconduct detected by a *single* firm exceeded the *total* number of corporate criminal offenses committed by publicly held firms sanctioned by federal prosecutors in a year.

Corporate crime is often hard to detect and even harder to prove. The outcome of corporate crimes—for example, large government contracts—often resembles legitimate transactions. The low risk of sanction undermines deterrence because people tend to ignore consequences that are not salient. In addition, employees may treat misconduct as an accepted practice if misconduct is the norm because the law is not enforced. Thus, enforcement authorities must create a genuine, material risk that corporate crime will be detected and punished. To ensure an adequate risk of detection, corporations must help the government detect crime and sanction wrongdoers.²⁰

Corporate policing also is important because corporations often are better able to detect and investigate than are government officials.²¹ Companies often can more cost-effectively detect misconduct because they are both more familiar with their own operations—and the attendant legal risks associated with them—and can monitor their employees' on-going activities. Companies also often are better able to investigate their employees' activities occurring in foreign jurisdictions. They also often can more cost-effectively obtain and analyze the available documentary evidence.²² When companies have a comparative advantage in detecting and investigating crime, countries can enhance deterrence by inducing them to accurately share the information obtained with the government, as discussed below.

Finally, corporate policing can benefit society by reducing the expected harm from corporate misconduct if companies are induced to detect and rapidly terminate misconduct.

Thus, governments seeking to deter corporate misconduct should structure the law to induce corporations to implement measures to detect misconduct, self-report it and fully cooperate.²³

2.2 *Effective Use of Corporate Liability to Deter Corporate Crime*

Although companies can take a variety of actions to deter crime, they will not do so unless they face a substantial risk of liability for all their employees' crimes that is structured to reward

Eugene F. Soltes, *The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality*, J. FIN. CRIME (forthcoming); see also Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. Fin. 2213 (2010) (finding that, in the U.S. only a small portion of detected frauds were discovered by enforcement authorities, such as the SEC).

²⁰ Arlen & Kraakman, *supra* note 17; see Arlen, *supra* note 2 (discussing individual liability for corporate misconduct). Indeed, bad cultures can more easily emerge and produce pressures to commit crime when people do not expect to be caught. See EUGENE SOLTES, *WHY DO THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* (2016) (discussing the many reasons people violate the law). For a discussion of how low probability of detection impacts the optimal sanction see, e.g., see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984).

²¹ See *supra* note 19. The relative efficacy of investigations by firms and government officials differ across jurisdictions depending in part on laws governing corporate investigations, such as employment laws and data privacy. See Jennifer Arlen & Samuel Buell, *The Global Expansion of Corporate Criminal Liability: Effective Enforcement Across Legal Systems*, 93 S. CAL. L. REV. (forthcoming) (comparing the relative efficacy of government and corporate investigations in the U.S. and abroad). For a discussion of investigations in the U.S. see Miriam H. Baer, *When the Corporation Investigates Itself*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, 308 (Jennifer Arlen ed., Edward Elgar Pub., 2018).

²² Local laws impacting private investigations, such as privacy and employment laws, can negatively impact a company's ability to obtain and analyze documents and other information, however. See Arlen & Buell, *supra* note 21.

²³ For a more detailed discussion see Arlen & Kraakman, *supra* note 17; Arlen, *supra* note 2.

self-reporting and full cooperation.

Corporate crimes tend to be profitable. Absent liability, companies often face market pressures to commit crimes in order to profit. Moreover, corporate prevention measures, such as effective compliance programs, are costly. Absent liability, a corporation might eschew such costs to stay competitive. Finally, corporations incur costs in detecting, investigating, and reporting crime, both directly and as a result of the legal and reputational consequences of bringing misconduct to light.

Countries can impact corporations' incentives by imposing liability on them for their employees' misconduct structured to ensure that firms want to both prevent crime and help enforcement officials detect it and sanction wrongful employees. To induce companies to prevent misconduct, corporate liability must ensure that corporations do not profit from their employees' crime. To induce corporate policing, corporate liability must be structured to ensure that companies are better off if they self-report detected misconduct and/or fully cooperate (by providing actionable evidence to enforcement officials about the scope of misconduct and the identity and role of those responsible) than if they do not. To deter employees, enforcement officials must ensure that the individuals responsible for the misconduct (and for any subsequent corporate cover-up) are held responsible.²⁴ These requirements are discussed below and set forth in Table One.

2.2.1 Goal One: Ensuring Corporations Want to Prevent Misconduct

Companies will not prevent, and may even encourage, misconduct unless corporate liability ensures that they do not profit from it. Profitable misconduct can be committed by low- and high-level employees. Companies therefore should be liable for all crimes committed by any and all employees in the scope of employment.²⁵ Corporate criminal liability generally should not be restricted to crimes committed by senior managers.

In addition, companies need to be held liable even if the company adopted and implemented an effective "compliance program." Broad corporate liability is needed for two reasons. First, it can motivate companies to prevent misconduct through measures beyond adopting a compliance

²⁴ See Arlen, *supra* note 14; Arlen & Kraakman, *supra* note 17; *cf. supra* note 21 (discussing the impact of laws governing corporate investigations).

²⁵ While corporate criminal liability is a particularly effective tool, other forms of corporate liability can deter misconduct if properly structured. Corporations must face substantial sanctions that are sufficiently higher than the benefit of misconduct that firms would be willing to self-report and cooperate in order to reduce liability to disgorgement of any benefit obtained. Authority over corporate liability also must be vested with well-resourced and dedicated enforcement officials who are insulated from political pressures. Corporate criminal liability thus often is superior to regulatory liability because criminal sanctions are more likely to be substantial, potentially trigger collateral sanctions (such as debarment), and, in many countries, prosecutors are more independent than enforcement authorities working for administrative agencies. Nevertheless, administrative sanctions can be equally effective if structured to mimic the deterrence impact of criminal liability. See Khanna, *supra* note 14 (evaluating whether there are any essential material differences in the deterrence effect of corporate civil and criminal liability); see also Jon Petter Rui & Tina Søreide, *Governments' Enforcement of Corporate Bribery Laws: A Call for a Two-Track Regulatory Regime*, TIDSSKRIFT FOR RETTSVITTENSKAP (forthcoming 2019) (explaining why countries should impose corporate criminal liability even when they have a robust ex ante regulatory approach); *cf.* Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87 (Jennifer Arlen ed., Edward Elgar Pub., 2018) (discussing how and when the form of liability can impact firms' reputational damage costs).

program. These measures include appropriate adjustments to compensation and promotion policies and adoption of effective internal reporting systems. Second, it is needed (along with appropriately structured DPAs) to motivate companies to deter by self-reporting detected misconduct and fully cooperating with the government's investigation. Absent liability, companies have little to either invest in a full investigation or to incur the reputational and other risks associated with self-reporting.²⁶

In addition to broad corporate liability, governments must ensure that the sanctions imposed on companies for their employees' misconduct is sufficiently large, and imposed with a sufficiently large probability, to render misconduct unprofitable.

2.2.2. *Goal Two: Inducing Corporate Self-reporting, Full Cooperation and Remediation*

In addition, in order to deter corporate misconduct, corporate liability must incentivize companies to detect it, self-report, and fully cooperate by providing government officials with information about the extent of the misconduct and the identity of those responsible for it. Companies will not detect, investigate, self-report and cooperate unless they face a genuine, material threat of being held liable for all of their employees' crimes. In addition, the form and magnitude of liability must be structured to ensure that companies face much higher *expected* costs—defined as the actual cost adjusted by the probability of sanction—if they fail to self-report or cooperate, and remediate than if they do.

To achieve this goal, corporate liability must satisfy two conditions. First, companies must be liable for all crimes committed by all employees in the scope of employment. Broad liability is needed because the government cannot use favorable forms of corporate liability to induce self-reporting and cooperation if the company is not liable for its employees' misconduct when it does not self-report or cooperate.²⁷

Second, the government must implement a corporate liability regime that imposes different costs on firms that self-report or cooperate and remediate than on those that do not. In order to ensure that companies are better off if they self-report, companies must be subject to enormous sanctions for detected misconduct if the company did not self-report it and cooperate. In turn, companies that *do* self-report, fully cooperate, and remediate must be guaranteed the ability to enter into a resolution that substantially mitigates the sanctions imposed (for example, lowering them to the benefit of the misconduct). This large difference in sanctions is needed because governments tend to detect a small portion of the misconduct that occurs. Thus, the sanction imposed on firms that refuse to report or cooperate must be very large, in order to make silence unattractive even though the risk of detection and punishment is low.

²⁶ Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops*, in *CRIMINALITÀ D'IMPRESA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO* 91 (Stefano Manacorda & F. Centonze eds., 2018).

²⁷ Susan Hawley, Colin King and Nicholas Lord make a similar point in their chapter for this volume, *Justice for Whom? Key Issues with the UK's Nascent Deferred Prosecution Agreement Regime*. Many, if not most countries, have corporate liability regimes that are too narrow to ensure that companies are motivated to either prevent misconduct or to help enforcement authorities even if DPAs are introduced. *See infra* Section 4 (discussion how Section 7 of the UK Bribery Act is a partial solution to this problem, at least as applied to corruption).

Companies are much more inclined to self-report and/or fully cooperate when those that do not do so expect to be convicted, whereas companies that self-report or fully cooperate and remediate are presumptively entitled to a DPA (or a declination with disgorgement). Sanctions also should be substantially lower if a company self-reports or cooperates, with companies those that self-report *and* cooperate facing much lower sanctions than those that only fully cooperate. By contrast, firms that detect and do not self-report and firms that fail to fully cooperate should face the maximum fine, which should be many times higher than the fine imposed on firms that self-report and fully cooperate.²⁸ Firms that do not self-report detected misconduct and do not fully cooperate also should be subject to a monitor²⁹ assuming, as is likely, that management refused to self-report or cooperate even when the firm would benefit.³⁰

DPA's will only provide these incentives, however, if properly structured. Section 3 of this chapter discusses how DPA statutes must be structured in order to provide the needed incentives. It also explains the other requirements needed to ensure that companies are motivated to seek leniency.

2.2.3. Goal Three: Deterring Individuals From Committing Corporate Misconduct

Corporate self-reporting and cooperation deters corporate misconduct in part by promoting termination and remediation of misconduct. But in order to be fully effective, prosecutors must use the information that corporations provide them to actively pursue, and successfully convict, the appropriate individuals responsible for the crime. Individual criminal liability is needed to deter the people who actually commit corporate crimes—the firm's employees and agents. Individual criminal liability deters in a variety of ways. First, it provides employees who are tempted to commit misconduct to save their jobs or get a promotion a reason not to commit the crime notwithstanding the personal benefits.³¹ Second, and related, it reinforces the message that employees who use crime to benefit the firm commit a moral wrong that society condemns. Deterrence thus requires that

²⁸ Consider a firm that detects misconduct that result in a \$100 million fine if it reports it. Assume that there is only a 10 percent chance that the government will detect if it does not self-report. In this situation, the firm's expected sanction if it does not self-report and cooperate is only \$10 million (one-tenth of \$100 million). The firm will not self-report and cooperate—thereby raising the risk of liability from 1/10 to 100 percent—unless the government reduces its expected costs to one-tenth of what they otherwise would be (or to \$10 million or less). Arlen & Kraakman, *supra* note 17; Arlen, *supra* note 2; see Arlen, *supra* note 14.

²⁹ A monitor is an outside person who is hired to monitor the firm's efforts to reform its compliance program and to satisfy its other duties under the corporate criminal resolution. Monitors are paid for by the company but report to the prosecutor. See Arlen & Kahan, *supra* note 7; Vikramaditya S. Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713, 1724 (2007).

³⁰ When enforcement is structured to incentivize self-reporting and cooperation, companies nevertheless may fail to self-report because senior managers are better off keeping enforcement officials in the dark. In this situation, financial incentives aimed at the firm will not be sufficient to induce optimal corporate policing. Additional measures—such as a monitor—are needed to ensure that management undertakes appropriate policing. See Arlen & Kahan, *supra* note 7.

³¹ Employees who expect to be fired for underperforming if they do *not* violate the law will not be deterred from misconduct by threat of being fired if they commit misconduct and it is detected, if the chance of getting fired if they do not commit the crime is higher than the likelihood of the misconduct being detected. See Arlen & Carney, *supra* note 14 (identifying last period concerns as a motivation for securities fraud). Beyond this, employees can avoid the cost of termination by using positive returns produced by misconduct to secure other employment before misconduct is detected.

enforcement officials actively seek to convict all appropriate individuals who are responsible for the crime.³²

3. The Potential Promise and Perils of Negotiated Settlements

This section examines how countries can most effectively structure liability and enforcement policy for corporate crime to achieve the deterrence goals outlined in Section 2. This section shows that in order to deter corporate misconduct, the regime should satisfy five conditions.

First, countries should implement a multi-tiered regime of negotiated corporate criminal resolutions that enables prosecutors to enter into guilty pleas, DPAs, and declinations with disgorgement. DPAs need to satisfy certain requirements, however. They should not trigger collateral consequences,³³ and firms should only have access to DPAs if they self-reported or fully cooperated and remediated.

Second, countries should ensure that corporations are held criminally liable for all of their employees' misconduct. Broad liability combined with adequate investment in detection is a prerequisite to effective use of DPAs since DPAs cannot motivate companies to self-report or cooperate unless they face a material salient risk that unreported misconduct will be detected and punished. In addition, broad liability is needed to ensure that companies want to prevent profitable misconduct.

Third, the minimum sanction imposed for corporate crime should equal the benefit the corporation received from the misconduct. The maximum sanction imposed on firms that did not self-report or fully cooperate should be many times the benefit received. It also should be sufficiently onerous to incentivize full cooperation and self-reporting.

Fourth, countries need to ensure that the government regularly detects unreported misconduct. In theory, countries can do this through regulatory audits if these occur regularly and are in-depth. They can more effectively achieve this goal by providing material incentives and protections to whistleblowers. Finally, countries must implement enforcement practices that ensure that wrongful individuals are prosecuted.

3.1. Conditions Governing Access to, and Sanctions Imposed by, a DPA

Countries can enhance deterrence by adopting a multi-tiered regime of non-trial corporate criminal resolutions that both facilitates speedy and less expensive resolution of criminal cases and provides strong incentives for companies to self-report, and fully cooperate with respect to, criminal misconduct.

Negotiated corporate criminal resolutions can take a variety of forms. The first is a guilty plea, which mirrors a conviction following a trial, except that the factual statement of the firm's

³² See *infra* Section 3.5 (discussing steps that need to be taken to ensure that prosecutors target the appropriate individuals, and not scapegoats); see also Laurent Cohen-Tanugi, *Scapegoating: A Structural Risk in Current U.S. Cross-Border Corporate Crime Enforcement*, COMPLIANCE & ENFORCEMENT BLOG (May 17, 2019), https://wp.nyu.edu/compliance_enforcement/2019/05/17/scapegoating-a-structural-risk-in-current-u-s-cross-border-corporate-crime-enforcement.

³³ See *infra* note 36.

guilt emerges from a negotiation with the prosecutor, potentially supervised by a court. When a firm pleads guilty, the facts of the crime are published, the firm is charged, the firm admits guilt, pays a fine (and, when appropriate, restitution or remediation), and may be subject to mandates (such as required compliance program reforms or a monitor). Conviction also may trigger collateral sanctions imposed by other parties (e.g., administrative agencies, states, or other countries), such as mandatory or presumptive exclusion from various business opportunities (particularly with governments).³⁴

Alternatively, countries can allow companies to resolve and be sanctioned for criminal charges through criminal resolutions that impose criminal sanctions but do not result in formal conviction. The most important of these are DPAs.³⁵ DPAs, as this term is used here, are non-trial corporate criminal resolutions that mimic a guilty plea but do not trigger presumptive or mandatory collateral sanctions.³⁶

When properly structured, DPAs enable the government to enhance deterrence and legitimacy by improving the government's ability to detect and remediate misconduct and sanction both corporations and those responsible for the misconduct. By contrast, DPAs can undermine deterrence if they are not designed to induce self-reporting and cooperation because in this case their main effect is to lower firms' cost of committing misconduct, and thus their incentive to deter it. Accordingly, DPA statutes must be structured to induce self-reporting and full cooperation, with credit for full cooperation restricted to companies that provide the government with actionable evidence about the scope of the misconduct and the role of the people responsible for it.

In order to achieve this goal, DPA legislation must ensure that companies that self-report or cooperate and remediate can be confident of receiving a DPA (or declination) with reduced sanctions, and confident that they will not be offered a DPA if they do not self-report or fully cooperate. In addition, firms must fare much better if they self-report and fully cooperate than if they only fully cooperate.

Countries can provide these incentives by creating a presumption that firms that proactively and fully self-report, fully cooperate and fully remediate will receive a declination (following disgorgement).³⁷ Firms that self-report or fully cooperate will be presumptively eligible for a DPA

³⁴ In many jurisdictions, one hallmark of corporate criminal liability (or its administrative equivalent in Germany) is that it can trigger presumptive collateral sanctions (such as debarment or delicensing) either in the home country or elsewhere. For example, the European directive provides that conviction for many offenses triggers automatic debarment.

³⁵ Other forms include NPAs, *see supra* text accompanying notes 6-7. For an analysis of the various forms of non-trial resolutions around the world see OECD, *Resolving Foreign Bribery Cases with Non-trial Resolutions: Settlements and Non-trial Agreements by Parties to the Anti-Bribery Convention* (2019).

³⁶ *See supra* text accompanying note 7. Although DPAs do not trigger mandatory or presumptive collateral sanctions, in general an agency or NGO could still pursue debarment when appropriate by instituting its own action. *See Alexander & Arlen, supra* note 25, Section 5.

³⁷ Arlen & Kraakman, *supra* note 17. Countries can structure corporate liability to induce publicly-held companies to report misconduct, even by senior management, provided that the country's corporate governance laws place authority over internal investigations in the hands of independent directors. These directors should have authority to hire outside counsel and take the steps they deem necessary to resolve the matter. *See Arlen & Kahan, supra* note 7 (discussing the incentives on independent directors not to violate their oversight duties). Privately held companies also can be induced to self-report if owned by institutions or individuals who are not directly involved in day-to-day management of the firm (or who are not involved in the misconduct). By contrast, owner-managed firms and family-owned firms are unlikely to self-report misconduct that could implicate a senior manager. To address these firms,

with substantially mitigated sanctions,³⁸ provided that they also remediate. Companies that self-report also generally should not be subject to a monitor.³⁹ By contrast, prosecutors should not be permitted to offer a DPA to companies that did not self-report and fully cooperate. Creating strong incentives to self-report and cooperate provides an additional benefit beyond revealing misconduct to authorities: it should induce companies to invest in the compliance measures that they genuinely believe will best help them detect misconduct, since detection would enable them to take the actions needed to obtain a declination.

By contrast, DPAs will not provide adequate incentives to self-report and cooperate—and thus will not enhance deterrence—if the legislation does not target their use at these activities. Thus, countries should not adopt legislation that provides that DPAs should be used whenever a prosecutor or judge concludes that a DPA is in the public interest. This standard introduces uncertainty that lowers companies' incentives to self-report or cooperate.⁴⁰ Similarly, companies will not self-report if a country treats self-reporting as simply one of many factors that *may* be taken into account in determining the form of settlement and magnitude of sanctions. Without assurances, companies which detect misconduct will remain silent, unless they are confident the government will detect this misconduct.

Properly structured DPA regimes will not induce self-reporting unless legislatures take other actions. First, the “cooperation” requirement to get a DPA must be defined to ensure that corporations provide enforcement authorities with new material information—either evidence about previously undetected misconduct or previously unknown actionable evidence about individuals' responsibility. Second, all firms, even those that self-report and cooperate, should be required to disgorge any benefits obtained from the misconduct.⁴¹ Third, in order to render prosecutors' threat to pursue a guilty plea that triggers collateral sanctions credible, legislatures should modify laws governing debarment to enable prosecutors to impose guilty pleas without triggering firm-wide permanent debarment. Temporary debarment or monitors should be employed as an alternative.⁴² Finally, the legislatures must adopt other reforms to corporate liability, individual liability, and whistleblowing laws discussed below.

countries need to implement an effective whistleblowing regime and enhanced regulatory oversight designed to detect misconduct.

³⁸ Mitigated sanctions should always exceed the benefit of the misconduct to motivate a firm to prevent misconduct. Arlen & Kraakman, *supra* note 17.

³⁹ A company that cooperates, but does not self-report, should be subject to a monitor if the management caused the firm not to self-report to serve its own interests. *Supra* note 30; *see* Arlen & Kahan, *supra* note 7.

⁴⁰ Firms usually will not self-report or cooperate unless they are certain that they will not be prosecuted if they do so. They also will not do so if judges or prosecutors may conclude that DPAs are appropriately used with companies that did not self-report and fully cooperate.

⁴¹ Corporate cooperation does not deter misconduct unless enforcement officials use the information to bring appropriate charges against those who committed the crimes. Legislatures also should ensure that corporations seeking remediation credit appropriately discipline any managers who are determined, after appropriate process, to have induced or knowingly condoned misconduct.

⁴² *See* Alexander & Arlen, *supra* note 25 (discussing effective policy governing collateral sanctions).

Table One
Structuring Corporate Liability to Deter Misconduct

| Goals | Implications | Policy Conclusion |
|--|---|---|
| <p>Preventing misconduct Companies must want to prevent all misconduct by all employees.</p> | Company cannot retain any material benefit of crime. | Corporation must be held liable for all crimes by all employees committed for its benefit. |
| <p>Corporate Policing Companies that detect misconduct must want to self-report and provide material information to authorities about those responsible for it.</p> | Corporations that self-report or cooperate must not be debarred or excluded. | Corporations that self-report or fully cooperate must be entitled to a form of resolution that does not trigger debarment, exclusion or delicensing. |
| | <p>A company must face lower total expected costs if it self-reports, cooperates and remediates than if it does not self-report or cooperate.</p> <p>Firms must be able to predict how self-reporting and cooperation impacts the form of settlement and magnitude of sanctions</p> | <ul style="list-style-type: none"> • Companies that self-report and fully cooperate must be presumptively eligible for both a DPA (or equivalent) and materially reduced sanctions. • DPAs should only be available for companies that self-report or fully cooperate. • Companies that do not self-report detected misconduct or fully cooperate should be convicted and should be likely candidates for a monitor. |
| | <p>Companies that fail to report misconduct must face a material risk that the government will detect the misconduct and punish the firm.</p> <p>Companies that refuse to cooperate with a valid government investigation must be prosecuted and sanctioned.</p> | <ul style="list-style-type: none"> • Government authorities must have sufficient resources and expertise to detect and investigate material corporate criminal misconduct. • Government should facilitate reporting of misconduct by providing clear opportunity, incentives, and protections for whistleblowers to report material corporate criminal misconduct. • Court system should permit expeditious and appropriate resolution of corporate criminal cases. |
| <p>Corporate Self-reporting</p> | Companies should be guaranteed better treatment if they self-report and cooperate than if they merely cooperate. | Companies that self-report, cooperate, and remediate should presumptively get a declination with disgorgement. |
| <p>Deter Individual Employees from Committing Crimes</p> | Employees who commit crimes should expected to be criminally convicted. | <ul style="list-style-type: none"> • Appropriate individuals materially responsible for misconduct should be convicted. • Companies should only get cooperation credit if they seek and provide all facts reasonably available to them about the scope of misconduct and the role of their employees in committing or facilitating it. • Enforcement authorities should independently investigate to determine the full extent of misconduct and identity individuals responsible. • Corporate remediation should involve appropriate discipline of employees responsible for either the misconduct or inadequate responses to its detection. • Individuals should be eligible for leniency if they provide material information against culpable senior employees or a non-cooperative company. |

3.2. *Scope and Magnitude of Corporate Liability*

DPAs alone are not enough. Countries genuinely committed to deterring corporate crime must also make sure that companies are held criminally liable for all crimes committed by their employees in the scope of employment. Broad liability is needed for two reasons.

First, DPAs cannot be used to induce companies to self-report and cooperate unless companies face a credible and material threat of criminal sanctions for their employees' misconduct if they do not take the actions needed to get a DPA. Thus, countries' corporate criminal liability rule must ensure that companies can be held liable for all crimes committed by their employees in the scope of employment.⁴³

Second, countries cannot induce companies to spend money to prevent misconduct if companies can walk away unscathed when misconduct is detected.⁴⁴ Indeed, companies that are not held liable may structure compensation and promotion systems to induce profitable misconduct. This suggests that, as indicated earlier, legislation permitting DPAs and NPAs needs to be adopted in concert with legislation holding companies potentially liable for crimes committed by all employees in the scope of employment.

Of course, corporate liability will not deter unless the sanctions imposed are sufficiently large to ensure that companies always forfeit any benefit obtained from the misconduct. In addition, companies that detected and did not self-report, and those that failed to fully cooperate, should face additional sanctions that are large enough to motivate them to self-report and cooperate.⁴⁵

3.3. *Effective Enforcement against Non-cooperative Firms: Funding and Whistleblowing*

Countries cannot induce self-reporting and cooperation unless they ensure that companies that fail to self-report or cooperate face a material risk that enforcement officials will detect and successfully prosecute them for unreported misconduct.

Thus, governments adopting laws promoting negotiated corporate resolutions must provide the resources and the institutional structure needed to enable enforcement authorities to create a salient material risk of detecting and successfully prosecuting undisclosed corporate crime. Techniques include providing adequate funding for enforcement and creating teams of investigators and prosecutors who specialize in complex corporate cases. They also can facilitate investigations by enabling enforcement authorities to enter into negotiated criminal resolutions that offer implicated individuals more favorable terms if they provide accurate material information against others who were more responsible for the misconduct.

⁴³ See Arlen, *supra* note 2.

⁴⁴ See *supra* notes 1 & 25. Corporate liability is particularly important for inducing self-reporting when companies would face costs from reputational damage if they disclose misconduct. In this case, the market deters disclosure and also may deter remediation. The threat of criminal liability if the firm fails to self-report or cooperate, and the offer of a DPA if it does, can provide firms with the needed incentive to self-report and cooperate, notwithstanding its reputational concerns. See Arlen, *supra* note 2.

⁴⁵ Many countries do not impose sufficiently large sanctions for corporate crime to deter profitable misconduct. For example, at least ten countries' statutes governing company liability for foreign bribery set the maximum fine at EUR 1 million or less (though in some cases other sanctions, such as restitution, may be available). OECD, *Liability of Legal Persons*, *supra* note 4, at 130.

In addition, to facilitate detection and investigation, countries should adopt whistleblower laws that provide adequate protections, and incentives, for private citizens—such as employees—to collect and provide information about misconduct to enforcement authorities.⁴⁶ The threat of an undisclosed whistleblower increases the probability that the government will detect misconduct, thereby increasing companies' incentives to seek favorable treatment by either self-reporting before the whistleblower reports or fully cooperating afterwards.⁴⁷ Also, prosecutors are insulated from becoming too dependent on, and influenced by, information provided by cooperating corporations if they have evidence provided by whistleblowers.

Countries thus need to adopt laws that protect whistleblowers' anonymity forever. Whistleblowers who report internally or externally also need to be protected from retaliation. Firms also must be prohibited from giving employees contracts that directly or indirectly discourage them from reporting to the government.

In addition, countries need to adopt whistleblower laws that provide monetary rewards to people who disclose previously unknown misconduct to the government that results in a successful enforcement action. Monetary compensation is important for two reasons. First, bounties compensate whistleblowers for the injury to their careers that often results from reporting misconduct. Second, substantial awards provide incentives for lawyers to help whistleblowers investigate inadequately substantiated claims of misconduct to provide the government with sufficient evidence to decide whether to move forward.

3.4. *Bringing Appropriate Individual Wrongdoers to Justice*

Corporate self-reporting and cooperation are not ends in themselves. In order to deter crime, enforcement officials must use the information obtained from companies to pursue criminal actions against those responsible for the crimes. Prosecutors undermine deterrence if they allow individuals to escape punishment for intentional misconduct because this enables individuals to retain the benefits of crime without risk of sanction.⁴⁸

⁴⁶ See generally David F. Engstrom, *Bounty Regimes*, p. 334 in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018) (discussing U.S. cash for information and bounty regimes). For a discussion of why bounty regimes should not exclude culpable employees see Miriam Baer, *Reconceptualizing the Whistleblower's Dilemma*, U.C. DAVIS L. REV. (forthcoming).

⁴⁷ Governments need whistleblowers because corporate misconduct is difficult to detect from outside the firm. See note 19. In addition, effective DPA legislation adopted in concert with good whistleblower laws can improve compliance by giving companies strong incentives to develop genuinely effective internal reporting systems that encourage employees to report internally.

⁴⁸ See Arlen, *supra* note 14 (discussing the importance of individual liability); Arlen, *supra* note 2 (same). Individuals generally should be convicted when the firm is. Nevertheless, in some situations enforcement authorities have good reason to pursue the firm without also charging individuals. For example, a prosecutor may have the jurisdiction needed to sanction a company for foreign bribery, without also having jurisdiction over the individuals responsible for it. This is particularly likely if liability is predicated on the firm's failure to prevent bribery. Corporate liability in these situations can still enhance deterrence for the reasons given in Section 2. Similarly, individual liability may not be appropriate for corporate liability predicated on the firm's failure to implement an adequate system to prevent misconduct by outsiders, e.g., money laundering. Deficiencies can arise without any individual knowing that the system is not effective. See Samuel Buell, *Criminalized Management*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., 2018) (discussing challenges with holding senior managers liable).

To ensure that prosecutors bring individuals to justice, countries may need to adopt institutional reforms. While prosecutors often seek to serve the public interest, they also have career-advancement concerns that may entice them to pursue the next high profile corporate case after completing a large corporate criminal resolution, without taking the time and resources needed to prosecute individuals. Corporate resolutions tend to garner the most public attention; individual cases are time-consuming and risky because white collar defendants tend to fight the charges armed with legal counsel funded by the firm. Enforcement officials face temptations to economize on resources and enhance their careers by avoiding cases against individuals in favor of new investigations against high-profile corporate wrongdoers. Countries must take steps to ensure prosecutors do not give in to these temptations because corporate resolutions do not deter effectively unless prosecutors use corporate cooperation to sanction the people responsible for the crime.⁴⁹

Legislatures can intervene to promote individual liability in several ways. First, they can ensure that prosecutors have the resources needed to conduct thorough investigations into individual culpability. They also should ensure that corporations cannot obtain the cooperation credit for a DPA unless they conduct a thorough investigation and provide the government with both a full and accurate account of all misconduct, and actionable evidence against individuals with a material role in committing or condoning the misconduct.⁵⁰ Prosecutors also would benefit from the ability to enter into guilty pleas on more favorable terms with less culpable, implicated individuals who provide them with credible material information about those more responsible for the misconduct. Finally, countries should implement oversight mechanisms that make prosecutors account to superiors from the start of an investigation about their approach to investigating individuals. They also should obtain approval from superiors prior to a decision not to charge responsible individuals.

4. Assessment of Corporate Criminal Liability Reforms in the U.K. and France

Jurisdictions around the world are reforming their laws governing both the scope of corporate criminal liability and negotiated corporate criminal resolutions. A growing number of countries now permit non-trial corporate criminal resolutions, including both guilty pleas and DPAs. Of particular importance, Britain reformed its laws to both expand the scope of corporate liability for corruption and to allow prosecutors to enter into DPAs. Recently, France introduced a sweeping reform governing liability for corruption: *Law on Transparency, the Fight against Corruption and Modernization of Economic Life* (“Sapin II”).⁵¹ France did not reform its law governing corporate criminal liability. Instead, it now requires certain firms to adopt an anti-corruption compliance program—a duty enforced with administrative sanctions. France also now allows criminal

⁴⁹ For a more detailed discussion of these issues in the U.S. context see, e.g., Arlen, *supra* note 26; JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017); BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014); *see also* BUELL, *supra* note 6 (assessing the U.S. approach to corporate criminal enforcement). For a discussion of the difficulty of imposing appropriate sanctions on managers who are responsible for inducing or condoning misconduct, but who do not actually commit it, see Buell, *supra* note 48.

⁵⁰ This is the existing policy of the U.S. Department of Justice as stated in the Justice Manual. *See* 9-28.700 - The Value of Cooperation, Justice Manual, *supra* note 11.

⁵¹ *Sapin II Law: transparency, the fight against corruption, modernisation of the economy*, GOUVERNEMENT.FR (Apr. 6, 2016), <http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy>.

enforcement authorities to resolve corporate criminal cases using either a guilty plea or a non-trial corporate criminal resolution similar to a DPA. Other countries are looking to these recently-adopted reforms for guidance.

This section evaluates the recent reforms to corporate liability and non-trial corporate resolutions in both the U.K. and France.⁵² Analysis of these two countries' reforms reveals that they represent a significant step forward. Nevertheless, they each suffer from material limitations that substantially undermine their ability to promote effective deterrence.⁵³

A central problem with both regimes is that they allow companies to avoid criminal liability for many serious crimes, thereby enabling them to profit from corporate crime. Companies' incentives to self-report are weak due to a low risk of government detection and the absence of whistleblowing laws that compensate individuals for reporting corporate misconduct to authorities. Both countries have adopted non-trial settlement regimes for some crimes, including corruption. The U.K. regime more effectively promotes deterrence by restricting access to DPAs to companies that provide enforcement authorities with material information about previously undetected misconduct, either through a self-report or during cooperation. In France, companies are supposed to cooperate in order to get a non-trial resolution, but cooperation is broadly defined. There is no requirement that companies report previously undetected misconduct. Courts moreover have approved non-trial resolutions with companies that did not provide any cooperation at all. Finally, in order to effectively deter, France would need to end its historic practice of under-funding criminal enforcement, including investigating magistrates.⁵⁴

4.1. U.K.

4.1.1. DPAs

In 2014, the U.K. adopted a law permitting designated prosecutors—specifically the Director of Public Prosecutions or the Director of the Serious Fraud Office (SFO)—to recommend a DPA to resolve a case against a legal entity chargeable with certain offenses.⁵⁵

⁵² For a discussion of other problems with the laws in these two countries see, e.g., Hawley, et al., *supra* note 27, and Stephane Bonifassi & Victoire Chatelin, *Value of court procedure versus non-trial resolutions*, in this volume; see also Arlen & Buell, *supra* note 21 (discussing differences in laws governing corporate investigations—such as criminal procedure, employment law and privacy laws).

⁵³ This section focuses on the U.K. and France because both countries introduced DPAs (or a related mechanism) by statute, and thus are focal for other countries considering reform. The critique of these two regimes does not imply that other DPA laws are optimal. For a discussion of problems with the U.S. approach see, e.g., Arlen, *supra* note 26 (discussing potential improvement to existing enforcement policy in the U.S. and elsewhere); Arlen & Kahan, *supra* note 7 (discussing optimal use of mandated reforms); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016) (discussing rule of law problems with U.S. practice); see also Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321 (2012) (critiquing the Organizational Sentencing Guidelines); Alexander & Arlen, *supra* note 25, Section 5 (providing basis for reforming laws governing collateral sanctions).

⁵⁴ France is not alone in devoting too little resources to corporate enforcement. Many other countries do as well. Indeed, the U.K. reduced the law enforcement's budget by 24% over a four year period and also has reduced the budget of the National Crime Agency. Nevertheless, enforcement underfunding in France is particularly severe, especially in light of investigating magistrates' resistance to using companies' internal investigations.

⁵⁵ Crimes and Courts Act of 2013, c. 22, § 45, sch. 17 (UK). The statute provides that the Secretary of State can allow other prosecutors to use a DPA but so far this has not been done.

U.K. DPAs result in the simultaneous filing and immediate suspension of formal charges. As in the U.S., U.K. DPAs incorporate key features of guilty pleas. They must state the facts of the offense and often require the company to admit guilt. They also can require the company to pay a penalty, disgorge profits, implement or reform a compliance program, cooperate with authorities, and pay the prosecutor's reasonable costs attributable to investigating and prosecuting the misconduct. Companies also can be required to compensate victims, either directly or indirectly by providing benefits to a relevant non-profit. DPAs last for a period of years and must include an expiration date. DPAs tend to impose more lenient sanctions. A central benefit of DPAs is that they do not trigger mandatory or presumptive collateral sanctions.⁵⁶

In the U.K., a court must approve a DPA. It has authority to review it to determine whether (1) offering it is in the interests of justice and (2) its terms are fair, reasonable, and proportionate.⁵⁷

To assess whether U.K. DPAs weaken or strengthen deterrence, we must determine whether DPAs primarily operate to reduce companies' expected cost of misconduct (which would weaken deterrence), or, alternatively, are an effective tool for enhancing enforcement by inducing companies to self-report and provide actionable evidence to prosecutors about misconduct. In addition, in order to deter effectively, corporate liability must both ensure that companies do not retain the benefit of misconduct and the appropriate individuals are sanctioned.

Companies will not reliably self-report and fully cooperate unless the DPA regime guarantees that a company will fare substantially better if it self-reports or cooperates and remediates than if it does not. This implies that the regime must effectively guarantee companies that they can resolve through a DPA (and get a reduction in sanctions) if they self-report or fully cooperate by providing the government with information about previously undetected misconduct. In turn, the regime must ensure that companies that do not self-report or fully cooperate cannot get a DPA.⁵⁸

The U.K. DPA statute and accompanying guidelines do not ensure that DPAs are guaranteed for, and restricted to, companies that provide government officials with material information about either previously undetected misconduct or about the responsibility of the individual wrongdoers. Indeed, the statute simply says that DPAs are to be employed when it is in the "public interest," without defining when DPAs are in the public interest. The Code of Crown Prosecutors has adopted guidelines on when corporate prosecutions are in the public interest.⁵⁹ Relying on these guidelines, the SFO adopted a Code of Practice to govern DPAs. Under the Code, self-reporting or cooperation, combined with remediation, weighs strongly in favor of a DPA. However, none of the guidelines

⁵⁶ Government agencies negatively impacted by a corporate crime generally will still have authority to trigger a civil or administrative enforcement action, which could be used as the basis for debarment. Private plaintiffs injured by a crime also could pursue a civil action—they just cannot use the DPA as evidence of corporate guilt.

⁵⁷ Crimes and Courts Act of 2013, c. 22, § 45, sch. 17(8) (UK). By contrast, in *U.S. v. Fokker Services, B.V.*, 818 F.3d 733 (D.C. Cir. 2016), the D.C. Circuit held that trial judges reviewing a DPA under the Speedy Trial Act cannot reject it based on concerns about the prosecutors' charging decisions. It also concluded that courts "play[] no role in monitoring the defendant's compliance with the DPA's conditions. . . . Rather, the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions..." at 744. For a critique of the U.S. approach to oversight of DPAs and DPA mandates see, e.g., Arlen, *Prosecuting Beyond the Rule of Law*, *supra* note 53; Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483 (2017).

⁵⁸ Companies should not have access to a DPA unless they provide the government either with information about previously undetected misconduct or actionable evidence establishing the role of those responsible for the misconduct that the government would not have likely obtained otherwise. See *supra* note 11.

⁵⁹ CPS, *The Code for Crown Prosecutors* (Oct. 26, 2018); see also CPS, *Corporate Prosecution: Legal Guidance*, <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions>.

create a presumption that companies that self-report or cooperate (and also remediate) can resolve through a DPA. Nor do they restrict DPAs to companies that self-reported or cooperated and also remediated. Instead, these Codes list a variety of factors that are relevant to the decision to employ a DPA, including factors that could weigh against offering a DPA to a firm that self-reported such as the scope of the misconduct and the magnitude of the harm caused.⁶⁰ Thus, formal provisions governing DPAs do not provide companies with the guaranteed benefit needed to induce them to come forward with material evidence that could otherwise be used against them.

Notwithstanding these limitations, the de facto regime governing U.K. DPAs is consistent with effective deterrence (at least as applied to corruption cases). The de facto regime provides greater incentives to self-report and cooperate for two reasons. First, in the U.K. only three people currently have authority over DPAs. Second, to date the people wielding that authority have restricted DPAs to companies that provide the government with new information about previously undetected misconduct.

Under the DPA statute, only two prosecutors—the Director of the SFO and the Director of Public Prosecution—have authority to recommend a DPA. David Green, when he was Director of the SFO, stated that DPAs should be reserved for companies that reported misconduct to authorities about which they were previously unaware—either by self-reporting initially or revealing to prosecutors a range of previously undetected misconduct when misconduct was otherwise brought to light. Under this approach, DPAs were not used for companies that did not provide prosecutors with evidence of previously undetected misconduct.⁶¹

Second, the U.K.’s approach to judicial oversight following enactment of the DPA statute operated to strengthen companies’ incentives to self-report. Initially, a single judge on the Crown Court, Brian Leveson, assumed authority over all DPAs. This approach facilitated consistency in the approach to DPAs and was designed to help develop a set of clear principles to govern their use. Judge Leveson’s opinions justifying the use of a DPA treat a firm’s decision to report new misconduct as, in effect, an essential factor in determining whether a DPA is in the public interest. This has both increased predictably and promoted deterrence by effectively creating a presumption that DPAs are reserved for companies that report misconduct to the government about which it was previously unaware.

Unfortunately, these institutions are vulnerable to change. The judge currently in charge of DPAs has retired. A new judge could take a different approach to both the question of whether to concentrate authority over DPAs in a single judge and to the criteria governing the use of DPAs. In

⁶⁰ For example, the DPA Code of Practice provides that:

“In applying the public interest factors when considering whether to charge, seek to enter a DPA or take no further criminal action the prosecutor undertakes a balancing exercise of the factors that tend to support prosecution and those that do not. This 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. Decisions will be made on an individual case by case basis.” *Id.* ¶ 2.6.

The DPA Code makes clear that companies cannot get cooperation credit without providing documents and new material information to prosecutors, for example by identifying witnesses. But cooperation is merely a factor to be considered in determining whether a DPA is appropriate.

⁶¹ In the Rolls Royce case, for example, the SFO had reason to investigate potential misconduct in China and Indonesia in one particular industry. Following an inquiry by the SFO, Rolls Royce conducted an internal investigation that revealed misconduct in other regions and different industries—misconduct that was outside the scope of the SFO’s investigation. Rolls Royce’s cooperation included reporting this additional misconduct.

addition, in 2018 a new Director, Lisa Osofsky, assumed authority over the SFO. Director Osofsky could alter the SFO's approach to DPAs considerably, given the wide discretion granted by the Crown Prosecution Services guidelines on the prosecution of corporations. Fortunately, Director Osofsky stated in a recent speech that DPAs are only appropriate if the company has either self-reported or cooperated by providing new information to the government.⁶² Yet questions remain about whether she has a more expansive definition of "new information" that would allow access to a DPA to a company that provided new evidence to prosecutors without revealing any previously undetected misconduct.⁶³ This shift, if it materializes, could reduce companies' incentives to report undetected misconduct, while potentially increasing their incentive to cooperate. This approach would enhance deterrence if, but only if, inducing cooperation is more valuable to the SFO than self-reporting. At first impression, this seems unlikely given the potentially powerful investigative tools available to the SFO, and the fact that the U.K. does not have a robust bounty regime to provide it with an alternative credible stream of information about misconduct.⁶⁴ Thus, to the extent that the SFO is better off using DPAs to induce self-reporting than cooperation, this shift may reduce deterrence.⁶⁵

4.1.2. Scope, Magnitude, and Likelihood of Corporate Criminal Liability for Misconduct

Nevertheless, even if optimally implemented, U.K. DPAs are unlikely to enable the U.K. to effectively deter corporate crime because most crimes are governed by an excessively narrow corporate criminal liability rule. Specifically, in the U.K. companies are not liable for most serious crimes committed by most of their employees—other than corruption and tax fraud—even when the crime was committed to benefit the firm.

This narrow corporate liability rule undermines deterrence in two separate ways. First, when this rule applies, the government cannot effectively use DPAs to induce firms to help it detect and punish corporate misconduct. Companies have no reason to incur the cost and risk of investigating,

⁶² Lisa Osofsky, Director, Serious Fraud Off., Keynote on Future SFO Enforcement, COMPLIANCE & ENFORCEMENT BLOG (Oct. 16, 2018).

⁶³ In a keynote speech, SFO Director Lisa Osofsky said that corporate cooperation, of the type that may warrant a DPA, requires that the company "tell me something that I don't know." This includes providing documents and financial records that make the prosecutors' job of gathering admissible evidence easier. Lisa Osofsky, Director, Serious Fraud Off., Keynote Address at the FCPA Conference, Washington DC (Dec. 4, 2018). This raises the question of whether companies may be able to get a DPA even if they do not self-report or conduct an investigation that detects misconduct.

⁶⁴ In the United States, many successful cases against companies for fraud have been brought by whistleblowers residing outside the firm who are motivated to seek out information about fraud—for example by using data analysis—by the huge potential financial rewards of successful litigation. *See* Engstrom, *supra* note 46.

⁶⁵ The SFO would appear to be unusually well-situated to obtain the information it needs given its broad investigatory powers and the narrower scope for legal privilege in the U.K., as compared with the U.S. *See* Arlen & Buell, *supra* note 23, Section 3. Nevertheless, enforcement authorities also inevitably face resource challenges. There also are reasons to wonder whether the U.K. judiciary may treat corporations more leniently than have some judges in the U.S. in recent years. *See* Fokker, 818 F.3d 733 (criticizing the DPA as being too lenient); *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014) (criticizing the settlement as too lenient).

Alternatively, reducing the focus on self-reporting would be appropriate as applied to industries or types of firms that already have adequate incentives to self-report, either as a result of effective oversight by a regulator or because they fall under the jurisdiction of enforcement authorities in another jurisdiction whose enforcement policy encourages self-reporting.

self-reporting and fully cooperating in order to obtain a DPA if they cannot be held liable for their employees' crimes. Second, this rule undermines companies' incentives to take steps to prevent misconduct. Companies need not intervene to prevent misconduct when they can retain the profit from it without any risk of being held liable for it.

4.1.2.1. *Scope of Liability for Crimes Requiring Proof of Mens Rea*

In England and Wales, companies generally cannot be held vicariously liable for felonies and other serious crimes that require proof of *mens rea* because U.K. courts reject the idea that the intent of an employee acting in the scope of employment can be attributed to the firm. Instead, companies are only liable for knowing or intentional misconduct if it was committed by someone in the upper echelons (directing mind) of the firm.⁶⁶ British courts tend to restrict attribution to employees who are “in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.”⁶⁷ Thus, corporate criminal liability for serious offenses generally is limited to crimes committed by members of the board of directors and senior officers.⁶⁸ This restrictive rule applies broadly, including to affirmative acts of bribery predicated on offering to pay bribes to domestic or foreign officials (Sections 1 and 6) of the U.K. Bribery Act.

This rule insulates large companies from criminal liability for most serious offenses committed on their behalf because employees of large complex organizations engaged in misconduct rarely do so as a result of orders emanating from, or directly attributable to, the board of directors or senior management. Instead, they are supervised and guided by managers operating many levels below the firm's directing mind. As a result, in the U.K., companies know they will not be held liable for a host of profitable offenses, including money laundering and phone-hacking, that tend to be committed by employees who are not members of senior management.

As a result, companies have inadequate incentives to try to prevent misconduct. Indeed, companies often can benefit from compensation and promotion policies that create subtle incentives to commit profitable crimes. In addition, the U.K.'s DPA law will not motivate companies to self-report or cooperate with respect to these crimes in most situations. Companies have little reasons to self-report or cooperate to obtain a DPA if the corporate liability law itself protects them from the risk of conviction.⁶⁹ In turn, in the U.K. individual liability for these offenses is less effective than

⁶⁶ The determination of who counts as an officer within the “directing mind” or “brain” of the firm depends on interpretation of the relevant statutory rule governing the crime in question. *E.g.*, *Shanks & McEwan (Teesside) Ltd. v. Env't Agency* [1999] QB 333, at 345, 348; *R. v. St. Regis Paper Co.*, [2011] EWCA (Crim) 2527. *See generally* Director, Serious Fraud Off., Keynote Address (Apr. 8, 2016), <https://www.law.nyu.edu/news/David-Green-Serious-Fraud-Office-UK-corporate-compliance-criminal-liability>.

⁶⁷ *Tesco Supermarkets Ltd. v Natrass* [1972] AC 153 at 187.

⁶⁸ As Lord Reid explained, when a crime requires proof of *mens rea*, corporations normally are only liable for crimes committed by people who are “[a member of] the board of directors, the managing director, and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company.” *Id.* at 171; *see also* Celia Wells, *Corporate Responsibility and Compliance Programs in the United Kingdom*, in *PREVENTING CORPORATE CORRUPTION: THE ANTI-BRIBERY COMPLIANCE MODEL* 505, 506 (Stefano Manacorda et al. eds., 2014).

⁶⁹ Companies have several reasons not to self-report or cooperate if they are not liable for misconduct. Internal investigations, which are a prerequisite to effective self-reporting and cooperation, are costly. In addition, reporting could impose costs on the firm from either reputational damage, civil liability, or enforcement in another country that

it otherwise would be because individuals often do not face a salient and material risk of being convicted when government authorities cannot rely on corporate self-reporting and cooperation.

4.1.2.2. *Failure to Prevent Bribery*

U.K. law governing corporate liability provides companies with stronger incentives to deter corruption and take the actions needed to obtain a DPA for such offenses. Section 7 of the 2010 U.K. Bribery Act effectively imposes strict liability on commercial companies for failing to prevent bribes offered by an agent to obtain or retain business or an advantage on the company's behalf. In theory, the company can avoid liability if it can prove that the bribery occurred despite the firm having in place "adequate procedures designed to prevent" bribery.⁷⁰ Yet companies have not been successful in asserting this defense, particularly if there were multiple instances of bribery.⁷¹

Section 7 liability provides several important deterrence benefits. First, liability should induce companies to prevent bribery—provided that the likelihood and magnitude of the sanctions imposed are sufficiently great to ensure that companies do not benefit from corruption. Second, the threat of conviction for a Section 7 offense could provide companies with the needed incentive to self-report and cooperate in order to obtain a DPA, if other features of U.K. law help provide these incentives.⁷² This would promote the speedy detection and remediation of corporate misconduct and increase the deterrence effect of corporate liability.

Whether Section 7 achieves these goals depends on two considerations. The first is whether courts continue to treat Section 7 as a broad corporate liability rule or narrow it excessively by interpreting the statute's affirmative defense ("adequate procedures designed to prevent bribery") in a way that enables companies to escape liability merely by showing that the firm had a well-funded compliance program that meets with the standards of various standard-setting organizations. Should courts allow companies to avoid liability by adopting compliance programs that are effective on paper, without also requiring them to detect and self-report misconduct, companies will focus on adopting such programs and will no longer need to self-report, cooperate, or remediate.⁷³

The second is whether the sanctions imposed by Section 7 and the likelihood of their imposition are sufficiently great to deter. To achieve this goal, liability imposed on firms that obtain

does not adequately credit self-reporting and cooperation. Of course, firms in some industries, such as financial institutions, have a legal duty to report detected misconduct to their regulator. The effectiveness of this duty depends on the magnitude of sanctions for failure to self-report and the regulator's effectiveness at detecting unreported misconduct.

One potential exception may be companies that face prosecution in another country with a broader corporate liability regime, such as the U.S. In this case, a local company could be motivated to cooperate with U.K. or French authorities in the hope that a joint corporate criminal resolution will enable it to negotiate a settlement that shifts some of the fine paid to local authorities and places it in charge of any monitor imposed.

⁷⁰ U.K. Bribery Act provides that: "(1) A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending—(a) to obtain or retain business for C, or (b) to obtain or retain an advantage in the conduct of business for C. (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct." Bribery Act 2010, c. 23, § 7 (UK).

⁷¹ Wells, *supra* note 68, at 508-09.

⁷² See *supra* Table One.

⁷³ See Arlen, *supra* note 26 (discussing in more detail the problems with corporate liability predicated on whether the firm had an effective compliance program).

a DPA must ensure that firms cannot profit from corruption. In addition, and equally important, potential liability for firms that do not self-report and cooperate must be sufficiently enormous to pressure firms into self-reporting and cooperating to obtain a DPA, even though there is a chance the government may not detect the crime if the firm remains silent.⁷⁴

4.1.3. Rewards and Protection for Whistleblowers

Regardless of the corporate liability rule, companies will not prevent misconduct or report it unless they face a material risk that government authorities will detect and punish them for unreported misconduct. This risk depends on whether enforcement authorities are adequately funded and whether they can expect to receive information about misconduct from sources other than companies—in particular, whistleblowers.

The U.K. SFO appears to have more resources than many other enforcement authorities around the world. Even so, it cannot reliably detect most corporate misconduct.⁷⁵ Corporate misconduct is profitable, often hides disguised as legitimate transactions, and regularly involves evidence distributed across the organization, including overseas.

The U.K. has not taken a critical step to mitigate this problem: adopting laws to protect and reward people who provide material information about previously undisclosed, significant misconduct to the government.⁷⁶ The U.K. does not reward whistleblowers. Unlike the U.S., it also does not have a robust enforcement policy precluding firms from deterring reporting through confidentiality and non-disparagement clauses in employee contracts. The resulting low risk of outside detection may help explain why, in the five years since the U.K. adopted DPAs, the SFO has only executed a handful of these agreements. This small number is consistent with a low rate of self-reporting by U.K. firms.

4.2 France

France recently reformed its law to impose administrative liability on companies that do not adopt an anti-corruption compliance program. It also now allows prosecutors to enter into DPA-like corporate criminal settlements. Sapin II also provides confidentiality to whistleblowers under certain circumstances. These reforms are a step forward but the overall corporate enforcement regime still falls considerably short of what is needed to effectively deter corporate misconduct.

4.2.1. Scope of Corporate Criminal Liability

The most important problem with French law and enforcement practice is the low expected cost to corporations of corporate misconduct, especially for crimes other than corruption and tax fraud. French law and practice governing corporate criminal liability insulates companies from liability for most of their employees' crimes. In France, companies are not liable for crimes

⁷⁴ Absent this carrot, Section 7 liability will produce perverse effects. Companies that expect to be liable for corruption, regardless of whether they adopted an effective compliance program, self-reported, or cooperated, will avoid taking actions (including adopting effective compliance systems, self-reporting or cooperation) that could help the government detect and sanction misconduct. *See Arlen, supra* note 14; *Arlen & Kraakman, supra* note 17.

⁷⁵ This problem afflicts all enforcement authorities. *See supra* note 19. Properly designed whistleblower bounty regimes (and anti-retaliation measures) can reduce, but not eliminate, this concern.

⁷⁶ For a discussion of whistleblowing provisions in the U.S. see Engstrom, *supra* note 46.

committed by their employees unless prosecutors can show that the wrongdoer was an “organ or representative” of the company who committed the offense “for [the company’s] account.”⁷⁷ Courts have employed inconsistent interpretations of the last clause. Many courts conclude companies are only liable if the wrongdoer was a manager with sufficient seniority to make a corporate-level decision that the firm should commit the crime.⁷⁸ This is important because many crimes are committed by lower level managers or employees.

Beyond this, even when a company can be charged, expected corporate criminal sanctions are low. French statutes generally severely restrict the maximum fines that can be imposed on companies for criminal misconduct. In turn, courts have imposed relatively small criminal sanctions on firms,⁷⁹ although a few recent cases provide some hope that this could be changing.⁸⁰

Finally, French judges often do not convict companies charged with offenses. Indeed, even though France criminalized overseas bribery in 2000, between 2000 and 2016 only one company was convicted for corruption in France.⁸¹

This undermines deterrence in two ways. First, corporations have little reason to actively deter corporate crime because they often can retain all, or some, of the profits of misconduct. Second, corporations often will have little reason to take the actions needed to obtain a negotiated resolution, such as cooperating, because gaining favor with prosecutors provides no benefit when

⁷⁷ The French did not introduce criminal liability for legal persons until 1994. At first, the legislature restricted liability to only specific offenses. Today, all organizations (other than state and some local public authorities) are liable for all types of crimes. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.); see Juliette Tricot, *Corporate Liability and Compliance Programs in France*, in PREVENTING CORPORATE CORRUPTION: THE ANTI-BRIBERY COMPLIANCE MODEL 477, 481 (Stefano Manacorda et al. eds., 2014). Yet the scope of organizational liability remains narrower than is optimal and more uncertain.

⁷⁸ CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.); see Frederick T. Davis, *The UBS Conviction: The Dawn of a New Era*, 35 INT’L ENFORCEMENT L. REP. (Mar. 2019); Tricot, *supra* note 77, at 481-82. Indeed, courts have allowed companies to escape liability for misconduct by employees, even though the wrongful employee was a manager. See Tricot, *supra* note 77, at 482. By contrast, in the recent UBS case the court concluded the company is liable and noted that representatives “from top to bottom” were involved. Davis, *supra*. Of course, this could change. Prior to Sapin II, some French judges concluded that the question of whether a company had the requisite intent to commit the crime—e.g., bribery—could be predicated on the commercial policy of the organization. This concept has not been widely embraced, however. Tricot, *supra* note 77, at 484. In addition, when liability is predicated on negligence, courts have been willing to base liability on the corporation’s actions as a whole. *Id.* at 485. Nevertheless, France is a long way from using that criminal liability—or its equivalent—to ensure that companies cannot retain the profits of, and want to deter, all crimes committed by their employees.

⁷⁹ Frederick Davis et al., *France’s New Anti-Corruption Framework: Potential Impact for Business in a Multijurisdictional World*, COMPLIANCE & ENFORCEMENT BLOG, at 4 (Dec. 7, 2016), https://wp.nyu.edu/compliance_enforcement/2016/12/07/frances-new-anti-corruption-framework-potential-impact-for-businesses-in-a-multijurisdictional-world. That said, large penalties have been imposed in a few cases. For example, in the UBS case the court imposed a total penalty of about 3.7 billion euros, as a result of the combined application of Article 131-38 of the Penal Code—which provides that the maximum penalty for a legal person is five times the maximum penalty for a natural person under the law that criminalizes the offence—and Article 324-3, which provides that the penalties referred to in Articles 324-1 and 324-2 may be increased to half of the value of the assets or funds involved in the money laundering operations. However, fines for companies generally are not high.

⁸⁰ See *infra* note 116 (discussing the UBS case).

⁸¹ See Davis et al., *supra* note 79. Indeed, prior to Sapin II, French magistrates closed proceedings against Alstom notwithstanding clear evidence that it engaged in wide-spread corruption around the world. OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France*, 24 (Oct. 12, 2012).

the firm is insulated from conviction. Thus, France's introduction of DPA-like settlements is unlikely to materially enhance resolutions for misconduct covered by France's narrow corporate liability regime.⁸²

4.2.1.1. Corporate Liability for Corruption

Sapin II did not change the approach to corporate criminal liability for corruption cases.⁸³ Thus, corporate *criminal* liability for bribery does not provide strong incentives for companies to deter (or self-report or cooperate with respect to) bribery in France. Yet Sapin II did impose a duty to adopt an effective compliance program to prevent corruption on certain companies; companies that breach this duty can be subject to administrative sanctions.⁸⁴ The French Anti-Corruption Agency (AFA) is empowered to audit certain companies to affirm their compliance with these requirements.⁸⁵

The new administrative liability does not provide adequate incentives for companies to deter corruption for several reasons. First, the maximum sanction that the AFA can impose on legal entities for not complying with the obligation to implement anti-corruption compliance program is only 1 million euros.⁸⁶ For larger firms, this sanction is smaller than the cost of implementing a truly effective compliance program.⁸⁷ Second, the AFA does not appear to have the resources and manpower to conduct the number of in-depth compliance audits needed to create a material risk of sanction for companies with deficient systems.⁸⁸ Indeed, to date the AFA has only audited a

⁸² Few French companies entered into a guilty plea after France introduced them. They preferred not to settle, confident that they would likely escape liability. Davis et al., *supra* note 79, at 4.

Companies potentially have greater incentives to prevent and cooperate with respect to some crimes, including tax fraud and corruption where firms are subject to broader corporate liability. *See infra* Section 4.2.1.1. Even so, UBS rejected a CJIP because it preferred to go to trial. It is unclear whether other firms will now be persuaded to enter into CJIPs, since UBS lost its case and was subject to a fine many times higher than that offered as part of the CJIP. *See* Davis, *supra* note 78.

⁸³ Davis et al., *supra* note 79.

⁸⁴ France also has expanded the corporate civil liability for very large companies that commit certain other offenses, such as environmental violations causing harm. France imposes a duty of vigilance on these firms. Companies that breach this duty are not subject to monetary sanctions, but it is possible that breach might serve as a basis for finding that the company can be held civilly liable for any harms that result. Ludovic Malgrain & Jean-Pierre Picca, *Compliance in France in 2019*, White & Case (July 9, 2019).

⁸⁵ *See* Laurent Cohen-Tanugi, *Anti-Corruption in France*, GTDT: MKT. INTELLIGENCE—ANTI-CORRUPTION 21 (2018). *See infra* note 89.

⁸⁶ Fred Einbinder, *Corruption Abroad: From Conflict to Co-operation, A Comparison of French and American Law and Practice*, CARDOZO INT'L & COMP. POLICY & ETHICS L. REV., at 48 (forthcoming, draft on file with the author) [citations are to pages in the draft].

⁸⁷ Davis et al., *supra* note 79, at 2.

⁸⁸ In addition, *ex ante* audits of compliance are less effective at inducing companies to adopt effective compliance programs than is broad corporate liability with appropriate credit for effective compliance, self-reporting and cooperation. First, compliance is most effectively assessed in the context of a violation. Second, enforcement authorities can better induce companies to have genuinely effective compliance—that actually detects misconduct—if they target DPAs and lower fines at the products of effective compliance: which is, the self-reporting and full cooperation that results from implementing an effective compliance system.

By contrast, the AFA will need to focus on the more “paper” features of compliance in its audits, because the deficiencies in many compliance programs are not apparent until misconduct occurs. Failures regularly occur in apparently well-designed programs as a result of the decision to vest authority in more compliant personnel, or as a

relatively small subset of the firms under its jurisdiction.⁸⁹ Finally, this duty only affects companies' incentives to adopt compliance programs. It provides no incentives for them to take other actions, including reforming compensation programs or self-reporting (and cooperating with respect to) detected corruption.⁹⁰

4.2.2. DPAs

Article 22 of Sapin II allows public prosecutors to enter into DPA-like non-trial corporate criminal resolutions, called Judicial Public Interest Agreements (CJIP) for certain crimes, including corruption.⁹¹ A company that enters into a CJIP can be required to pay a fine to the French Treasury, to implement compliance program reforms subject to oversight by AFA, and to pay compensation to victims. But the company need not be required to admit to any wrongdoing if it signs the agreement before formal charges are filed with a judge.⁹² Moreover, companies that enter into a CJIP avoid non-fine penalties that accompany conviction, including the obligation to forfeit the entire proceeds from the offense.⁹³ Companies also avoid collateral sanctions, such as exclusion from public procurement.⁹⁴

Sapin II's CJIP provisions are an important reform, but additional reform is needed for them to effectively deter corporate crime. First, as noted earlier, to make effective use of CJIPs France needs to expand liability for corporate crime. Second, France should extend access to CJIPs (or similar agreements) to all corporate crimes, rather than limit them to a narrow range of crimes (such as corruption). Finally, France should reform the guidelines governing access to CJIPs to ensure that CJIPs are used to induce companies to self-report and fully cooperate by providing enforcement officials material information, in a timely way that they otherwise would not have practicably obtained through self-reporting and cooperation.

The French legislature did not draft Sapin II to ensure that CJIPs are used to incentivize companies to self-report or fully cooperate by providing the government with valuable actionable evidence about either undetected misconduct or the role of individuals.⁹⁵ Instead, Sapin II indicates that CJIPs should be used when they are in the "public interest," without defining when CJIPs are

result of pressures not to rock the boat, that can undermine a system that appears effective on paper. *See* Arlen & Kahan, *supra* note 7 (discussing the benefits of evaluating compliance ex post after misconduct is detected).

⁸⁹ *See* Cohen-Tanugi, *supra* note 85. The AFA's mandatory compliance requirement applies to companies with over 500 people and gross revenues of more than 100 million euros, and consolidated subsidiaries of parent companies that meet these requirements. In 2018, the AFA conducted a total of 47 audits—28 private companies and 15 public—which covers only a small percentage of the 3-6,000 firms estimated to be subject to the compliance requirement.

⁹⁰ The new guidelines from the national financial prosecutor encourage companies seeking to enter into a settlement (CJIP) to self-report and cooperate, and to remediate deficiencies in their compliance programs. Yet these guidelines only apply to companies that could be convicted. French prosecutors cannot convict companies for bribes paid unless the employee was a manager with sufficient seniority. *See supra* Section 4.2.1.

⁹¹ Sapin II, *supra* note 51, Art. 22(1). CJIPs are available for active corruption by individuals or public officials, private corruption, and influence peddling, among other offenses. CODE DE PROCEDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 41-1-2, 180-2, R. 15-33-60-1 et seq. (Fr.).

⁹² *See* Cohen-Tanugi, *supra* note 85; Einbinder, *supra* note 86, at 50.

⁹³ CODE PENAL [C. PÉN.] [PENAL CODE] art. 131-21 (Fr.).

⁹⁴ Under French law, only a person who has been convicted of an offence against probity may be excluded from a public procurement procedure. Article L. 2141-1, Public Procurement Code.

⁹⁵ Davis, et. al, *supra* note 79, at 5.

in the public interest.⁹⁶ This public interest standard is particularly problematic in France because self-reporting and cooperation are not traditional goals of French criminal law. Indeed, the Ministry of Justice issued a circular indicating that a CJIP can be in the public interest if the firm does nothing more than agree to settle promptly, ensure compensation for any victims, and implement reforms to prevent reoccurrence.⁹⁷ Consistent with this view, the first several CJIPs were entered into late in the investigation, after the government apparently had established its case apparently without the benefit of corporate cooperation. Moreover, in at least one the agreement is clear that the company neither cooperated nor self-reported.⁹⁸ As a result, initially CJIPs potentially undermined deterrence by offering companies a way to lower the cost of detected misconduct—potentially below the benefit to the firm of the crime⁹⁹—without requiring the firm to take material steps to either help enforcement authorities determine the full scope of misconduct or to sanction individuals.

Recently, the State Financial Prosecutor's office (PRF) and the AFA jointly published guidelines governing the use of CJIPs that improve their deterrent effect by enhancing companies' incentives to cooperate.¹⁰⁰ The guidelines indicate cooperation is a prerequisite for obtaining a CJIP.¹⁰¹ The guidelines also appear to set forth a more robust view of cooperation. Companies are expected to conduct an internal investigation, to provide a report to prosecutors setting forth the facts of the misconduct, and to share minutes of witness interviews. These guidelines are an

⁹⁶ Luca d'Ambrosio, *Settlement Agreements under French Sapin II Law: In Search of the 'Public Interest,'* COMPLIANCE & ENFORCEMENT BLOG (Mar. 11, 2019). The AFA is currently working on guidelines governing the imposition of CJIPs.

⁹⁷ A January 31, 2018 circular issued by the Directorate of Criminal Affairs and Pardons of the Ministry of Justice indicates that CJIPs can be in the public interest when they promote speedy resolution, victim compensation, and corporate reform, even though allowing a CJIP—instead of a guilty plea—for those benefits alone enables the corporation to avoid forfeiture of the benefits of crime without materially enhancing prosecutors' ability to convict wrongful individuals.

⁹⁸ The first CJIP apparently was deemed in the public interest because the firm, HSBC, was willing to acknowledge responsibility and adopt measures to prevent future offenses. d'Ambrosio, *supra* note 96. There is no indication the company provided evidence to help convict individuals. Indeed, French prosecutors specifically stated that HSBC provided only minimal cooperation in explaining why it did not recommend greater fine mitigation. Skadden, Arps, Slate, Meagher & Flom LLP, *France Announces Its First Deferred Prosecution Agreement*, December 8, 2017, <https://www.skadden.com/insights/publications/2017/12/france-announces-deferred-prosecution-agreement>.

The next three CJIPs also were agreed to late in the investigation. In addition, at least one of the companies neither self-reported nor fully cooperated. BakerHostetler, *Two Years Since Sapin II: Is France Now a Player in the Global Anti-Corruption Enforcement Arena?*, <https://www.bakerlaw.com/alerts/two-years-since-sapin-ii-is-france-now-a-player-in-the-global-anti-corruption-enforcement-arena>. The CJIP with Societe Generale was the first one entered into in the preliminary stages of an investigation, when the firm's own evidence could be particularly useful. This CJIP was negotiated as part of a settlement with the DOJ which generally does not enter into DPAs without full cooperation. Luca d'Ambrosio, *supra* note 96. Joint resolution enabled France to obtain part of the fine and gain the authority over the monitor imposed on the French bank.

⁹⁹ Antoine Kirry et al., *First French DPAs for Corruption Offenses*, COMPLIANCE & ENFORCEMENT BLOG, at 2 (Mar. 14, 2018), https://wp.nyu.edu/compliance_enforcement/2018/03/14/first-french-dpas-for-corruption-offences. Companies must always be required to disgorge the profit from the misconduct for otherwise they do not have adequate incentives to prevent it, and may even benefit from incentivizing employees to commit it. *See supra* Section 3.

¹⁰⁰ The guidelines are available at <https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf>.

¹⁰¹ French public investigations have two stages. The prosecutor conducts a preliminary investigation to determine whether there is sufficient evidence to refer the matter to the court. At that point, the magistrate conducts an investigation to determine whether the defendant should be charged and tried. A CJIP can be used at either stage.

important reform, but France could do more to ensure the CJIPs help deter misconduct by motivating companies to report misconduct and provide evidence to government investigators in a timely way.

First, the guidelines do not create a presumption that companies that self-report or cooperate will be entitled to a CJIP. This undermines incentives to self-report or cooperate promptly, in cases where investigators may be unable to detect the misconduct or obtain the needed evidence without the firm's information. Second, under the guidelines, companies that previously sanctioned for misconduct, in France or abroad, have little incentive to cooperate or self-report because the guidelines treat prior misconduct as an obstacle to obtaining a CJIP.

Third, the guidelines have a broad definition of cooperation. They do not state that companies will not be deemed eligible for a CJIP unless they provided full and timely cooperation that provides investigators with information about misconduct—and evidence against individuals—that investigators did not already have. At present, the guidelines state that access to a CJIP will depend on the degree of cooperation, but prosecutors have discretion to give a company cooperation credit that waited to cooperate until after the prosecutor obtained the evidence needed to charge the firm.¹⁰² Granting cooperation at this stage undermines companies' incentives to cooperate earlier, since the company can escape all sanction if the prosecutor does not obtain sufficient evidence to bring charges.

Fourth, Sapin II gives companies little incentive to self-report.¹⁰³ Under the guidelines, a company can get a CJIP by cooperating alone. Prosecutors cannot offer companies that self-report and cooperate an additional material benefit, such as a declination and NPA.¹⁰⁴ The fine is likely to be lower but the reduction is not sufficient to outweigh the cost to the firm of reporting misconduct that otherwise would likely remain undetected.¹⁰⁵

In addition, questions remain about whether judicial review will undermine the deterrence effect of CJIPs. Unlike the U.K., judicial review of CJIPs is not concentrated in a single judge or group of judges. Each judge has considerable discretion to determine what constitutes the public interest. This discretion could undermine the deterrence effect of CJIPs. Traditionally French judges have been both suspicious of non-trial corporate resolutions and resistant to using evidence obtained from internal investigations to supplement their own investigation, notwithstanding their own

¹⁰² Indeed, the guidelines state that

"The use of the CJIP is in the public interest when it makes it possible to significantly reduce the investigation time, to ensure the effectiveness and firmness of the judicial reaction in response to the conduct pursued, to ensure compensation for the victim's prejudice and to contribute to the prevention of recidivism by setting up effective mechanisms for detecting breaches of probity."

¹⁰³ It should be noted that companies in some industries in France, such as financial institutions, have duties to self-report some misconduct to regulators. But these duties do not extend to all types of misconduct. Moreover, there are reasons to question how rigorously they are adhered to.

¹⁰⁴ French culture tends to eschew efforts to pressure private actors to self-report and provide information on others. *See generally* JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005).

¹⁰⁵ This critique also applies to provisions in other countries governing mitigation for self-reporting and cooperation. *See* Arlen, *The Failure of the Organizational Sentencing Guidelines*, *supra* note 53 (discussing insufficient mitigation under U.S. Organizational Sentencing Guidelines).

resource challenges.¹⁰⁶ Judicial review could undermine companies' incentives to cooperate if these attitudes cause French judges to either reject use of a CJIP even when a company cooperated, or to accept a CJIP but not use information provided by the firm to assist its investigation. Of equal concern, judges may take an excessively permissive view of corporate cooperation—one that does not require the firm to materially aid the investigation by producing new evidence—given traditional attitudes toward internal investigations. CJIPs predicated on an excessively broad definition of cooperation could undermine deterrence by reducing companies' expected cost of misconduct without inducing any countervailing increase in companies' and individuals' risk of being sanctioned for misconduct.¹⁰⁷ Unless judicial attitudes change, CJIPs are unlikely to materially enhance deterrence even if prosecutors were able to structure enforcement policy to induce corporate self-reporting and cooperation.

4.2.3. *Insufficient Ability of Enforcers to Detect and Investigate Misconduct*

French efforts to deter corporate misconduct are also undermined by the low risk that the government will detect and prosecute misconduct for which companies can be charged when companies do not self-report or cooperate. As a result, companies in France have little incentive to self-report or cooperate to obtain a CJIP because the likelihood of detection and prosecution if they fail to do so tends to be quite small.¹⁰⁸ In turn, they also often have inadequate incentives to prevent profitable misconduct.

Companies generally need not fear that enforcement officials will detect and prosecute misconduct if they do not self-report or cooperate for several reasons.¹⁰⁹ First, France underfunds corporate criminal enforcement. France does not provide its investigating magistrates with adequate resources—either financial or manpower—to take the steps needed to ferret out and investigate corporate misconduct. Indeed, France provides less funds to the administration of justice than all but a handful of the 38 countries in the European Union. As a result, investigation magistrates often are over-burdened; some are expected to handle as many as 300 investigations (or “dossiers”).¹¹⁰

Second, French authorities generally must seek to detect and investigate misconduct without the benefit of the reports and evidence provided by whistleblowers or cooperating witnesses. France has not adopted robust laws to fully protect and reward whistleblowing. France generally does not offer any compensation to whistleblowers¹¹¹—even though whistleblowers in France, as elsewhere, can expect to incur considerable costs if they do report and their identity becomes known. French

¹⁰⁶ See Einbinder, *supra* note 86, at 12; Michael Griffiths, *The Investigator's Guide to France*, GLOBAL INVESTIGATIONS REV. (Nov. 29, 2018); see also *infra* Section 4.2.3.

¹⁰⁷ See *supra* text accompanying notes 96- 99.

¹⁰⁸ The low risk of detection by the government undermines companies' incentives to self-report in many jurisdictions, including the U.S. See *supra* note 19. Robust whistleblowing programs can reduce the problem.

¹⁰⁹ This conclusion must be modified for firms in industries subject to genuine oversight by a regulator.

¹¹⁰ Einbinder, *supra* note 86, at 9. For a discussion of whether this underfunding is intentional see *id.* at 9; VINCENT LE COQ, IMPUNITIÉS, UNE JUSTICE À DEUX VITESSES, 173 (2017). The AFA, which can bring administrative enforcement actions, appears to be better funded. Yet the AFA may not have authority to investigate, *id.* at 49, and therefore is unlikely to be a vehicle for detecting and investigating unreported misconduct.

¹¹¹ During a two year window, France offered bounties to people providing information about certain tax crimes. Decree 2017-601 of 21 April 2017 adopted for the application of Article 109 of Law No 2016-1917 of 29 December 2016 of finance for 2017.

employees generally are unlikely to report altruistically. France has a strong cultural predisposition against “informing” on others.¹¹² In addition, the protections afforded by Sapin II to whistleblowers do not reliably apply to the employees most able and likely to report material information about misconduct. Sapin II allows anonymous and protected reporting to authorities by individuals who are disinterested and acting in good faith. The “disinterested” and “good faith” limitations can be read to exclude employees who were either previously disciplined by the firm or involved in the misconduct, even if tangentially. If so, this would exclude the people who either have the least to lose in reporting or have the most information about the misconduct.¹¹³ In addition, Sapin II requires employees to report internally before going to authorities, which can enhance employees’ expected risk from reporting.¹¹⁴ French enforcement authorities cannot rely on information provided by implicated cooperating witnesses because the laws permitting non-trial criminal resolutions do not apply to individual defendants. Prosecutors do not offer more favorable terms to individuals in return for material actionable information about others’ offenses.

Finally, in corruption cases, government investigations have been impeded by three separate French Finance Ministers’ decision to block the release of critical documents on national security grounds.¹¹⁵ Companies capable of eliciting similar support in the future would have little reason to self-report or cooperate in order to obtain a CJIP.

4.2.4. *Prosecution of Individuals*

The French reforms ostensibly aimed at enhancing corporate liability for misconduct ultimately will fail to deter corporate misconduct unless France genuinely commits to prosecuting the individuals who commit corporate crimes.

Historically, France has tended not to convict individuals responsible for corporate misconduct; those convicted often are not imprisoned.¹¹⁶ Sapin II appears to be aimed at increasing the threat of individual sanctions. Specifically, it provides that senior corporate officials—i.e., presidents, directors, executive board members, and CEOs—of certain public companies can be sanctioned for violations of Sapin II.¹¹⁷ Recently French prosecutors have pursued French executives.¹¹⁸

¹¹² In France, whistleblowing is not a culturally accepted practice. CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE 309 (Paul Lomas & Daniel J. Kramer eds., 2d ed. 2013).

¹¹³ Einbinder, *supra* note 86, at 45-46.

¹¹⁴ While France does not have strong whistleblower provisions, it allows non-governmental organizations and others to bring civil actions against perpetrators of crime on behalf of victims. These actions have been brought against corrupt officials, however, and not corporations. *Id.* at 21-22. Moreover, these actions do not help the government detect and obtain evidence about misconduct unless NGOs have the resources to do so and are willing to share their findings.

¹¹⁵ *Id.* at 10.

¹¹⁶ For example, in the case against Alstom for long-standing and wide spread corruption, French authorities did not convict a single individual for foreign corruption. Rather individuals responsible for the misconduct were convicted by authorities elsewhere, including the U.S., U.K., and Lithuania. Individuals also pled no contest to corruption charges in Italy. Einbinder, *supra* note 86, at 37-39. In the UBS case, the company paid a \$3.1 billion fine to resolve a major tax fraud scheme, but all of the individuals who were convicted received suspended jail sentences. *See* Davis, *supra* note 78 (discussing the UBS case).

¹¹⁷ Article 17, Sapin II, *supra* note 51.

¹¹⁸ Einbinder, *supra* note 86, at 66.

Yet impediments to effective enforcement remain. First, prosecutors must spend considerable resources to pursue individuals. French prosecutors rarely enter into guilty pleas with individuals, instead they incur the cost of going to trial.¹¹⁹ This reduces the resources available to pursue other cases.¹²⁰ Second, government investigators do not have the same access to evidence as their U.S. and U.K counterparts. As noted earlier, they generally do not have access to helpful testimony from implicated cooperating witnesses because, at least in theory, prosecutors are not supposed to enter into pleas that trade more lenient terms in return for more favorable treatment.¹²¹ In addition, government investigators often are unwilling to use the fruits of corporate internal investigations to aid their own inquiries. It is hoped that this attitude will change if the PRF/AFA joint guidelines succeed in encouraging companies to conduct internal investigations that identify materials witnesses and relevant documents, and produce witness interviews useful to the prosecutors.

5. Conclusion

Reform is in the air. Many countries are actively engaged in determining how to reform their laws on corporate liability and non-trial resolutions, such as DPAs. DPAs that are appropriately structured and situated within an effective corporate liability regime can materially enhance deterrence. They will lead people to refrain from committing crimes in two ways. They will induce firms to prevent misconduct. They will also lead wrongdoers to fear prosecution by encouraging firms to detect misconduct, self-report it, and fully cooperate by providing enforcement authorities with material information about all misconduct and the role of those responsible for it, for use in prosecutors' efforts to prosecute wrongdoers.

Yet reform efforts could backfire if countries adopt DPA regimes that simply lower companies' expected sanctions without ensuring that DPAs enhance enforcement by inducing corporate self-reporting and full cooperation. Moreover, even if DPA laws are properly structured, they will be ineffective in the fight against corporate crime unless countries adopt other needed reforms. Countries need to ensure that companies are both held criminally liable for all misconduct by all employees, and are subject to adequate sanctions that, at a minimum ensure that companies do not retain any benefits from misconduct. They also should adequately fund corporate enforcement, and promote criminal actions against individuals responsible for the misconduct.

¹¹⁹ In 2011, France adopted a law that allows prosecutors to enter into a form of plea bargaining with defendants charged with serious offenses. This procedure, known as "comparution sur reconnaissance préalable de culpabilité," or CPRC, requires the defendant to accept the facts and legal basis of the charges and to accept the sentence imposed. Although this procedure was used in the UBS case, *see Davis, supra* note 78, prosecutors rarely use it in complex corporate cases, such as corruption. Einbinder, *supra* note 86, at 18-19.

¹²⁰ This claim that pleas can be beneficial does not imply that countries should embrace U.S. style plea bargaining. Instead, guilty pleas should include stronger procedural protections for individuals, including access to effective legal counsel, accurate and full information about the case against the defendant, and genuine and robust judicial review. For a discussion of the French perspective on guilty pleas for individuals see Einbinder, *supra* note 86, at 18-21; Bonifassi & Chatelin, *supra* note 52.

¹²¹ Bargaining over the terms of a French guilty plea (CPRC), *see* note 119, is expressly precluded. Officially, the defendant either accepts or rejects the prosecutors' recommendation. Einbinder, *supra* note 86, at 18. Nevertheless, in December 6, 2013 France promulgated a law that allows natural persons to spontaneously disclose acts of corruption. This can result in the person getting their prison sentence reduced in half. Article 433-2-1, Criminal Code.

Finally, they could materially enhance enforcement by promulgating laws that provide adequate protections for and rewards to whistleblowers.

Applying our analysis of effective corporate criminal liability to recent reforms adopted in the U.K. and France reveals important insights for both these countries and others. The U.K. and France have introduced important reforms, but these reforms still fall short of what is needed to effectively deter corporate misconduct. Both countries need to expand corporate criminal liability to ensure that companies can be held liable for—and have incentives to investigate and self-report—all corporate misconduct. Indeed, unlike the U.K., France does not even impose criminal liability on companies that failed to take effective measures to prevent corruption. Moreover, the administrative liability that Sapin II imposes in corruption compliance cases is undermined by the very low sanctions imposed on violators. In addition, both countries need to provide more resources to fight corporate misconduct. Finally, enforcement authorities in both countries would benefit from the introduction of whistleblower laws that better protect and incentivize individuals who investigate and report.

France faces additional challenges. The provisions governing CJIPs do not provide material incentives to companies to self-report. They also are unlikely to induce companies to cooperate by providing prosecutors with material information about unsubstantiated misconduct when this information is most needed. Finally, it is unclear whether Sapin II has materially increased the risk of individual liability. France historically has not pursued the individuals responsible for corporate misconduct. As a result, it currently does not appear likely that Sapin II will lead French companies to take active steps to either prevent crime or to help prosecutors detect and investigate it. Indeed, in this context, the creation of CJIPs with reduced sanctions could undermine deterrence by allowing companies to settle on more favorable terms, without admitting guilt, in the relatively rare situation where they face a genuine risk of conviction, thereby lowering their expected cost of crime. The situation in France reveals the risk of countries adopting non-trial corporate criminal resolutions without providing the ancillary reforms needed to enhance deterrence.

Many countries appear to be increasingly committed to introducing genuinely effective reforms, however. Crime (especially corruption) and ineffective corporate enforcement undermine both the economy and people's faith in the rule of law. Countries have a tremendous opportunity to cooperate with each other to develop and implement reforms designed to deter. It is hoped that they will do so.