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Impression management in corporate corruption settlements: The storied self of the prosecutorial authority^{☆, ☆☆}

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1. Introduction

Transnational corporate bribery involves companies bribing foreign public officials to obtain or retain business in their international business dealings. Prosecutorial authorities are faced with multiple investigatory and prosecutorial hurdles in relation to this type of crime due to the complex structural and transnational nature of corporate activities (Chan et al., 2021). In about 27 jurisdictions, approximately two-thirds of all corporate bribery cases are settled without a full court proceeding (OECD, 2019) in an effort to mitigate these difficulties (Perez, 2020). An array of legal mechanisms (Lord, 2022) allows such settlements, but they share the following three elements: negotiation between the defendant company and the prosecutorial authority, consensus-driven procedure, and broader prosecutorial discretionary powers. Prosecutors not only determine whether to investigate or prosecute foreign bribery crimes (Lord, 2014:108), but they also decide on the appropriate criminal sanctions (Barkow and Barkow, 2011:1). Generally, the use of settlements is expanding in corporate liability cases (Søreide and Vagle, 2020), and in the field of anti-corruption enforcement, settlement procedures are already the 'new normal' (King and Lord, 2018:1).

This is also the case in England and Wales. Since 2014, deferred prosecution agreements (DPAs) make it possible for the Serious Fraud Office (SFO), the main prosecutorial authority against complex financial crime, to defer the prosecution of companies accused of transnational corruption in exchange for their cooperation in the investigation of such crimes (Chan et al., 2021; Schedule 17). Companies who cooperate with the investigation of bribery within their organisational structures enter into a tailor-made settlement with the SFO. The prosecutorial decision to defer prosecution in exchange for cooperation and the negotiated terms of the settlement are only published (Chan et al., 2021, Schedule 17, §8 (7)) after their validation by a Crown Court (Chan et al., 2021; Schedule 17, §§7,

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8).

This framework fundamentally challenges the role and the legitimacy of the prosecutorial authority. Settlements allow the defendant company and the prosecutor to work together on the investigation, charging, and sanctioning decisions (Hock, 2021:985). English and Welsh DPAs, like settlements in general, constitute an ambiguous and unusual setting for the prosecutor in this regard. On the one hand, the prosecutor is required to conserve his or her traditional role of defending the public interest and seeking justice and accountability against offenders. On the other hand, he or she acts as a negotiator who works with offenders to reach a common arrangement for the benefit of procedural efficiency (Alldrige, 2013:226; Bisgrove and Weekes, 2014:419). Moreover, the responsibility of independently constructing a convincing case against the suspect is no longer the central aspect of prosecutorial work (Campbell, 2021:241–42), as the suspected company voluntarily provides evidence and admits to agreed-upon incriminating facts based on the prospects of a settlement (Mazzacuva, 2014:250). The adversarial process in which the prosecutor and the defendant publicly present competing stories (McGrath, 2021:428) to an impartial judge about what happened, who is to blame, and what the appropriate outcomes are is replaced by a collaborative, non-transparent process (Campbell, 2021:244; Hock, 2021:950). Importantly, in DPA procedures, the prosecutor, along with the defendant company and the validating Crown Court judge, craft a joint story in private before revealing the final settlement account to the public.

The shifting role of the prosecutor during DPA procedures has attracted considerable ethical concerns about its crime control mandate and the role of criminal law in countering transnational corporate bribery more broadly. Settlement frameworks create a particular power structure between prosecutorial authorities and defendants by treating the implicated company simultaneously as a defendant and a partner in criminal proceedings. This may, in turn, undermine public perceptions of the fairness and impartiality of the criminal justice system. Some authors have suggested that, by using settlements instead of conventional prosecutions, prosecutors diminish the deterrent role of criminal law (Hawley et al., 2020; Uhlmann, 2016) and undermine the seriousness of the crime (King and Lord, 2018:94). In addition, it is criticised that because prosecutors rely on the investigations the company provides and do not properly verify them, the company may use its position to reach an outcome that is favourable to its interests (Arlen, 2020:176–77). Moreover, the prosecutorial authority and the company negotiate and reach a consensus in secrecy. The public becomes aware of the DPA procedure only through the published account of the settlement that marks the end of the negotiations.

Even though settlement procedures are narrative erasing procedures because the battleground of competing narratives at trial is missing, we argue that settlements are new storytelling sites that provide a platform for narrative team performances of criminal justice. In fact, these storytelling sites are the only publicly accessible record of such criminal procedures. Accordingly, we consider published DPA texts as narratives and aim to uncover how prosecutors adapt to their new environment of settling rather than prosecuting by studying the narrative (self-)legitimation and role construction as it is transmitted by these narratives. This contribution thus draws on a narrative analysis of an England and Wales DPA to reveal how prosecutors showcase their professional selves, roles, and responsibilities.

The paper begins by explaining the theoretical approach chosen, which is based on Erving Goffman's (1959) theory of impression management and the distinction between backstage and frontstage performance that Goffman has developed. Using this trope, we conceptualise settlement procedures as 'backstage criminal justice'. The theoretical part is followed by a description of the data and methodology of the empirical analysis. Next the results are presented and discussed. The analysis reveals three distinct and sometimes conflicting narratives of the prosecutorial role in settling criminal justice. We then conclude that these narratives reflect the ambiguous environment for prosecutors when enforcing anti-corruption criminal law through settlements and that settlements are indeed new storytelling sites that provide a platform for carefully team-crafted narratives. These narratives serve 'backstage criminal justice' to showcase its performances to the public.

2. Impression management in the context of settlements

Actors – in our context, the prosecutorial authority – attempt to control the image they convey to maintain or regain an acceptable social standing by engaging in various strategies of 'impression management' (Goffman, 1959:132). Previous research on the impression management of criminal justice actors has demonstrated how the study of their frontstage performances provides insights into the moral standing, societal expectations, and contextual constraints of criminal law (Sausdal, 2021; Bullock, 2018; Mawby, 2014; Portillo et al., 2013). Prosecutors animate justice (Offit, 2019) and transmit its values, display its forces and weaknesses by performing their occupational roles and responsibilities, justifying their decisions, and assigning responsibility. By enacting their roles in the settlement context, prosecutors give meaning to justice and reveal the state and structure of criminal law's power (Sausdal and Lohne, 2021). In the always particular context of corporate crimes, Buell (2018:841–42) has characterised prosecutors as having the unfortunate mandate to regulate large multinational businesses with the limited possibilities of national criminal law and enforcement resources. In considering these limitations, prosecutors tend to settle criminal charges with offender companies rather than engage in court proceedings. Settling with offender companies does not, however, correspond well with the 'tough-on-crime' approach that prosecutors usually proclaim (Amulic, 2017). Hence, prosecutors are faced with conflicting values and goals when dealing with offender companies that are seen as 'too big to jail' (Garrett, 2014) and whose demise might hurt collective economic interests (Oded, 2011). Consequently, prosecutors are expected to give the impression of controlling crime (Buell, 2018:853) while maintaining that a negotiated settlement is the appropriate outcome of their crime-fighting actions.

To better grasp the strategies of impression management that result from this complex baseline of the prosecutorial role and function, our approach adopts the distinction between backstage and frontstage performance that Goffman (1959:66) developed. Backstage performances refer to actions that are hidden from the public (Goffman, 1959:53–56). In contrast, frontstage performances point to actions shown to the public (Goffman, 1959:69). Frontstage performances are deemed successful when the audience views the

actors as they want to be seen. To achieve this, actors strive to produce a convincing front by presenting their activities, roles, and relationships in ways that match the norms and goals of specific social settings (Goffman, 1959:132).

When applying this trope to criminal justice performances, a division into two parts becomes discernible: backstage and frontstage. International criminal courts represent a clear version of 'frontstage criminal justice', and they emphasise the frontstage performance. International criminal court trials are not only held in public, but are also often filmed and broadcasted via social media, notably to enhance their expressivist messaging (Bringedal Houge, 2019; Meijers and Glasius, 2016; Sander, 2019). For example, one can visit the Twitter account of the International Criminal Court, where people are sometimes invited to watch live court proceedings.¹ The frontstage performance before audiences matches the description of trials as dramaturgical events (Luhmann 1969: 124–128). The essential rationale of frontstage criminal justice is the well-known maxim that 'justice not only needs to be done but also needs to be seen to be done' (The King v. Sussex Justices, [1924] KB 256).

In contrast, criminal justice performances in the context of settlements are only partly performed in the public's gaze. The confrontation and negotiation of distinct narratives about facts and evidence and the consensus about adequate sanctions are all acts performed backstage, without the interference of the public as an audience. Nevertheless, English and Welsh DPAs require a degree of openness as they are concluded under the supervision of a judge intervening at two stages of the negotiation process. After the start of the negotiations between the prosecutor and the defendant company, but before a DPA can be reached, the Crown Court conducts a preliminary hearing where the facts of the case and the draft terms of the agreements are reviewed in private (Chan et al., 2021, Schedule 17, §7 (1) (2)). The privacy of the preliminary hearing is required to ensure no adverse publicity for the prosecutions or the defendant's case should the DPA be disproved, and ordinary criminal proceedings engaged in a later stage (Davis, 2022:38). During this stage, the role of the judge is to examine whether entering a DPA is in the interests of justice and whether the proposed terms of the agreement are fair, reasonable, and proportionate (Chan et al., 2021, Schedule 17, §7 (1) (2)). In doing so, the judge considers several factors including the seriousness of the offences, self-reporting and the scope of the collaboration provided by the company as well as its compliance culture. In case of judicial refusal, the parties can submit for a second preliminary hearing (Chan et al., 2021, Schedule 17, §7 (3)). In case of judicial approval during the preliminary hearing, the negotiation process continues. However, the legal provisions are silent on the question of when to approach the Crown court for a preliminary hearing. The parties can thus ask for the preliminary hearing at an advanced stage of the negotiations and drafting of the agreement (Grasso, 2016:397). Once the DPA is finalized, the Crown Court conducts a final hearing where the DPA is approved or refused (Chan et al., 2021; Schedule 17, §8). At this stage, the judge can decide whether the final hearing will be held in private or in public (Chan et al., 2021, Schedule 17, §8 (5)). Independently of whether the final hearing is public or private, the reasons for judicial approval or refusal to grant the DPA must be given in open court (Chan et al., 2021, Schedule 17, §8 (6)). Once the DPA is approved, the prosecution is charged with publishing the judicial declarations during both hearings, the facts describing the bribery conduct and the terms of the DPA (Chan et al., 2021, Schedule 17, §8 (7)).

Making this kind of jointly achieved justice visible to the public is, therefore, a persisting need of the criminal justice system and is expressly considered in English and Welsh DPA legislation. Judicial intervention during negotiations and agreement drafting and the subsequent publication of DPA documents is considered as positive step towards public scrutiny of the DPA process in comparison to the United-States version where judicial oversight is absent (Davis, 2022:72–73; Bisgrove and Weekes, 2014:435–436). Despite this perceived openness, we argue that settlements can be considered as 'backstage criminal justice'. In fact, justice is not performed at a public trial, but backstage, without the interference of the public as an audience. This way, settlement procedures such as English and Welsh DPAs shield important parts of doing justice. The confrontation and negotiation of distinct narratives about facts and evidence and the consensus about adequate sanctions are all acts performed backstage. The way this occurs with published settlement documents recalls Goffman's description of a peephole (1959:72) as a means to link back- and frontstage. The redaction and publication of the settlement creates a peephole that signals transparency and openness. We argue that publicly available settlements allow for a maximum of impression management, given that they conform to the principle of open justice only at a very late moment in the criminal proceedings. No inopportune intrusions are possible, and no performance disruptions need be feared during the procedure. A Goffmanian reading of DPA procedures suggests that the published DPA documents are carefully crafted to be showcased to the public. Our analysis aims to demonstrate how the prosecutorial authority anticipates the gaze of audiences (the public, the stakeholders, the media, etc.) and how that gaze affects its strategies of impression management.

Goffman (1959:47) posits that frontstage impression management strategies are usually practiced through teamwork or a joint performance. In performing their roles in a given framework, the team participants explicitly or implicitly express something about the character and roles of their team-mates. Team participants rely on their cooperation with each other to sustain the idealised selves they want to convey. Accordingly, joint performances express something about the individual performers, namely their position and role in creating the whole (Flower, 2018:231). Recalling the DPA procedure, publicly available settlements are the product of a joint performance between the prosecutorial authority, the company, and the Crown Court judge. In this sense, DPAs can be said to be an official retelling of events – a story – that includes more than one voice (Goffman, 1959:49). Such joint performances express something about the individual performers, namely their position and role in creating the whole (Flower, 2018:231).

¹ <https://twitter.com/IntlCrimCourt/status/1357027584245178369>.

3. Data and methodology

The method this study employs is narrative analysis (Freeman 2015: 27). Settlements are understood as 'big stories', that is, as narratives with a retrospective dimension and that entail a significant measure of reflection on the experience of investigating and prosecuting companies for bribery. In looking backward within settlements, we are told what happened when, as in a historical chronicle, and how events and experiences might be related to one another according to the narrator. Settlements transmit a constellation of meaning that holds together the disparate past actions and reactions of the prosecutorial authority (Freeman 2015: 28). The account they produce is interpretive and deliberately selective. A narrative analysis allows the interrogation of the context in which the story is produced (Riessman, 2008:25) to take cultural, social, or institutional contexts into consideration (Polletta et al., 2011).

Narrative analysis requires a processual reading of the data by which close attention is paid to sequences of actions or events (McAllum et al., 2019:366; Riessman, 2008:25). The identity of the story's protagonists emerges from their role in the story's events and from their relationship to the other characters in these events (Ewick and Silbey, 2003; Georgakopoulou, 2006). Narrative analysis has been used to explore the different roles and relationships that storytellers construct to convey their idealised selves (Georgakopoulou, 2006; Kulbayeva, 2022; Smiley and Middlemass, 2016). This analytical approach has inspired narrative criminology to consider stories representing insightful material, as they inform us about the narrator's self-conception, influence criminal justice agent's and would-be offender companies' actions as well as the audience's perception: stories work in the present and for the future (Presser 2009; Presser and Sandberg 2015; Bringedal Houge 2019) regardless of their veracity (Presser, 2016: 139). Taking into account that stories work for whoever the narrator may be, including an offender, victim, prison or probation staff, judge, lawyer, police officer or prosecutor (Maruna and Liem 2021), we examine in this paper the accounts presented in settlement storytelling to uncover the self-representations of criminal justice agents (Barbour 2018: 225).

Public accounts of criminal procedures, such as court verdicts, police investigations, and plea or deferred prosecution agreements can be said to be stories that start with the end, in contrast to stories that start at the beginning (Nafstad, 2019:6). DPAs are produced in a dialogical interaction between the judge, the defendant company, and the prosecutorial authority (Lord 2022:9) and told when the storyteller already knows the end. The storytelling serves to explain the actions that led to a specific ending. In our context, DPAs are published for the purpose of justifying the deferment of the prosecution to the public and to uncover the work done by the principal actors involved in favour of this arrangement (Chan et al., 2021, Schedule 17, §8 (6) (7)).

The textual data consists of the official record of the DPA which concluded in 2020 between the SFO and Airbus SE (hereafter, Airbus), a multinational company active in the aviation industry with headquarters in the Netherlands and France. The SFO first became aware of the bribery conduct when another UK governmental agency (the United Kingdom Export Finance Agency [UKEF]) reported Airbus' deficient due-diligence procedures regarding the use of business partners. After four years of investigation, the SFO charged Airbus with failure to prevent bribery in five countries: Indonesia, Malaysia, Taiwan, Sri Lanka, and Ghana. This case is considered one of the most extensive and complex investigations that the SFO has faced, and it also required the help of external counsel (Counsel Magazine, 2020). The SFO partnered with the Parquet National Financier (PNF), the prosecutorial agency responsible for economic and complex crime in France, to investigate Airbus's conduct. In addition, the US Department of Justice (DOJ) opened parallel investigations into the company. The Airbus case resulted in three separate settlements between Airbus and the United States, France, and England and Wales, which in total covered the bribery of foreign officials in 15 countries. The official account of the English and Welsh Airbus DPA comprises an official SFO press release, the approved judgment, the agreement, and the statement of facts. All four documents are publicly available on the SFO's website.² Considering that these separate documents serve to account for one procedure and one settlement, we treat them as integral parts of one story. Each of these documents contains narratives around the investigation, charging, and sanctioning decisions of the SFO, as well as official positions and evaluations of their actions in making the DPA.

Our analysis thus focused on the different sequences of events described in the DPA procedure. In line with Goffman's impression management framework, we sought to identify how the prosecutor positioned itself and was being positioned by teammates in relation to the events and to other characters described in the DPA story. The first reading of the Airbus DPA aimed to identify these events and characters, which were delimited through manual coding. In the following readings of the settlement, we sought to uncover the role of the prosecutorial authority in relation to these events and characters. In addition to the position of the prosecutor toward the DPA story, the analysis also focused on the positioning of the prosecutor regarding DPA audiences and the settlement context.

4. Results and discussion

The public is introduced to the subject – the settlement of a corporate bribery case – by learning about the final outcome: a consensus reached between the prosecutorial authority and the company and approved by the judge. The documents then describe the legal and factual basis of the DPA, as well as the terms of the agreement. Four additional sequences of events are identified in these accounts: the bribery schemes, the investigatory steps undertaken to uncover these crimes, the justifications for settling, and the negotiations of the terms of the agreement. Our analysis revealed three distinct and, at times, conflicting narratives: two narratives about teambuilding, one with foreign prosecutorial authorities against the defendant company, and the other about team-building

² SFO, 2019 (January 31), R v Airbus SE – Deferred Prosecution Agreement. Available at: <https://www.sfo.gov.uk/download/airbus-se-deferred-prosecution-agreement-statement-of-facts/>.

with the defendant company; the third narrative relates to the sole control of the prosecutorial authority.

4.1. Narrative of team-building with foreign counterparts

The official account of the Airbus DPA begins by framing the settlement as the successful completion of the prosecutorial work by reaching an agreement with Airbus on a consequential fine. In fact, in contrast to ordinary criminal proceedings, the success of a law enforcement action through settlement is based on the capacity to impose hefty economic burdens on the company instead of securing a conviction. Following this logic, the title of SFO's official press release announcing the Airbus DPA states: 'SFO enters into €991 m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution'. The settlement is characterised as 'record-breaking', a result of SFO's and its law enforcement partners' dedicated work, which is supported by visual representations that highlight the monetary consequences for Airbus. The monetary outcome of the settlement is also the object of the approved judgment's introductory remarks:

One of the consequences of this Order is that Airbus must pay a total financial sanction of approaching one billion euros (€990,963,712 including costs) to the Consolidated Fund via the SFO within 30 days of today's date, made up of the disgorgement of profit of €585,939,740 and a penalty of €398,034,571. To put this figure into context, this financial sanction is greater than the total of all the previous sums paid pursuant to previous DPAs and more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018. (SFO v Airbus SE [2020] Approved Judgement, para. 1)

The narrative emphasises the existence of a 'global resolution' by pointing to other jurisdictions and the amount of the sum to be paid abroad. In this context, the international collaborative capability of the prosecutorial authority is stressed. Although the legally informed framework suggests that the teammates of the DPA performance are the prosecutorial agency, the company, and the Court, the Airbus DPA introduces the reader to new, additional key players in the settlement process:

The total sums which Airbus must now pay in a global context however exceeds €3.5 billion. This is because the SFO investigation which has led to this DPA is part of a joint investigation with the French Parquet National Financier (PNF) conducted by a joint investigation team (the JIT) and is parallel to an investigation conducted by the United States Department of Justice (DOJ) and by the United States Department of State (DOS). Each of the prosecuting authorities has taken responsibility for a number of geographical areas or customers and has now entered into their own DPA, Judicial Public Interest Agreement (CJIP) or (in the case of the Department of State) a Consent Agreement, with Airbus SE. (SFO v Airbus SE [2020] Approved Judgement, para. 2)

This illustrative passage places the work of the SFO in a multinational context. Similar sequences that enhance the narrative about multinational cooperation with other prosecutorial agencies are a common recurrence throughout the Airbus DPA story. In fact, transnational crimes require multinational responses, as the successful prosecution of such crimes largely depends on interagency cooperation and coordination. Accordingly, the enforcement of anti-bribery laws for transnational conduct implies coordination between several prosecutorial agencies on procedural and substantive legal questions (Hock, 2017). The particularity of anti-corruption enforcement against multinational companies is that multiple jurisdictions overlap. This leads to tensions between competitive and collaborative strategies of implicated prosecutorial authorities (Mégevand 2023; Oded 2020; Spahn, 2012). On the one hand, a DPA that has been reached more rapidly in one country than in another may preclude the other country from prosecuting the same company (Liévaux, 2020:49–51). On the other hand, as the Airbus DPA demonstrates, combining forces (Hock 2021:956) in the hope of reaching a multi-jurisdictional settlement may offer the possibility of reducing the risk of multiple, long-lasting criminal procedures ending in trials in different countries (Arlen and Buell, 2019).

The Airbus DPA story thus highlights the creation of a new team – the transnational team – in evoking enforcement bundling and by giving credit to overseas prosecutorial partners for the success of the DPA. In these passages, the SFO shifts alignments from the DPA performance team to the transnational team, as the story focuses on the efforts of the prosecutorial agencies and is silent on those of the company. The SFO and its French counterpart, the PNF, joined forces to investigate the crime by creating a special 'Joint Investigation Team'. The purpose of the investigation unit is to facilitate information-sharing between the two prosecutorial agencies and consequently enhance their capabilities of discovering criminal conduct. The coordination between these two prosecutorial agencies and their American counterpart, the DOJ, is highlighted, as well. The DPA narrative fails to mention, however, other team members; no information is shared about hiring external counsel during the prosecutorial authority's investigation (Counsel Magazine, 2020).

Alignment with the transnational team and the exclusion of information about an externally mandated work force speaks to the creativity and capabilities of the SFO as a prosecutorial authority. The team-building narrative is enhanced by stressing the need to access information abroad and the difficulty of doing so, as the following sequence shows. Obtaining such information from abroad is a crucial element, as foreign bribery is a difficult crime to prosecute because of its cross-border, hidden nature. Accordingly, the success of an investigation and the prosecution of foreign bribery depends on the ability of a prosecutorial agency to obtain access to such information (Lord, 2014:111; Oduor et al., 2014:63).

French Law No. 68–678 of 26 July 1968 (the 'French Blocking Statute' or 'FBS') prevents any French citizen, resident, or officer of a legal entity having its registered office on French territory, subject to international treaties and agreements, from communicating documents or information of an economic, commercial, industrial, financial or technical nature which could constitute evidence in foreign judicial or administrative proceedings. Airbus is subject to the French Blocking Statute. In addition, under 694–4 of the French Code of Criminal Procedure, when responding to a mutual legal assistance request, French

judicial authorities are entitled to exclude from their response any documents or information that would be detrimental to the essential interests of France. In the present case, the French authorities concluded that this includes the making public of specific contract values. (SFO v Airbus SE [2020]Statement of Facts, para. 36)

Here, the SFO is portrayed as a capable law enforcement authority that can prosecute even the most complex crimes by engaging in and attending to interagency cooperation. This, in turn, positions the SFO as an important participant in the global fight against transnational corporate bribery:

The JIT's investigation covered all of the BPs [Business Partners] which were engaged or considered for engagement by one or more of Airbus' divisions until 2016, i.e., more than 1,750 entities across the world. The JIT focused more particularly on Airbus' relations with around 110 of these BPs for which red flags had been identified, among which the JIT selected several investigation priorities. The JIT Agreement resulted in a division of these investigation priorities between the PNF and the SFO. (SFO v Airbus SE [2020]Statement of Facts, para. 38)

Interestingly, the team-building narrative positions the SFO and its foreign counterparts as a separate team working against and not in cooperation with the company, contrary to the legally informed settlement framework. The introduction to the official account of the Airbus DPA thus perfectly depicts the ambiguities of negotiating criminal justice. It alludes to an agreement with the company, showcasing the SFO as a capable negotiator and contributor to the state's budget through its law enforcement activity. At the same time, the company assumes the subordinate position of the defendant facing a powerful law enforcement agency. These ambiguities reflect the absence of a 'philosophy of justice' guiding the DPA framework (Bronitt, 2017:215), as they cannot be qualified either as a punishment or as a consensual agreement between two equals (Shiner and Ho, 2018:709).

The observable changes in allegiance from one team to another align with Goffman's descriptions of actors' constant shifts between different roles and team alignments in constructing representations of self (Goffman, 1959:130). The responsibility commonly attributed to the prosecutor by the public and by political actors is to control crime efficiently (Luna and Wade, 2012:424). The SFO's team-shifting can accordingly be interpreted in light of the desire to conform to this social image of an efficient crime control agency (Manning, 1982) that can prosecute complex, cross-border crimes.

4.2. Narrative of team-building with the defendant company

Team-building with foreign counterparts, however, has limitations in terms of evidence-gathering in transnational corporate bribery cases (Dandurand, 2007). This is one reason DPA procedures aim to encourage defendant companies to self-report and cooperate (Ministry of Justice, 2012, n. 35). Self-reporting and cooperation require defendant companies to conduct internal investigations and share the results with the prosecutorial authority (Arlen, 2020: 162). The resulting internal investigation reports considerably facilitate the prosecutorial authority's tasks of uncovering the scope of criminal conduct and gathering evidence. The SFO qualifies such cooperation from companies as a 'public benefit' that serves to 'advance the interests of justice' because it enables the prosecutorial authority to understand criminal conduct 'quickly and reliably' (SFO, 2019). The justification for settling instead of prosecuting relies on the cooperative stance that the defendant company adopts (Garrett, 2017: 1530–1531; Lord, 2022:10). Accordingly, the cooperation between the SFO and Airbus in uncovering and investigating the bribery schemes is frequently narrated in the DPA story.

Airbus' cooperative stance begins to emerge in accounts describing the investigation of the bribery conduct, and it takes centre stage in accounts that justify deferring prosecution. Giving an account of the investigation and justification to settle is an integral part of the Crown Court judge's work of DPA validation. The description of the investigation starts with SFO's and its counterparts' work, followed by the investigative efforts undertaken by Airbus:

On 15 July 2016 the SFO opened a criminal investigation into Airbus and associated persons (the Investigation). Airbus were informed of this on 5 August 2016 prompting a disclosure by Airbus to financial markets.

On 31 January 2017 the SFO and the PNF entered into a JIT agreement, the purpose of which was to facilitate investigations into bribery and corruption allegations in relation to Airbus, its BPs, former and current employees, and other third parties. (...)

I deal [the judge] with the issue of Airbus' co-operation with the Investigation below at paras 68 to 74. It is however to be noted: (i) that the scale of the case and number of documents collected by Airbus from custodians relevant to the investigation (in excess of 30.5 million documents) required both Airbus and the JIT [Joint Investigation Team] to develop new and proportionate procedures for the identification and review of the documentation; (ii) that Airbus made the JIT aware of its findings, producing contemporaneous evidence and through presentations and the like, which were reviewed by the SFO; (iii) that these presentations concentrated on the priority customers and jurisdictions identified by the JIT; (iv) that the SFO examined the internal investigation documents (including interviews with Airbus employees and BPs, Airbus having waived legal professional privilege on a limited basis) and (v) that in addition, the SFO undertook its own independent investigation. (SFO v Airbus SE [2020]Approved Judgment, para. 33, 34 and 36)

In describing the investigation, the judge frequently refers to Airbus' inquiry into its own criminal conduct as cooperation. This includes conducting an extensive internal investigation, providing self-incriminating evidence to law enforcement, developing data-management procedures for the purposes of the investigation, and identifying relevant individuals for questioning. These accounts depict the company as a valuable law enforcement partner that has gone to extensive lengths to help prosecutors reconstruct the past.

At this point, the tone of the narrative is far less authoritative than in the beginning, as it acknowledges the quality and extent of the company's cooperation. In doing so, the DPA story realigns the SFO and the company as part of one team working collaboratively to reach the outcome. It also reveals the company's role in constructing the main DPA storyline, which contradicts the previous narrative of team-building, which revolved uniquely around the SFO and its foreign counterparts (section 4.1).

The judge then proceeds to justify deferring prosecution and describes the gravity of the bribery conduct:

The seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed in the Statement of Facts demonstrate that bribery was, to the extent indicated, endemic in two core business areas within Airbus. (SFO v Airbus SE [2020]Approved Judgment, para. 64)

The judge then reminds the public that 'a core purpose of the creation of DPAs was to "incentivise" the exposure and self-report of wrongdoing' (SFO v Airbus SE [2020]Statement of Facts, para. 68). However, the SFO became aware of the conduct through UKEF, which denounced its suspicions of bribery within the Airbus company. It was only after this denunciation that the company's cooperative stance began. The judge acknowledges that the company could have self-reported more quickly and provides an extensive account of Airbus' cooperation during the DPA proceedings:

Airbus could have moved more quickly. Having said this, since engaging with the SFO, Airbus has provided the fullest co-operation. Whether the co-operation is to be described as extraordinary, or exemplary, the adjectives used respectively by Mr Keith QC and Mr Lewis QC during the course of submissions, seems to me make little difference of substance to the overall issues I have to consider. In my judgment, the co-operation provided was exemplary. [...]

The list of all that has been done by Airbus is a long one but in view of the seriousness of the predicate conduct, and my overall conclusion on the interests of justice in this case, it is important to set it out. Airbus has (i) comprehensively confirmed the existence of corruption concerns across its Commercial, Defence, and Space and Helicopter divisions; (ii) identified to the JIT a comprehensive compilation of red flag cases across divisions of which the JIT was not aware; (iii) accepted that the Bribery Act had provided the SFO with extended extraterritorial powers and potential interest in the facts post 2011; (iv) reported conduct which had taken place almost exclusively overseas, which, as I have already said, is an exemplary step for a French and Dutch domiciled company; (v) performed and presented an analysis of all BP relationships in the company's records; (vi) provided a list of former BPs, which included an anti-corruption risk assessment, including red flags not otherwise known to the authorities, from which the JIT could select its priorities for investigation; (vii) collected in excess of 30.5 million documents post de-duplication relevant to the JIT investigation, from over 200 custodians. (SFO v Airbus SE [2020]Approved Judgment, para. 73 and 74)

These passages showcase an impression management strategy that Goffman has coined as 'in-frame' and 'out-of-frame'. Goffman (1974: 10–11) posits that social actors can manage impressions by defining various events as fitting (i.e., in-frame) or departing (i.e., out-of-frame) from the general impression or the 'working consensus'. The general impression that these passages seek to convey is the justification of the DPA as the appropriate outcome of the present law enforcement action. By depicting a positive image of the defendant company as an ethical entity that merits leniency, the judge provides a justification for the DPA (Lord, 2022). Airbus' willingness to provide proof of criminal conduct, enhance its anti-bribery compliance, and the potential negative consequences to its economic interests are in-frame events that relate to the approval of the DPA. Airbus thus becomes the main protagonist in these passages. It is transformed from the amoral, self-serving, deviant company presented in the beginning of the DPA story (section 4.1.) into an exemplary defendant. The exemplary conduct of Airbus SE is strengthened further in a discussion of jurisdictional issues in pursuing overseas bribery:

In addition to providing information regarding prior UKEF inaccuracies, Airbus also accepted that the Bribery Act had provided the SFO with extended extraterritorial powers and potential interest in the facts post 2011. This was an exemplary step for a Dutch and French domiciled company, reporting conduct which had taken place almost exclusively overseas. (SFO v Airbus SE [2020]Approved Judgement, para. 42)

Overall, the role of the prosecutorial authority is rarely mentioned, and the SFO takes on a secondary role as the beneficiary of Airbus' investigative efforts. According to Goffman (1959:23–33), impression management efforts reflect the goals and values of the setting in which they are performed and transmit the moral claim of the working consensus that the performers endorse. DPAs are demonstrations of the prosecutorial authority's willingness to reward companies that cooperate with uncovering and investigating bribery conduct (Makinwa, 2020: 46). By retreating from the spotlight, the SFO sends a message to potential corporate offenders that partnership in resolving complex bribery cases is encouraged, valued, and rewarded (King and Lord, 2018: 9; Nagin, 2013:205).

4.3. Narrative of sole control

The DPA story's description of the negotiations between the SFO and Airbus recount a hierarchical positioning between the two parties. Control over the DPA proceedings is assigned to the SFO. The prosecutorial authority is represented as a powerful body, as the DPA story uncovers its numerous discretionary powers, including the possibility of opening future prosecutions against the company, request information in the company's possession, and unilaterally decide whether the terms of the DPA have been breached:

During the Term of the Agreement, should any of Airbus' Board of Directors learn of any evidence or allegation of conduct by Airbus, or Airbus' controlled subsidiaries, or by its past, present, or future officers, directors, employees, or agents which (1) any of Airbus' Directors reasonably believes constitutes serious or complex fraud, as that term is used in the SFO's Statement of Principle, and (2) any of Airbus' Board of Directors reasonably believes would satisfy the SFO's criteria for case acceptance set forth therein, Airbus shall promptly report such evidence or allegation to the SFO, subject to applicable laws and regulations. (SFO v Airbus SE [2020]Deferred prosecution agreement, para. 16)

The SFO is not precluded from arguing in any future prosecution that the Court should impose a higher financial penalty. (SFO v Airbus SE [2020]Deferred prosecution agreement, para. 22)

In the event that the SFO believes that Airbus has failed to comply with any of the terms of this Agreement, the SFO agrees to provide Airbus with written notice of such alleged failure prior to commencing proceedings resulting from such failure. Airbus shall, within fourteen (14) days of receiving such notice, have the opportunity to respond to the SFO in writing to explain the nature and circumstances of the alleged failure, as well as any actions Airbus has taken to address and remedy the situation. The SFO will consider the explanation in deciding whether to make an application to the Court. (SFO v Airbus SE [2020]Deferred prosecution agreement, para. 32)

Furthermore, Airbus and its surrounding entourage is precluded from publicly sharing information about the terms, facts, or process of the DPA concluded with the English and Welsh authorities without their permission:

Public Statements

Airbus agrees that it shall not make, and it shall not authorise its present or future lawyers, officers, directors, employees, agents or shareholders, or any other person authorised to speak on Airbus' behalf to make any public statement contradicting the matters described in the Statement of Facts. [...] If the SFO determines that a public statement by any such person contradicts in whole or in part a matter described in the Statement of Facts, the SFO shall so notify Airbus, and Airbus may avoid the SFO applying to the court seeking a finding that Airbus has breached the Agreement by publicly repudiating such statements) within five business days after notification. (SFO v Airbus SE [2020]Deferred prosecution agreement, para. 35)

Through these accounts, the DPA story attributes the narrative ownership (Shuman, 2015:38) to the SFO and restricts possibilities of developing narratives counter to those presented in the settlement. The narratives of control of DPA proceedings in SFO's favour extend to the company's self-reporting and evidence-gathering efforts, an element previously framed as a team-building contribution of the company:

Mindful of the need to identify the full extent of the alleged offending, the SFO interrogated the Airbus narrative as well as conducting its own investigation. (SFO v Airbus SE [2020]Statement of Facts, para. 40)

The SFO is here positioned as exercising a supervisory role in the investigatory work undertaken by the company. Interestingly, the narrative anticipates critics questioning the completeness, independence, and impartiality of the prosecutorial fact-finding and evidence-gathering activities in such an approach to criminal proceedings. The DPA story repeatedly notes what would be a self-evident fact in traditional proceedings, namely that a prosecutorial authority conducts an independent investigation. This assuring confirmation is apparent, for example, in the following extract of the description of the investigation:

While the SFO has reviewed the Airbus material, it has, as far as is possible, independently sourced information to confirm or challenge the information provided to it. The SFO has instituted an independent procedure to interrogate and examine Airbus documents provided to test the veracity and completeness of the provision of those documents. (SFO v Airbus SE [2020] Statement of Facts, para. 41)

However, accounts of the SFO's investigation remain vague. The investigative acts of the SFO appear only as a summarised list (SFO v Airbus SE [2020]Statement of Facts, para. 40), not without, however, turning immediately away from investigation towards the cooperation of the company. In fact, proof of incriminating conduct is rarely revealed. In the few examples where a source of proof is mentioned, the evidence-gathering was outsourced. For instance, evidence the French police obtained was used to qualify business contracts between Airbus and Taiwan's airlines as bribery (SFO v Airbus SE [2020]Statement of Facts, para. 113). Another example is how Airbus' own investigatory interviews with its employees revealed the processes through which the bribery contract was executed (SFO v Airbus SE [2020]Statement of Facts, para. 124).

The emphasis on the SFO's control over the settlement proceeding can be considered an additional effort to maintain the general impression or the working consensus (Goffman 1959:8) DPAs seek to maintain. Criminal justice authorities have a publicly proclaimed mission of preventing, detecting, and punishing crime and strive to maintain this public image (Bullock, 2018; Manning, 1978). Settlements undermine this proclaimed role, as they allow organisational criminals to bypass criminal punishment by privileging quick criminal procedures through defendants' cooperation (O'Sullivan, 2014; Uhlmann, 2016). The narrative of control can be thus understood as an 'aligning action' (Stokes and Hewitt, 1976:838) or a communicative effort to restore the crime-fighting role of the prosecutorial authority in line with political and public expectations (Buell, 2018; Wade 2018). The company, a prominent contributor to the work of the settlement, consequently, accepts the position of a voiceless participant. Controlling communications relates to what Goffman (1959:87s.) describes as efforts to avoid 'destructive information' that would jeopardise the overall impression that the joint performance maintains.

5. Conclusion

Settlements are negotiated and enforced out of the public view (Diamantis, 2017: 529). In this paper, we accordingly characterise DPAs as 'backstage criminal justice'. Nevertheless, some sort of publicly perceivable justice is still performed, as the law requires the publication of DPAs (Chan et al., 2021, Schedule 17, §8 (7)). Following Goffman's impression management framework, we consider the settlement accounts as a peephole into 'backstage criminal justice', told in a way that allows a maximum of impression management. Our research shows that settlements become new storytelling sites for criminal justice, particularly for prosecutors, where impressions are managed through joint narrative performances.

Our analysis demonstrates how the SFO takes advantage of its newly facilitated position within 'backstage criminal justice' and simultaneously tries to maintain the socially negotiated image (Musolf, 1992:173–74) of a capable and resourceful crime-fighting authority. What results are opaque stories of justice with important silenced parts, which various team members have co-constructed, and an image of a prosecutorial authority struggling to identify proper roles in settlement contexts. The narratives of team-building and sole control position the prosecutor as both a teammate and a unilateral decision-maker working with and against the offender company in reaching the DPA. The constant shift in position reflects the ambiguous environment of settlements, creating a tension between the punitive and rehabilitative goals of criminal law enforcement. When dealing with corporate crime, the prosecutor is expected to maintain the impression of enforcing criminal laws equally against economically powerful companies and, at the same time, safeguarding national economic interests by avoiding their collapse (Bronitt, 2017). This places the prosecutorial agency in a delicate position of balancing conflicting political and public expectations (Wade, 2018).

What makes settlement storytelling special is that, in contrast to frontstage criminal justice storytelling, there is no open, accessible battleground of competing narratives, no transparent erasure of past unpersuasive interpretations (Buell, 2018; Sander, 2018). With our case study, we have revealed that settlement storytelling does not aim to invalidate counter-narratives that conflict with their own judicially constructed narratives because no such counter-narratives can be presented regardless. Instead, settlement storytelling seeks to showcase the teammates' solidarity around secretly agreed-upon narratives.

With this narrative analysis of the settlement storytelling, our study follows the call for narrative criminological research to explore criminal justice's 'reaction towards the breaking of law' (Sutherland, 1960 [1924]:3; Ugelvik, 2016: 216). It contributes to the limited scholarship on law enforcement storytelling (Kurtz and Upton, 2018:283), narrative criminal justice (Barrera, 2019), and the growing criminological interest in this new field of criminal justice (Lord, 2022) by highlighting a new site of storytelling. In this paper, we have strictly limited ourselves to an analysis of the storytelling as presented by the settlement documents published. This approach leads evidently to considerable limitations in regard of the silenced parts of the negotiated story. Nevertheless, we consider this approach to be legitimated because these narratives are replacing judgements; hence, they are expected to function on their own for criminal justice. The question remains open as to whether settlement storytelling can develop the narrative authority it is intended to have. Once published, settlement narratives begin a process of connecting with the world. Like court judgements (Boyd White, 1985; Sander, 2018), they are not self-validating; rather, they require community acceptance. In future studies, this might be explored, and researchers might also include other methods to complement the findings of this narrative analysis and integrate findings from analysing interviews with prosecutors, which would make it possible to examine the silenced parts of the settlement storytelling, as well.

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