

University of Neuchâtel

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Stories of Negotiated Justice

A Comparative Narrative Analysis of Swiss Summary Penalty Orders and UK Deferred Prosecution Agreements in Transnational Corporate Bribery Cases

PhD Thesis

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28 October 2025

IMPRIMATUR POUR LA THÈSE

STORIES OF NEGOTIATED JUSTICE
A COMPARATIVE NARRATIVE ANALYSIS OF SWISS SUMMARY PENALTY ORDERS AND UK DEFERRED
PROSECUTION AGREEMENTS IN TRANSNATIONAL CORPORATE BRIBERY CASES

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Neuchâtel, le 07 novembre 2025



Abstract

Traditionally, criminal justice systems have relied on prosecution and trial as the primary means of determining criminal liability. In contemporary practice, however, the resolution of criminal cases involving large corporations increasingly occurs through out-of-court agreements, with non-trial resolutions (NTRs) in transnational corporate bribery (TCB) cases exemplifying this shift. These law enforcement mechanisms rely on negotiations and public-private cooperation, facilitating prosecution while offering corporate offenders mitigated sanctions such as limited publicity, exemption from convictions, or expedited closure. Justified on grounds of efficiency and regulatory pragmatism, non-trial resolutions transform the ways criminal justice is being achieved and ultimately communicated to broader audiences. Drawing from narrative and comparative approaches to criminal justice, this thesis examines the communicative aspects of NTRs in TCB cases, focusing on the legal narratives embedded in Summary Penalty Orders (SPOs) in Switzerland and Deferred Prosecution Agreements (DPAs) in the United Kingdom (UK). Using narrative methods, it investigates how TCB prosecutions, offences, and offenders are storied in SPO and DPA decisions. The findings reveal divergent narratives concerning TCB prosecutions and offences, shaped by distinct institutional logics and procedural cultures, while converging in their depiction of corporate offenders as a rehabilitated actor. By tracing and comparing SPO and DPA stories, this thesis contributes to the literature on the communicative dimensions of criminal proceedings and offers insight into the processes of adaptation of negotiated enforcement mechanisms within two distinct criminal justice systems.

Key-words: negotiated justice; non-trial resolutions; transnational corporate bribery; narratives of criminal justice; narrative expressivism; narrative analysis; comparative criminal justice; summary penalty orders; deferred prosecution agreements; corporate criminal liability.

Résumé

Traditionnellement, les systèmes de justice pénale s'appuient sur les poursuites et les procès pénaux comme principaux moyens de déterminer la responsabilité pénale. Dans la pratique contemporaine, cependant, le règlement des affaires pénales impliquant de grandes entreprises passe de plus en plus par des accords à l'amiable, les accords hors procès dans les affaires de corruption transnationale d'entreprises illustrant parfaitement cette évolution. Ces mécanismes reposent sur des négociations et une coopération public-privé, facilitant les poursuites tout en offrant aux entreprises contrevenantes des sanctions atténuées telles qu'une publicité limitée, l'absence de condamnation ou une clôture accélérée des investigations. Justifiés par des considérations d'efficacité et de pragmatisme dans les poursuites pénales, les accords hors procès transforment la manière dont la justice pénale est rendue et, par

conséquent, communiquée au public. S'appuyant sur des approches narratives et comparatives de la justice pénale, cette thèse examine les aspects communicatifs des accords hors procès dans les affaires de corruption transnationale d'entreprises, en se concentrant sur les récits juridiques intégrés dans les ordonnances pénales en Suisse et les accords de poursuite différée au Royaume-Uni. À l'aide de méthodes narratives, elle étudie comment les poursuites, les infractions et les auteurs de corruption transnationale d'entreprises sont présentés dans les décisions issues des ordonnances pénales et des accords de poursuite différée. Les résultats révèlent des récits divergents concernant les poursuites et les infractions en matière de corruption transnationale d'entreprises, façonnés par des logiques institutionnelles et des cultures procédurales distinctes, tout en convergeant dans leur représentation des entreprises délinquantes comme des acteurs réhabilités. En retraçant et en comparant les récits des ordonnances pénales et des accords de poursuite différée, cette thèse contribue à la littérature sur les dimensions communicatives des procédures pénales et offre un aperçu des processus d'adaptation des accords hors procès au sein de deux systèmes de justice pénale distincts.

Mots-clés : justice négociée ; accords hors procès ; corruption transnationale d'entreprises ; récits dans la justice pénale ; *narrative expressivism* ; l'analyse narrative ; justice pénale comparée ; ordonnances pénales ; accords de poursuite différée ; responsabilité pénale de l'entreprise.

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List of Acronyms and Abbreviations

ACLA	Federal Act on Administrative Criminal Law
AML	Anti-Money Laundering
AMLA	Anti-Money Laundering Act
Art.	Article
BAE	British Aerospace
BCG	The Boston Consulting Group
CCA	Crime and Courts Act
Cf.	Confer
CJA	Criminal Justice Act
CoE	Council of Europe
CPIA	Criminal Procedure and Investigations Act
DoJ	Department of Justice
DPA	Deferred Prosecution Agreement
<i>et al.</i>	<i>et alii</i>
ed.	Edition
eds.	Editors
ff.	and several that follow
FDJP	The Federal Department of Justice and Police
FAFT	Financial Action Task Force
FCC	Federal Criminal Court
FCPA	Foreign Corrupt Practices Act

Fedpol	Federal Office of Police
FG	Federal Gazette
FOS	Federal Office of Statistics
HM Government	Her Majesty's Government
HMCPSP	Her Majesty's Crown Prosecution Service Inspectorate
<i>Ib.</i>	<i>Ibid</i>
IBA	International Bar Association
<i>Ibid.</i>	<i>Ibidem</i>
i.e.	<i>id est</i>
MLA	Mutual legal assistance
MNC	Multinational Company
MoJ	Ministry of Justice
n	number of individual observations
N	note
no.	Number
NPA	Non-Prosecution Agreement
NTR	Non-Trial Resolution
LJ	Lord Justice
OAG	Office of the Attorney General
OB	Official Bulletin
OECD	Organisation for Economic Cooperation and Development
OECD-ABC	Organisation for Economic Cooperation and Development's Anti-Bribery Convention

OECD-WGB	Organisation for Economic Cooperation and Development's Working Group on Bribery
para.	Paragraph
PLC	Public Limited Company
Pub. L.	Public Law
QC	Queen's Counsel
s.	Section
SCC	Swiss criminal code
SCCP	Swiss code of criminal procedure
sch.	Schedule
SECO	State Secretary for Economic Affairs
SFC	Swiss Federal Court
SFO	Serious Fraud Office
SPO	Summary Penalty Order
ss.	Sub-section
SR	<i>Systematische Sammlung des Bundesrechts</i> (translated: Classified Compilation of Federal Legislation)
Stat.	United States Statutes
TCB	Transnational Corporate Bribery
TI	Transparency International
TLO	Transnational Legal Ordering
UK	United Kingdom
UKBA	United Kingdom Bribery Act

US

United States

USAM

United States Attorney Manual

Acknowledgements

There are many people to whom I owe heartfelt thanks for their invaluable contributions to this dissertation.

First and foremost, I am deeply grateful to my thesis supervisor, Prof. Nadja Capus, whose constant support, patience, and guidance have shaped every stage of this project. Her mentorship through moments of indecision and difficulty, has been a constant source of strength. I could not have wished for a more committed and insightful supervisor.

My sincere appreciation goes to Prof. Nicholas Lord for his guidance and warm welcome during my research visit at the University of Manchester. His work has been a significant source of inspiration throughout this thesis.

Many thanks go to my colleagues, teammates, and friends who have supported me throughout this journey. I am especially grateful to Franziska Hohl-Zürcher and Hannah Kei Brodersen for their mentorship and for always being there with encouragement, thoughtful advice, and emotional support. To Basilio Nunnari, thank you for the stimulating conversations and for being the best office partner I could have hoped for in this process. To Stefan Mbiyavanga, thank you for the meaningful discussions and for always pushing me forward. To Diana Bociga Gelvez for thoughtful support at times when it mattered most. To Festus Nzeyimana for cooking the best comforting meals.

To the practitioners who generously took the time to share their insights on anti-bribery law enforcement, thank you. Your perspectives have significantly informed this research.

I am also deeply thankful to my family, my mother Caroline and my brother Andrey, for their unwavering love and support.

Finally, I am sincerely grateful to Marjan Biočanin, my partner in life and the inspiration behind this journey. Thank you for believing in me and for walking by my side every step of the way: *Иднината припаѓа на љубопитните, а јас на тебе, и ти на мене.*

За вас, Матијас и Милан

1. Introduction

In the context of expanding global trade networks and increasing cross-border mobility, criminal law has emerged as a central instrument through which states and international institutions seek to address and contain contemporary transnational harms. The past three decades have produced multiple international conventions and institutions specifically designed to confront globalised harms, such as terrorism, human and drug trafficking and corruption, often through the mobilisation of domestic criminal law frameworks¹. Within this context, the Organisation for Economic Co-Operation and Development (OECD) spearheaded an international initiative to combat bribery in global commerce, focusing particularly on transnational corporate bribery (TCB). TCB involves multinational companies (MNCs) resorting to corruption to secure or maintain business across borders. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 (OECD-ABC) obliges signatory states to criminalise the bribery of foreign public officials², thereby reclassifying previously tolerated business practices as matters of international legal concern. In doing so, it mobilised national prosecuting authorities as key actors in the global effort to police corruption in cross-border commercial transactions³. This shift not only redefined domestic enforcement priorities but also prompted the development of new prosecution practices designed to address the complex challenges inherent in pursuing corporate transnational crimes through nationally bounded legal frameworks⁴.

Among these emerging enforcement practices, non-trial resolutions (NTRs) have gained prominence as pragmatic instruments for addressing the legal, evidentiary and financial complexities of TCB cases⁵. These procedures facilitate anti-bribery law enforcement by encouraging and structuring the cooperation of the corporate offender during TCB investigations, which is in turn rewarded by mitigating the negative consequences of criminal prosecutions⁶. In parallel, TCB cases are resolved

¹ Mikkel Jarle Christensen, 'International Prosecution and National Bureaucracy: The Contest to Define International Practices within the Danish Prosecution Service', *Law & Social Inquiry* 43, no. 1 (2018): 152; Larry Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation', *ILSA Journal of International and Comparative Law* 14 (2007): 506.

² OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 ILM 1 (adopted 21 November 1997, entered into force 15 February 1999) (OECD-ABC).

³ Nicholas Lord, 'Prosecution Deferred, Prosecution Exempt: On the Interests of (in) Justice in the Non-Trial Resolution of Transnational Corporate Bribery', *The British Journal of Criminology* 63, no. 4 (2023): 848–49.

⁴ Christensen, 'International Prosecution and National Bureaucracy', 152.

⁵ Nicholas Lord, 'Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany', *Crime, Law and Social Change* 60, no. 2 (2013): 128.

⁶ Abiola Makinwa and Tina Søreide, 'Introduction', in *Negotiated Settlements in Bribery Cases: A Principled Approach*, eds. Abiola Makinwa and Tina Søreide (Edward Elgar Publishing, 2020), 11.

through negotiated agreements between prosecutors and corporate offenders pertaining to the facts of the case and the legal outcomes, thereby circumventing long and uncertain trial proceedings⁷.

While frequently justified on grounds of efficiency and regulatory pragmatism, these mechanisms also introduce significant institutional and normative shifts in how criminal justice is achieved and ultimately represented to broader audiences. Within NTRs, negotiations and concessions take precedence over adjudication of guilt and the unilateral imposition of criminal sanctions. This framework transforms criminal justice as a collaborative endeavour aimed at resolving legal and factual issues through compromise. In doing so, it invites reflection on how criminal justice is reimagined, namely, how the roles and interactions of key procedural actors are defined, how the facts of the case and criminal responsibilities are constructed, and how the negotiated outcome is justified within the contours of NTRs.

Against this backdrop, the present thesis explores the communicative dimensions of NTRs in TCB cases. It does so by analysing and comparing the legal narratives of prosecutions, offences, and offenders constructed through two distinct NTR mechanisms: Swiss Summary Penalty Orders (SPOs) and UK Deferred Prosecution Agreements (DPAs). Approaching these mechanisms as narratives, the study foregrounds their function as vehicles through which criminal justice authorities define TCB crimes, assign responsibility to corporate offenders, and articulate responses to these crimes. Simultaneously, the comparative approach reveals how core features of NTRs are interpreted and enacted within distinct legal systems, shedding light into the evolving procedural and normative logics that shape contemporary anti-bribery enforcement.

1.1. Negotiated Justice in Transnational Corporate Bribery Cases

NTRs are out-of-court criminal procedures engaged by national prosecutors to address allegations of corporate crimes, offering an alternative to full criminal prosecutions⁸. The criminal proceeding is resolved through agreements between the prosecution and defendant companies pertaining to one or several aspects of the case⁹. NTRs culminate with criminal sanctions against the defendant company and/or alternative legal measures, such as obligations to enhance internal anti-bribery compliance structures without trial adjudication¹⁰.

⁷ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention'. (OECD Publishing, 2019), 11.

⁸ Felix Lüth, 'Corporate Non-Prosecution Agreements as Transnational Human Problems: Transnational Law and the Study of Domestic Criminal Justice Reforms in a Globalised World'. *Transnational Legal Theory* 12, no. 2 (2021): 315–33.

⁹ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 11.

¹⁰ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 11; Abiola Makinwa and Tina Søreide, 'Structured Settlements for Corruption Offences: Towards Global Standards?' (International Bar Association [IBA] Anti-Corruption Committee: Structured Criminal Settlements Subcommittee, December 2018), 15.

In the contemporary anti-bribery enforcement landscape, NTRs have emerged as pivotal mechanisms for addressing TCB offences across various countries¹¹. However, no uniform strategy can be identified when examining the negotiated justice approach to TCB offences among criminal justice systems¹². NTRs vary in form and outcome¹³. Some NTRs consist of preexisting procedural mechanisms that have been repurposed to address the complexities of corporate crimes¹⁴. Other countries have preferred to legislate on the matter and introduce new procedural mechanisms specifically designed for corporate crimes¹⁵. Furthermore, certain NTRs lead to the conviction of corporate offenders¹⁶. Others exempt these offenders from convictions by postponing prosecution until the successful fulfilment of specified conditions, such as the implementation of anti-bribery compliance structures, and ultimately abandoning the possibility of a conviction¹⁷.

Despite these variations, NTRs are increasingly recognised as new criminal justice models due to their departure from conventional criminal justice principles and practices¹⁸. Indeed, NTRs are characterised by three interrelated features that define their novelty compared to traditional criminal proceedings: negotiation of penal conflicts, public-private cooperation in case-making, and leniency towards corporate offenders.

¹¹ Felix Lüth, 'The Rise of Corporate Non-Prosecution Agreements: Transnational Criminal Law in the Making' (PhD Thesis, Graduate Institute of International and Development Studies, 2022), 319; Makinwa and Søreide, 'Introduction', 4; Abiola Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement: Non-Trial Resolutions as a Solution?', in *Negotiated Settlements in Bribery Cases* (Edward Elgar Publishing, 2020), 43; OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 17.

¹² Makinwa and Søreide, 'Structured Settlements for Corruption Offences', 16–17.

¹³ For a comprehensive study of the differences and similarities between country-specific NTRs, see generally OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions'.

¹⁴ This is the case for Switzerland, which uses a special procedure originally introduced for misdemeanour offences to resolve TCB cases. See chapter 2, section 2.3.3.

¹⁵ This is notably the case for the UK which introduced a new criminal justice proceeding in 2014 available only for corporate offenders. See chapter 2, section 2.4.3.

¹⁶ This is notably the case of Switzerland, Italy, Germany, Norway and the Netherlands. See OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 55–6. For Switzerland's conviction-based SPO, see chapter 2, section 2.3.3.

¹⁷ This is notably the case of the UK, the US, Canada, France and Chile. See OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 49–50.

¹⁸ Liz Campbell, 'Trying Corporations: Why Not Prosecute?', *Current Issues in Criminal Justice* 31, no. 2 (2019); Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements', in *Regulating Preventive Justice*, eds. Tamara Tulich *et al.* (Routledge, 2017), 215; Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan, 2018), 121; Francoise Tulkens, Yves Cartuyvels, and Isabelle Wattier, 'Negotiated Justice', in *European Criminal Procedures*, eds. Mireille Delmas-Marty and J.R. Spencer (Cambridge University Press, 2002), 641.

NTRs are part of the established trend of negotiated justice¹⁹, characterising the use of criminal procedures where the penal conflict is subject to negotiations²⁰. Within this context, the conditions and consequences of criminalisation are negotiated between prosecutors and corporate offenders²¹. These proceedings thus appear to conflict deeply with traditional retributive conceptions of criminal justice as something that is unilaterally imposed and uncompromising in defence of the public interest towards the prosecution and punishment of crimes²². The specific aspects subject to negotiation may vary from country to country²³ and may or may not be regulated by formally enacted guidelines²⁴. Negotiations may concern the facts of the case, the legal interpretation of the facts, the scope and scale of the offending represented in the NTR decision, the criminal fines and other measures to be imposed, e.g. confiscation and implementation of anti-bribery compliance structures²⁵. Regardless of these differences, justice is not attained through a hierarchical method whereby a court issues a ruling and imposes a sanction following a contentious trial²⁶. Rather, stemming from a desire to streamline the criminal process, justice is achieved by reaching a compromise between opposing interests²⁷. Accordingly, debates over conflicting factual accounts, diverging interpretations of laws and arguments over appropriate sentences take place behind closed doors instead of the public scenery of the criminal trial²⁸. The public is, in turn, informed of the TCB case only at a later stage once the finalised NTR decision is published or announced, revealing the outcome of the negotiations²⁹.

¹⁹ Negotiation as the preferred mode of resolving penal conflicts has given rise to various out-of-court proceedings (plea bargaining, mediations, restorative justice processes and non-trial resolutions with individuals and companies), effectively shifting the administration of justice from the public scenery of the trial to the closed-door setting of less formal agreements. For international trends of this phenomenon, see generally Ulrich Sieber, 'The New Architecture of Security Law-Crime Control in the Global Risk Society', in *Alternative Systems of Crime Control: National, Transnational, and International Dimensions*, eds. Ulrich Sieber *et al.* (Duncker & Humblot, 2018).

²⁰ Tulkens, Cartuyvels, and Wattier, 'Negotiated Justice', 642; Donald R. Cressey, 'Negotiated Justice', *Criminologica* 5 (1967): 5-7.

²¹ Cressey, 'Negotiated Justice', 5-6.

²² Sieber, 'The New Architecture of Security Law-Crime Control in the Global Risk Society', 7; Darryl K. Brown, 'The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement Symposium: The Criminal Law and Policing Corporate Conduct', *Ohio State Journal of Criminal Law* 1, no. 2 (2004 2003): 524; Tulkens, Cartuyvels, and Wattier, 'Negotiated Justice', 642.

²³ See Branislav Hock, 'Policing Corporate Bribery: Negotiated Settlements and Bundling', *Policing and Society* 31, no. 8 (2021): 950-66, for empirical findings on NTR aspects subject to negotiation in the US and the UK. See Grégoire Mégevand, 'Accords hors procès avec des entreprises', *Revue Pénale Suisse* 141, no. 2023 (2023): 61-88, for a discussion on potential negotiating avenues in Swiss NTRs.

²⁴ Makinwa and Søreide, 'Structured Settlements for Corruption Offences', 16-17.

²⁵ See generally Hock, 'Policing Corporate Bribery'; Mégevand, 'Accords hors procès avec des entreprises'.

²⁶ Sabine Gless and Nadine Zurkinden, 'Negotiated Justice-Balancing Efficiency and Procedural Safeguards', in *Challenges in the Field of Economic and Financial Crime in Europe and the US*, eds. Vanessa Franssen and Katalin Ligeti, 2 (London: Hart Publishing, 2017), 119; Leonard Orland, 'The Transformation of Corporate Criminal Law', *Brooklyn Journal of Corporate, Financial & Commercial Law* 1, no. 1 (2006): 52-3.

²⁷ Tulkens, Cartuyvels, and Wattier, 'Negotiated Justice', 673.

²⁸ Nadja Capus and Melody Bozinova, 'Impression Management in Corporate Corruption Settlements: The Storied Self of the Prosecutorial Authority', *International Journal of Law, Crime and Justice* 73 (2023): 3.

²⁹ *Id.*, 2.

Consistent with their negotiated nature, NTRs promote public-private cooperation in case-making³⁰. Investigation, prosecution, and sentencing decisions stem from the collaborative efforts of public prosecutors and private actors, that is, defendant companies³¹. The company's role may involve self-reporting, self-investigating, or admitting wrongdoing regardless of the robustness of the evidence³². Additional cooperative behaviours include waiving due process rights, providing information on company employees, or facilitating access to overseas documents³³. These features aid in uncovering the factual elements of the case, the degree of blameworthiness of the defendant company and other parties (individuals, company subsidiaries), and the bribery-induced profits to be disgorged³⁴. Within this context, NTRs thus redefine the roles and functions of criminal justice actors, where the typical distinctions between prosecution and defence become indistinguishable and overlapping³⁵.

Central to NTRs is the practice of offering leniency to corporate offenders in exchange for their cooperation³⁶. NTRs alleviate the traditionally punitive character of criminal procedures by mitigating the consequences through different means³⁷. Most notably, certain types of NTRs, such as the UK's DPA, exempt companies from convictions. Others lessen the publicity surrounding criminal procedures or reduce criminal charges to lesser offences³⁸. As Bronitt explains, NTRs cannot be viewed strictly as instruments of punishment despite their application in criminal law³⁹. Rather, these mechanisms are regarded as alternative methods similar to regulatory law tools that facilitate cooperation, reducing the potential negative consequences of law enforcement based on the level of cooperation demonstrated by the company⁴⁰.

³⁰ Nadja Capus and Franziska Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency', in *Negotiated Justice in Transnational Corruption - Between Transparency and Confidentiality*, eds. Nadja Capus and Franziska Hohl Zürcher (Helbing Lichtenhahn, 2024), 2; Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2; Hock, 'Policing Corporate Bribery', 985.

³¹ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2–3; Mégevand, 'Accords hors procès avec des entreprises', 62; Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement', 44–8.

³² For a cross-country comparison of cooperative behaviours required from company defendants, see OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 68–81.

³³ *Ibidem*. For a discussion on the benefits of corporate cooperation for obtaining criminal evidence located overseas, see Jennifer Arlen and Samuel W. Buell, 'The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement', *Southern California Law Review* 93 (2019): 728.

³⁴ Brown, 'The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement Symposium', 530 ff; Makinwa and Søreide, 'Introduction', 7.

³⁵ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements' 2, 7; Makinwa and Søreide, 'Introduction' 7; Simon Bronitt, 'Deferred Prosecution Agreements: Negotiating Punishment before Conviction?', in *The Evolving Role of the Public Prosecutor*, eds. Victoria Colvin and Philip Stenning (New York: Routledge, 2018), 45; Peter Alldridge, 'Bribery and the Changing Pattern of Criminal Prosecution', in *Modern Bribery Law: Comparative Perspectives*, eds. Jeremy Horder and Peter Alldridge (Cambridge University Press, 2013), 220.

³⁶ Lüth, 'The Rise of Corporate Non-Prosecution Agreements', 191; Abiola Makinwa, 'Negotiated Settlements for Corruption Offences: Wither Europe?', in *Negotiated Settlements for Corruption Offences: A European Perspective*, eds. Makinwa Abiola (Eleven International Publishing, 2015), 11; Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice', 222.

³⁷ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 81–96.

³⁸ Abiola Makinwa, 'Negotiated Settlements for Corruption Offences: Wither Europe?', 11.

³⁹ Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice', 222.

⁴⁰ *Ibid.*

1.2. A Focus on Legal Narratives and Comparative Criminal Justice

This section outlines the conceptual and comparative framework for studying legal narratives. By situating the analysis within both narrative scholarship and comparative criminal justice research, it establishes the rationale for approaching NTR decisions as storytelling devices that shape understandings of crime, justice and institutional legitimacy.

There is a significant interest in legal decisions, not merely as a collection of rules and principles but as a series of stories, explanations, performances, and linguistic exchanges⁴¹. Legal narratives have captured both scholarly and public attention as mediums through which compelling stories about justice, accountability and the human condition are conveyed⁴². In criminal law, this narrative dimension is especially pronounced⁴³. Just as storytellers shape events to convey a message, criminal justice decision-makers craft narratives to “make the case” that justice has been done⁴⁴. Through their decisions, they connect expectations, disruptions, and resolutions, assigning normative weight to human actions and clarifying what happened, why it matters, and what moral lessons it carries⁴⁵. In this way, legal narratives serve as a crucial bridge between the abstract norms of legal systems and the concrete realities of individual cases, whether in trials, out-of-court negotiations, or other legal processes⁴⁶.

Interest in legal narratives is rooted in established scholarly currents that recognise the power of criminal law, not just in enforcing compliance through punishment but in its capacity to communicate, to make statements, to define and authoritatively declare specific truths about the issues it addresses⁴⁷. As stated by Garland, in common with ethics and art, religion and science, technology and common sense, the law embodies a cultural role in informing society and creating social meaning about the problems it deals with⁴⁸. The law and its practice constitute *cultural agents*, or means through which the values, conceptions and sensibilities of criminal justice are produced and reproduced in a given society⁴⁹. The ways in which criminal justice institutions define criminality and criminals, as well as the specific

⁴¹ Paul Gewirtz, ‘Narrative and Rhetoric in the Law’, in *Law’s Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (Yale University Press, 1996), 2; Peter Brooks, ‘The Law as Narrative and Rhetoric’, in *Law’s Stories: Narrative and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (Yale University Press, 1996), 14; Kim Lane Scheppele, ‘Foreword: Telling Stories’, *Michigan Law Review* 87, no. 8 (1989): 2081–84.

⁴² Bringedal Anette Houge, ‘Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice’, *Criminology & Criminal Justice* 19, no. 3 (2019): 282–83; Gewirtz, ‘Narrative and Rhetoric in the Law’, 2.

⁴³ Gewirtz, ‘Narrative and Rhetoric in the Law’, 2.

⁴⁴ Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 4; Anthony G. Amsterdam and Jerome S. Bruner, *Minding the Law* (Harvard University Press, 2000), 124; Brooks, ‘The Law as Narrative and Rhetoric’, 14.

⁴⁵ Susan S. Silbey, ‘Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Way We Understand the Law - and Ourselves.’, *American Journal of Sociology* 107, no. 1 (2001): 230.

⁴⁶ Silbey, ‘Minding the Law: How Courts Rely on Storytelling’ 230.

⁴⁷ Anette Bringedal Houge, ‘Narrative Expressivism’, 281.

⁴⁸ David Garland, ‘Punishment and Culture: The Symbolic Dimension of Criminal Justice’, *Studies in Law, Politics and Society* 11 (1991): 191.

⁴⁹ *Ibid.*

language they use to describe their own actions and those of others, extend beyond the internal workings of the criminal justice system⁵⁰. These conceptions influence broader societal perceptions, often becoming embedded in mainstream discourse⁵¹.

Though the communicative function of public criminal trials is widely recognised within socio-legal scholarship⁵², this foundational premise has seldom been extended to the analysis out-of-court proceedings such as NTRs⁵³. Specifically, legal and socio-legal research on the emergence of NTRs often takes an instrumentalist view, focusing on how these mechanisms either undermine or should be adapted to achieve deterrence and restorative justice goals⁵⁴. While these dimensions are important, the communicative role of NTRs, that is, the narratives they construct about criminality, corporate criminal responsibility, and justice, remains an understudied aspect⁵⁵. Indeed, NTRs warrant close narrative analysis, as they increasingly serve as the exclusive procedural forum through which TCB cases are addressed. As these mechanisms become more widely adopted and formally embedded in national legal systems, they play a central role in constructing and circulating institutional knowledge about TCB crimes and criminal law enforcement directions adopted in response.

This research addresses this gap by analysing the legal narratives included in two types of NTR decisions: SPOs in Switzerland and DPAs in the UK. The approach is inspired by narrative-oriented scholarship in law and criminology, which emphasises the expressive and meaning-making dimensions of legal practices. By treating SPOs and DPAs as sites of narrative construction⁵⁶, the study seeks to uncover how these decisions articulate, legitimise, and make sense of the institutional responses adopted

⁵⁰ *Id.*, 200.

⁵¹ *Ibid.*

⁵² See generally Kristine Avram, ‘Narrating Communist Repression in and Outside the Courtroom: The Case of Former Prison Commander Alexandru Vişinescu and Its Resonance with (Societally) Available “Narrative Worlds”’, *Social & Legal Studies* 33, no. 1 (2024): 82–103; Zuzanna Godzimirska and Nabil M. Orina, ‘Scapegoats and Underdogs: Narrative Control and Defence Positioning within and Beyond the International Criminal Court’, *International Criminal Law Review* 23, no. 3 (2023): 443–63; Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press, 2020); Dubravka Zarkov and Marlies Glasius, *Narratives of Justice In and Out of the Courtroom: Former Yugoslavia and Beyond* (Springer International Publishing, 2014); Susan Trevaskes, ‘Propaganda Work in Chinese Courts: Public Trials and Sentencing Rallies as Sites of Expressive Punishment and Public Education in the People’s Republic of China’, *Punishment & Society* 6, no. 1 (2004): 5–21.

⁵³ For a discussion on the importance of narrative studies in the context of out-of-court proceedings, see Anne E. Ralph, ‘Narrative-Erasing Procedure’, *Nevada Law Journal* 18 (2017): 573–627, 578–90.

⁵⁴ See generally Tina Søreide and Kasper Vagle, ‘Settlements in Corporate Bribery Cases: An Illusion of Choice?’, *European Journal of Law and Economics* 53, no. 2 (2022): 261–87; Darren McStravick, ‘Deferred Prosecution Agreements and the Restorative Justice Paradigm: Justice Restored or Corporate Cop Out?’, in *Corruption, Integrity and the Law*, eds. Nicholas Ryder, Jon Tucker, and Umut Turksen (Routledge, 2020), 113–26; Susan Hawley, Colin King, and Nicholas Lord, ‘Justice for Whom? The Need for a Principled Approach to Deferred Prosecution Agreements in England and Wales’, in *Negotiated Settlements in Bribery Cases*, eds. Abiola Makinwa and Tina Søreide (Edward Elgar Publishing, 2020), 309–46; Jennifer Arlen, ‘The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US’, in *Negotiated Settlements in Bribery Cases*, eds. Abiola Makinwa and Tina Søreide (Edward Elgar Publishing, 2020), 156–99; Simon Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice’.

⁵⁵ For exceptions, see generally Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’; Lord, ‘Prosecution Deferred, Prosecution Exempt’.

⁵⁶ Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 2.

to TCB offences. In doing so, the study shifts focus from evaluating the effectiveness of NTRs in terms of retribution, deterrence and restorative justice to examining how these mechanisms actively produce legal and societal meaning through storytelling.

An essential concept in this study is narratives, which are here used synonymously with the term stories. For the purpose of this study, narratives or stories are defined as a form of communication in which past events and experiences are represented sequentially with a beginning-middle-end structure in order to make a specific point⁵⁷. Narratives are not neutral or standalone sources of information, as the act of narration inherently involves choices about what to include, what to exclude, and how to arrange and frame the account of past experiences⁵⁸. As a communicative practice, storytelling is inherently purposeful; it implies that the events and details conveyed matter in light of the point being made⁵⁹. In other words, the elements selected for inclusion in a narrative are not presented arbitrarily⁶⁰. They serve a particular argumentative or interpretive goal determined by the storyteller's intentions and the communicative context⁶¹. This study therefore approaches narratives not merely as descriptive tools but as expressive devices that actively shape meaning, construct legal realities, and convey judgments about actions and actors. Within the context of this thesis, NTR decisions are therefore approached as narrative accounts that describe, interpret, and evaluate the processes of investigating, prosecuting, and resolving TCB offences⁶².

The study of legal narratives inevitably raises attention to their embeddedness within the specific institutional frameworks in which they are produced⁶³. Empirical research consistently demonstrates that legal narratives are shaped by procedural rules, enforcement priorities, and cultural norms, which together structure what stories can be told and how they are told⁶⁴. As Houge illustrates, the institutional

⁵⁷ For similar definitions of narratives and stories, see Mark Freeman, 'Narrative as a Mode of Understanding: Method, Theory, Praxis', in *The Handbook of Narrative Analysis*, eds. Anna De Fina and Alexandra Georgakopoulou (Wiley Blackwell, 2015), 28–29; Dominique Robert and Shaul Shenhav, 'Fundamental Assumptions in Narrative Analysis: Mapping the Field', *The Qualitative Report* 19, no. 38 (2014): 5; Lisa Kern Griffin, 'Narrative, Truth, and Trial', *The Georgian Law Journal* 101 (2012): 287–88; Patricia Ewick and Susan S. Silbey, 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative', *Law & Society Review* 29, no. 2 (1995): 200; Ann Rigney, 'The Point of Stories: On Narrative Communication and Its Cognitive Functions', *Poetics Today* 13, no. 2 (1992): 265–67.

⁵⁸ Peter Brooks, 'Narrative in and of the Law', in *A Companion to Narrative Theory*, eds. James Phelan and Peter J. Rabinowitz (Blackwell Publishing Ltd, 2005), 417; Ewick and Silbey, 'Subversive Stories and Hegemonic Tales', 200; Rigney, 'The Point of Stories', 265.

⁵⁹ Rigney, 'The Point of Stories', 267.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 4.

⁶³ Anette Bringedal Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', *British Journal of Criminology* 56, no. 3 (2016): 435; Thomas Ugelvik, 'Techniques of Legitimation: The Narrative Construction of Legitimacy among Immigration Detention Officers', *Crime, Media, Culture: An International Journal* 12, no. 2 (2016): 228–29; Scheppele, 'Foreword: Telling Stories', 2085.

⁶⁴ See generally, Silvia D'Amato and Sonia Lucarelli, 'Talking Migration: Narratives of Migration and Justice Claims in the European Migration System of Governance', *The International Spectator* 54, no. 3 (2019): 1–17; Houge, 'Re-Presentations of

context of court proceedings, encompassing courtroom practices, legal frameworks, and procedural strategies, privileges certain narrative constructions of offences and offenders while marginalising alternative accounts⁶⁵. Accordingly, studying legal narratives requires close attention to the specific institutional conditions under which they are crafted and communicated.

At the same time, legal and criminology scholars, as well as international organisations have highlighted a trend toward cross-country convergence of NTR practices for resolving TCB cases. Indeed, an increasing number of jurisdictions adopt NTRs as primary mechanisms for addressing these types of offences⁶⁶. However, recent studies show that NTRs take on distinct procedural forms and produce different outcomes when implemented within national legal systems⁶⁷. These variations reflect what comparative criminal justice scholarship has long argued: that definitions of crime and justice are culturally and institutionally situated, even amidst apparent global harmonisation⁶⁸. Legal practices do not simply travel intact; rather, they are reinterpreted and reshaped through translation and adaptation processes within specific national contexts⁶⁹. The transnational movement of NTRs is therefore not a linear diffusion but a negotiated process in which the legal standards, institutional priorities, and normative expectations that these mechanisms carry are reconfigured to fit domestic legal traditions⁷⁰.

Given this dual recognition - the embedded nature of legal narratives and the culturally contingent character of NTRs - a comparative criminal justice approach is particularly well suited for analysing NTR narratives. First, a comparative perspective enables observations on the conditions of storytelling

Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 419–37; Anna Sergi, "'Three Tales/Two Threats": Prosecutors in Italy, England and the United States Narrate National and Transnational Organised Crime', in *Narratives of Organised Crime in Europe: Criminals, Corrupters & Policy*, eds. Petrus C. van Duyne *et al.* (Wolf Legal Publishers, 2016), 221–46; Scheppele, 'Foreword: Telling Stories', 2073–098.

⁶⁵ Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 435.

⁶⁶ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency', 2; Lord, 'Prosecution Deferred, Prosecution Exempt', 848–49; OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 17–9; Makinwa and Søreide, 'Structured Settlements for Corruption Offences', 15–16; Jacinta Anyango Oduor, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank Publications, 2014), 17.

⁶⁷ Liz Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', in *European White-Collar Crime: Exploring the Nature of European Realities*, eds. Nicholas Lord *et al.* (Bristol University Press, 2021), 237, 247. See also generally OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions' for a discussion on the divergences between country-specific NTR procedures in terms of legal requirements, outcome and level of process-transparency.

⁶⁸ Dario Melossi, Maximo Sozzo, and Richard Sparks, 'Introduction. Criminal Questions: Cultural Embeddedness and Global Mobilities', in *Travels of the Criminal Question: Cultural Embeddedness and Diffusion*, eds. Richard Sparks, Dario Melossi, and Maximo Sozzo (Hart Publishing, 2011), 11; Stewart Field and David Nelken, 'Reading and Writing Youth Justice in Italy and (England and) Wales', *Punishment & Society* 12, no. 3 (2010): 288; Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure', *Harvard International Law Journal* 45, no. 1 (2004): 4.

⁶⁹ Melossi, Sozzo, and Sparks, 'Introduction. Criminal Questions: Cultural Embeddedness and Global Mobilities', 11; Tim Newburn and Richard Sparks, 'Criminal Justice and Political Cultures', in *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control*, Cullompton, eds. Tim Newburn and Richard Sparks (Willian Publishing, 2004), 6–7; Nicola Lacey, 'Principles, Politics and Criminal Justice', in *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood*, eds. Lucia Zedner and Andrew Ashworth (Oxford University Press, 2003), 86; David Garland, 'The Culture of High Crime Societies', *British Journal of Criminology* 40, no. 3 (2000): 354.

⁷⁰ In the same sense, Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', 247.

within and in relation to specific legal frameworks, thus providing insights into the embedded nature of legal communication⁷¹. Second, it enables an exploration of how globally circulating models of negotiated justice are recontextualised within national legal cultures. Indeed, the narratives produced in the legal field are considered as mediums through which local law enforcement practices are expressed⁷². They have also been employed in studies of legal transplants to examine how imported legal ideas are adopted, reshaped, and articulated through domestic legal categories, institutional practices, and culturally resonant forms of expression⁷³. In this sense, a comparative narrative analysis of NTRs provides a valuable lens for the examination of the interplay between imported legal mechanisms and national procedural logics. It allows for the exploration of how NTR practices of negotiation, public-private cooperation, and leniency may be not only implemented differently, but also interpreted and legitimised in ways that reflect the normative and institutional specificities of distinct legal systems.

Against this backdrop, this study adopts a comparative narrative approach to grasping the contingencies of NTR narratives, focusing on the storytelling produced within Swiss SPOs and UK DPAs. Since DPAs are only available in England and Wales, Northern Ireland and Scotland were excluded from this research⁷⁴. Nevertheless, for simplicity, UK is used to refer to England and Wales.

1.3. Objective and Research Questions

This research aims to study the communicative aspects of NTRs by comparing the legal narratives within the resulting decisions of two distinct mechanisms: the Swiss SPOs and the UK's DPAs. It focuses specifically on NTRs in the context of TCB cases. While TCB offences are predominantly addressed through NTRs, it is important to note that these mechanisms are increasingly becoming the primary mode of resolution for a broader range of corporate crimes⁷⁵.

⁷¹ Sergi, “Three Tales/Two Threats”, 225. For a discussion of the relationship between legal frameworks and storytelling, see Anette Bringedal Houge, “Thugs” on Trial: Narrating Conflict-Related Sexual Violence in and for International Criminal Justice’ (PhD Thesis, University of Oslo, 2017), 55.

⁷² Sergi, “Three Tales/Two Threats”, 225.

⁷³ See generally Lüth, ‘The Rise of Corporate Non-Prosecution Agreements’; Žiga Podgornik-Jakil and Jonas Bens, ‘Toward a Comparative Anthropology of Activism: Activist Identity Formations in Germany and Uganda’, *Dialectical Anthropology* 45, no. 3 (September 2021); Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2009).

⁷⁴ Crime and Courts Act 2013, c. 22 (CCA), s. 61, para. 13(g).

⁷⁵ Michel A Perez, ‘The Rise and Globalization of Negotiated Settlements: How an American Procedure, the Deferred Prosecution Agreement (DPA), Became a Transnational Key Tool to Fight Transnational Corporate Crimes’, *Rule of Law and Anti-Corruption Center Journal* 2020, no. 1 (2020): 11; Cindy R. Alexander and Mark A. Cohen, ‘The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements’, *American Criminal Law Review* 52, no. 3 (2015): 537.

The research objective is pursued through four guiding questions:

1. How are narratives about the prosecution of TCB offences constructed in SPO and DPA decisions?
2. How are TCB offences narrated within these documents?
3. How are corporate offenders narratively characterised within these documents?
4. What are the key similarities and differences between the narrative constructions found in SPOs and those in DPAs?

The research questions address the communicative aspects of NTRs by exploring the narratives about TCB cases and are formulated considering the foundational practices of these mechanisms discussed in section 1.1 above. The first question considers how prosecutions are represented within the negotiations-prone and the cooperative framework promoted by NTRs. Similarly, the second research question considers the narratives of crimes produced by investigative strategies that hinge on corporate self-investigations and negotiations between prosecutors and defendants. The third research question focuses on the narratives of corporate offenders within the lenient approach offered by these mechanisms.

Drawing upon and adapting narrative approaches in legal and socio-legal scholarship to the framework of NTRs⁷⁶, this thesis offers new perspectives through which the communicative aspects of these mechanisms can be approached and interpreted. It aligns with the socio-legal scholarship on legal storytelling, recognising this practice as an integral part of any legal process and, therefore, the main instrument through which the underlying understandings of crimes and justice are conveyed to audiences⁷⁷. By examining SPO and DPA decisions as primary units of analysis, this study explores the narratives they employ to reveal how crimes and justice are understood, constructed, and communicated to audiences. It also investigates how these interpretations are shaped by institutional logics and procedural cultures across different NTR systems.

This research makes two key contributions. First, by examining the narratives produced through NTRs, this thesis advances our understanding of criminal proceedings as interpretive frameworks that shape social perceptions of TCB, as well as that of the role and authority of criminal law in addressing such offences. The analysis identifies the forms of knowledge conveyed - or potentially obscured - through SPOs and DPAs, particularly in how they construct understandings of TCB prosecutions, offences, and the corporate offender.

⁷⁶ For a similar approach, see Houge, ‘“Thugs” on Trial’, 3–7.

⁷⁷ See the theoretical perspectives relayed in chapter 3 for a discussion on legal narratives and their communicative function.

Second, by adopting a comparative lens on legal narratives, this study explores how core NTR elements - negotiation, leniency, and cooperation - are differently interpreted and operationalised within two different NTR frameworks, that of SPOs and DPAs. In doing so, the research contributes to a deeper comprehension of the evolving cultural logics of enforcement that underpin NTRs, highlighting the ways in which these mechanisms either conform to or reshape traditional criminal process values and offer insight into cross-country convergence and divergence in NTR practice.

1.4. Structure of the Thesis

This introductory chapter outlines the research focus of the thesis and sets out its aim and research questions. Chapter 2 proceeds with the contextualisation of NTR procedures by describing their emergence in the context of anti-bribery enforcement internationally and nationally in Switzerland and the UK. It first provides a brief history of the OECD-ABC, which catalysed national criminal law reforms in relation to foreign bribery, before delving into the development of NTR mechanisms as primary means of official responses to TCB crimes. The chapter also discusses the observed advantages and pitfalls of NTRs as relayed by the legal and criminological literature. It then describes the national foreign bribery legislative frameworks and NTR practices in Switzerland and the UK. By providing this context, chapter 2 establishes the institutional, legal, and political settings in which NTRs have evolved, thereby clarifying how these frameworks shape both their practical application and the narratives that will be analysed in subsequent chapters.

Chapter 3 examines the theoretical underpinnings of this thesis. It is structured around two interconnected bodies of scholarship that inform the theoretical and conceptual lens through which NTR narratives are explored. It first introduces the *Law as Narrative* approach from legal and socio-legal studies, which foregrounds the narrative dimension of legal texts. This section lays the groundwork for understanding legal practices as meaning-making activities, where law is not merely applied but constructed and conveyed through stories. The second theory addressed in this chapter is Houge's *narrative expressivism*. This theoretical framework provides conceptual tools to explore the communicative functions of criminal proceedings and their outcomes, as well as theoretical insights through which the results are interpreted. This approach is further refined by incorporating insights from socio-legal literature that highlight the presentational and audience-oriented dimensions of legal narratives, with particular attention to the performative aspects of criminal justice decisions. Combined, these frameworks provide the conceptual and theoretical basis for approaching legal decisions as narratives through which criminal justice authorities construct and communicate meaning to their various audiences. By conceptualising legal narratives as situated practices, these theories support analytical sensibilities that foreground how legal narratives are shaped by country-specific criminal justice practices and legal cultures.

Chapter 4 considers the methodological and analytical approach to this thesis. This chapter first presents the narrative paradigm and its ontological, epistemological and methodological assumptions that are equally adopted in this research. It then justifies the comparative research design and proceeds to consider and describe the empirical data of this research - SPO and DPA decisions. The analytical methods used are equally presented. Lastly, it considers the narrative proprieties of SPO and DPA decisions. By doing so, the chapter establishes the foundation for the empirical analysis in the following chapters, clarifying how the chosen methods enable an examination of the narrative structures and contents, as well as the communicative dimensions embedded in these legal documents.

Chapters 5, 6, and 7 present the empirical findings and discuss the identified narratives from the perspective of the theoretical framework. Chapter 5 responds to the first research question by examining how these legal instruments narrate the prosecution of TCB offences. It identifies contrasting narrative structures that reflect differing procedural logics and institutional roles in Switzerland and the UK. Chapter 6 addresses the second research question by analysing how the offence itself is represented within the documents. It explores the narrative construction of bribery schemes and reveals how each investigative framework selectively foregrounds aspects of the criminal conduct, thereby shaping the perceived nature of the offence. Chapter 7 responds to the third research question by focusing on the portrayal of the corporate offender. It analyses how companies are characterised across different narrative segments, particularly in relation to liability and sentencing, and considers the implications of these portrayals for how responsibility is assigned. Finally, the comparative insights drawn across all three chapters respond to the fourth research question by highlighting key differences and convergences in narrative form and content between SPOs and DPAs.

Chapter 8 concludes the thesis by summarising the main findings, discussing the narrative coherence of SPO and DPA decisions, assessing their theoretical and practical implications, and suggesting directions for future research. Focusing on the findings, the concluding chapter of this thesis highlights, on the one hand, contrasts between prosecution and offence narratives in SPO and DPA decisions, and, on the other, convergences in offender narratives. The chapter further argues that DPAs display a high degree of internal narrative coherence, with conciliatory storytelling that legitimises the deferral of prosecution as a rational and principled outcome. In contrast, SPOs exhibit narrative tensions between authoritative, blame-oriented prosecution narratives and lenient, rehabilitative conclusions, reflecting a broader enforcement paradox in corporate crime control. Finally, the chapter highlights the thesis's contributions to socio-legal scholarship on the communicative dimensions of criminal justice and the application of narrative methods to out-of-court resolutions. It also acknowledges the study's contextual and methodological limitations and outlines directions for future research, particularly regarding the reception and performative construction of NTR narratives.

2. International and National Legal and Enforcement Contexts

Chapter 2 situates this study of NTRs within the broader international and national legal contexts. It outlines the legal frameworks and practices that support the enforcement of anti-bribery laws, emphasising the emergence of NTRs as both a global and national enforcement standard. Section 2.1 offers an overview of the OECD-ABC as a significant influence on national legislative responses to TCB offences. Section 2.2 charts the development and evolution of NTRs. Sections 2.3 and 2.4 shift the focus to the national level, specifically examining the Swiss and UK anti-bribery enforcement landscape. Finally, section 2.5 provides a synthesis of this chapter.

2.1. The OECD Anti-Bribery Convention

In socio-legal academic discourse, the term “OECD anti-bribery regime” is frequently used to describe the framework of principles, norms, and enforcement practices established or initiated by the OECD-ABC to regulate foreign bribery⁷⁸. The OECD anti-bribery regime is considered in this part by providing a brief historical overview of the OECD-ABC and its content. As this thesis focuses on the use of NTRs in TCB cases, special attention is afforded to foreign bribery offences and enforcement requirements concerning corporate offenders.

TCB is a form of corruption in which a company headquartered in country A bribes a foreign public official in country B⁷⁹. The significant growth of international trade and investment over the past 50 years has been accompanied by MNCs offering traded payoffs to secure public contracts, facilitate business practices, or gain favourable interpretations of laws affecting their operations⁸⁰. It often concerns MNCs headquartered in industrialised countries bribing public officials in developing countries⁸¹.

⁷⁸ Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (Oxford University Press, 2019), 3; Jo-Anne Gilbert and J. C. Sharman, ‘Turning a Blind Eye to Bribery: Explaining Failures to Comply with the International Anti-Corruption Regime’, *Political Studies* 64, no. 1 (2016): 75; Branislav Hock, ‘Intimations of Global Anti-Bribery Regime and the Effectiveness of Extraterritorial Enforcement: From Free-Riders to Protectionism?’, *Tilburg Law and Economics Center (TILEC)*, 2014, 1–2.

⁷⁹ Nicholas Lord, ‘Establishing Enforcement Legitimacy in the Pursuit of Rule-Breaking “Global Elites”: The Case of Transnational Corporate Bribery’, *Theoretical Criminology* 20, no. 3 (2016): 377.

⁸⁰ Christopher Baughn *et al.*, ‘Bribery in International Business Transactions’, *Journal of Business Ethics* 92 (2010): 15. See also, Celeste Beesley, ‘Globalization and Corruption in Post-Soviet Countries: Perverse Effects of Economic Openness’, *Eurasian Geography and Economics* 56, no. 2 (2015): 171–72; Glenn T. Ware and Gregory P. Noone, ‘The Anatomy of Transnational Corruption’, *International Affairs Review* 14, no. 2 (2005): 33–4.

⁸¹ Baughn *et al.*, ‘Bribery in International Business Transactions’, 19.

TCB represented an unproblematic business practice in Western countries until the 1990s⁸². According to Krastev, in the 1960s and 1970s, bribery served as an instrument for Western MNCs to bypass the official protectionist barriers erected by post-colonial states and modernise developing economies⁸³. Indeed, much of the political attention in the post-colonial world was focused on economic growth⁸⁴. The enhanced ties between MNCs and developing nations, along with rising competition for foreign markets, led to bribery evolving into a systematic practice in international business⁸⁵. In this context, bribe payments from MNCs became normalised and viewed as tax-deductible business expenses⁸⁶.

Perceptions regarding bribery significantly shifted in the 1990s⁸⁷. International actors, ranging from non-governmental organisations to global and regional inter-state entities, redefined foreign bribery from a common business practice to a harmful activity⁸⁸. These viewpoints were articulated primarily through an economic discourse, emphasising the role of bribery in creating uncertainty in economic transactions by privileging unfair competition and, thus, acting as an obstacle and deterrent to foreign investment in developing countries⁸⁹. As noted by Williams and Beare, the motivations behind the shifting discourses surrounding the corruption issue were seemingly unrelated to any increase in bribery and corruption levels⁹⁰. Rather, they aligned with the broader interests of foreign investors in developing markets⁹¹. Specifically, it became evident that bribery posed a barrier for Western nations seeking to establish an efficient global market based on universally binding rules that allows capital to flow freely⁹². Understanding bribery as a hindrance to foreign investment in developing markets was also the primary reason for MNCs joining the anti-bribery movement of the 1990s⁹³.

⁸² Mark Pieth, Lucinda A. Low, and Nicola Bonucci, *The OECD Convention on Bribery: A Commentary*, 2nd ed (Cambridge University Press, 2014), 13; Indira Carr, 'Corruption, Legal Solutions and Limits of Law', *International Journal of Law in Context* 3, no. 3 (2007): 227.

⁸³ Ivan Krastev, 'When "Should" Does Not Imply "Can." The Making of the Washington Consensus on Corruption', in *Shifting Obsessions: Three Essays on the Politics of Anticorruption*, eds. Ivan Krastev (Central European University Press, 2004), 15.

⁸⁴ Carr, 'Corruption, Legal Solutions and Limits of Law', 227.

⁸⁵ *Ibid.*

⁸⁶ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 13.

⁸⁷ Moisés Naim, 'The Corruption Eruption', *The Brown Journal of World Affairs* 2, no. 2 (1995): 245.

⁸⁸ James W. Williams and Margaret E. Beare, 'The Business of Bribery: Globalization, Economic Liberalization, and the "Problem" of Corruption', *Crime, Law and Social Change* 32, no. 2 (1999): 115; Elitza Katzarova, 'The World Is Broken: The Social Construction of a Global Corruption Problem' (PhD Thesis, University of Trento, 2015), 8; Ivan Krastev, *Shifting Obsessions: Three Essays on the Politics of Anticorruption* (Central European University Press, 2004), ix–x; Patrick Glynn, Stephen J. Korbin, and Moisés Naim, 'The Globalization of Corruption', in *Corruption and the Global Economy*, eds. Kimberly Ann Elliott (Peterson Institute, 1997), 7–8.

⁸⁹ Williams and Beare, 'The Business of Bribery', 117; Glynn, Korbin, and Naim, 'The Globalization of Corruption', 13; Dani Rodrick and James E. Rauch, 'Comments', in *Corruption and the Global Economy*, eds. Kimberly Ann Elliott (Peterson Institute, 1997), 109–10; Kimberly Ann Elliott, 'Corruption as an International Policy Problem: Overview and Recommendations', in *Corruption and the Global Economy*, by Kimberly Ann Elliott (Peterson Institute, 1997), 198–207.

⁹⁰ Williams and Beare, 'The Business of Bribery', 117.

⁹¹ *Ibid.*

⁹² *Id.*, 127, 133.

⁹³ Krastev, 'When "Should" Does Not Imply "Can."', 18.

Of particular significance for the criminalisation of TCB were the United States' (US) interests in internationalising the prohibition of foreign bribery⁹⁴. The US Foreign Corrupt Practices Act (FCPA), in effect since 1977⁹⁵, represented the only Western-based legal act prohibiting the bribery of foreign public officials at that time⁹⁶. These circumstances obstructed the trade opportunities for US MNCs in environments susceptible to bribery, placing them at a competitive disadvantage relative to other Western companies⁹⁷. In response to pressures from the US business community, the FCPA was amended in 1988⁹⁸, requiring the US President to negotiate with competitors for an international agreement against foreign bribery to level the playing field in international commerce⁹⁹. Following these developments, the US requested the OECD, as the organisation of the major exporting and investing nations, to initiate work on a multilateral instrument for combating foreign bribery¹⁰⁰.

These efforts culminated in the adoption of the OECD-ABC in 1997. The Convention urged its member states to criminalise foreign bribery and implement effective measures to penalise business actors engaging in foreign bribery¹⁰¹. It mirrored the approach of the FCPA by concentrating its efforts on active bribery in international business transactions¹⁰². Consequently, the OECD-ABC's exclusive focus is on the supply side of foreign bribery, prohibiting business actors based in leading industrial countries - "home states" - from offering bribes to foreign officials to secure contracts in developing nations - "host states"¹⁰³. Criminalising public officials, which represent the demand side of foreign bribery, is thus outside of its scope¹⁰⁴.

The narrow subject matter implied that the Convention's success depended on adherence from home states dominating the global market as leading exporters and investors, whose laws govern MNCs likely to engage in bribery in developing countries¹⁰⁵. In this regard, the exclusive participation of capital-exporting countries in the negotiation and drafting of the OECD-ABC¹⁰⁶ enabled clear agreements regarding its core elements: the definition of foreign bribery, the criteria for qualifying a foreign official, and the obligations of states in prosecuting such bribery¹⁰⁷.

⁹⁴ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 14.

⁹⁵ Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366, 112 Stat. 3302, 3303.

⁹⁶ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 11-2.

⁹⁷ *Id.*, 114.

⁹⁸ Foreign Corrupt Practices Act of 1977 (Pub. L. No. 100-418, 102 Stat. 1415).

⁹⁹ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 12-3.

¹⁰⁰ *Id.*, 13.

¹⁰¹ OECD-ABC Preamble.

¹⁰² Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (OUP Oxford, 2015), 59; Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 31-2, 67.

¹⁰³ Rose, *International Anti-Corruption Norms*, 60; Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 67.

¹⁰⁴ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 67.

¹⁰⁵ Rose, *International Anti-Corruption Norms*, 60.

¹⁰⁶ Most of the OECD-ABC signatories were the then 29 OECD member states and the lead exporting countries. See, OECD-ABC Annex A.

¹⁰⁷ Rose, *International Anti-Corruption Norms*, 60.

At the centre of the Convention is the definition of foreign bribery provided in Article 1 paragraph 1:

“[...] any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”¹⁰⁸

The Convention established a quid pro quo concept of bribery, where the briber offers an advantage, expecting a favour in return from the bribee¹⁰⁹. The definition targets every act that improperly influences a foreign official by including the offer, promise, or giving of an undue advantage in its remit¹¹⁰. The crime of foreign bribery is considered complete regardless of whether the foreign official acts on the request¹¹¹. Furthermore, the Convention requires member states to punish only those acts committed with intention¹¹². What constitutes intentionality and which other mental states should be included is left to the discretion of member states¹¹³.

The definition of a foreign official is provided by Article 1 paragraph 2 of the OECD-ABC. It encompasses considerations of the bribee’s official title, its function and role¹¹⁴. A foreign public official is “any person holding a legislative, administrative or judicial office of a foreign country” and/or “any person exercising a public function for a foreign country, whether for a public agency or public enterprise”¹¹⁵. The definition provided is unique to the OECD-ABC and independent of any divergent or convergent conceptualisations of the public official in the host state¹¹⁶.

The OECD-ABC further addresses TCB by requiring signatory states “to establish the liability of legal persons for the bribery of foreign officials”¹¹⁷ and ensuring that corporate offenders face “effective, proportionate and dissuasive” criminal or non-criminal sanctions¹¹⁸. Whether criminal or other forms of liability should be imposed is left at the discretion of the member state¹¹⁹.

¹⁰⁸ Cf. OECD-ABC Art. 1 para. 1.

¹⁰⁹ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 39.

¹¹⁰ *Id.*, 136.

¹¹¹ *Id.*, 137.

¹¹² *Id.*, 193.

¹¹³ *Ibid.*

¹¹⁴ *Id.*, 76-77.

¹¹⁵ Cf. OECD-ABC Art. 1 para. 4 lit. a.

¹¹⁶ Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 76.

¹¹⁷ Cf. OECD-ABC Art. 2.

¹¹⁸ Cf. OECD-ABC Art. 3 paras. 1, 2.

¹¹⁹ OECD, ‘Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ (OECD, 1997), para. 20.

The OECD-ABC follows the “functional equivalence” approach to ensure national implementation and adherence to the Convention¹²⁰. Under this framework, the OECD-ABC establishes standards to be met by signatory states for prohibiting foreign bribery¹²¹. It does not require legal uniformity or substantial changes in the fundamental principles of the state’s legal system, considering the fundamental differences in conceptions of criminal procedure and evidence, as well as models of liability for legal persons¹²². Despite the functional equivalence approach, many signatory states opted for amending existing anti-bribery laws to include foreign bribery as a criminal offence by retaining a similar definition to that of the OECD-ABC¹²³. The implementation of the Convention by signatory states thus led to the cross-country convergence of substantive laws related to foreign bribery¹²⁴.

Most of the signatory states ratified the OECD-ABC by the beginning of the 2000’s¹²⁵. According to Pieth, Low, and Bonucci, the rapid ratification was mainly due to the implementation of the monitoring system established by the Convention and led by the OECD Working Group on Bribery (OECD-WGB)¹²⁶. Established in 1994, this group adopts a peer-reviewed monitoring system conducted in successive phases, during which member states assess each other’s compliance with the Convention¹²⁷.

2.2. Non-Trial Resolution

This part considers, first, the emergence and diffusion of NTRs (section 2.2.1) and, second, evaluates the advantages and challenges associated with NTRs as highlighted in the relevant legal and criminological literature (section 2.2.2). This provides a more comprehensive understanding of the key issues and complexities associated with NTRs.

2.2.1. The Emergence and Diffusion of Non-Trial Resolutions

Despite the generally swift implementation of the OECD-ABC, the enforcement of the newly established anti-bribery legal frameworks remained largely absent in many countries, including Switzerland and the UK¹²⁸. The factors contributing to this underenforcement among OECD member

¹²⁰ *Id.*, para. 2.

¹²¹ *Ibid.*

¹²² Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 36.

¹²³ *Id.*, 38.

¹²⁴ Lord, ‘Establishing Enforcement Legitimacy in the Pursuit of Rule-Breaking “Global Elites”’, 377.

¹²⁵ See Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 21–2 for a listing on the ratification status of the OECD-ABC in the signatory states.

¹²⁶ Cf. OECD-ABC, Art. 12 “Monitoring and Follow-up”.

¹²⁷ Rose, *International Anti-Corruption Norms*, 83; Pieth, Low, and Bonucci, *The OECD Convention on Bribery*, 22. See also OECD, ‘OECD Anti-Bribery Convention and the Country Monitoring Process’ (OECD, 2024).

¹²⁸ Makinwa and Søreide, ‘Introduction’, 2; Ely Aaronson and Gregory Shaffer, ‘Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process’, *Law & Social Inquiry* 46, no. 2 (2021): 475–76. For Switzerland, see OECD-WGB, ‘Implementing the OECD Anti-Bribery Convention. Phase 3 Report: Switzerland’ (Paris: OECD Publishing,

states are diverse and often contingent upon individual country contexts. Nonetheless, legal and criminology scholarship has identified two principal factors: political reluctance to expose and prosecute the corrupt practices of economically significant companies and the inherent complexity of TCB offences, which makes their detection, investigation, and prosecution particularly challenging. The following discussion elaborates on each of these factors, setting the stage for understanding why alternative enforcement mechanisms, most notably, non-trial resolutions, emerged as a pragmatic response to these challenges.

First, exposing the corrupt practices of economically relevant companies is an issue of high political sensitivity¹²⁹. Company convictions impair their operations, which, in turn, pose threats to the development of national economies and industries¹³⁰. Governments are more interested in fostering economic prosperity by providing favourable operating conditions for private companies than in combating bribery abroad¹³¹. In reflecting on the evolution of anti-corruption policies, Heiman and Pieth cite several examples of law enforcement agencies in the UK, Sweden, France, Slovenia, Hungary, and Australia being pressured politically to discontinue or disengage in investigations against companies active in nationally important industries¹³².

Second, TCB crimes are complex and difficult to detect, investigate and consequently prosecute¹³³. Obstacles to their detection arise from the absence of tangible harm, identifiable victims, and the exploitation of legal opportunities to disguise bribery exchanges as legitimate business transactions¹³⁴. Indeed, TCB may produce no immediately visible or tangible consequences because it involves illicit exchanges between two willing parties: private firms acting as bribe-givers and public officials acting as bribe-takers¹³⁵. In many cases, the transaction simply preserves the existing business arrangement

16 December 2011), 9–10. For the UK see OECD-WGB, ‘Implementing the OECD Anti-Bribery Convention Phase 3 Report: United Kingdom’ (Paris: OECD Publishing, 11 January 2012), 8.

¹²⁹ Lord, ‘Prosecution Deferred, Prosecution Exempt’, 850; Rachel Brewster, ‘The Domestic and International Enforcement of the OECD Anti-Bribery Convention’, *Chicago Journal of International Law* 15, no. 1 (2015): 100–01; Daniel K. Tarullo, ‘The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention’, *Virginia Journal of International Law* 44, no. 3 (2004): 668–73.

¹³⁰ Fritz Heiman and Mark Pieth, *Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies* (Oxford University Press, 2018), 95; Tarullo, ‘The Limits of Institutional Design’, 668.

¹³¹ Tamar Hostovsky Brandes, ‘The Relevance of Moral Arguments against Foreign Bribery: Israel as a Case Study’, in *The Transnationalization of Anti-Corruption Law*, eds. Régis Bismuth, Lucinda A. Low, and Philip Nichols (London and New York: Routledge, 2021), 148–49.

¹³² Heiman and Pieth, *Confronting Corruption*, 95.

¹³³ Erling J. Hjelmeng and Tina Søreide, ‘Bribes, Crimes and Law Enforcement’, *European Business Law Review* 28, no. 1 (2017): 23–6; Nicholas Lord, ‘Detecting and Investigating Transnational Corporate Bribery in Centralised and Decentralised Enforcement Systems: Discretion and (de-)Prioritisation in the UK and Germany’, *Policing and Society* 25, no. 6 (2015): 579–80.

¹³⁴ Nicholas Lord and Michael Levi, ‘Organizing the Finances for and the Finances from Transnational Corporate Bribery’, *European Journal of Criminology* 14, no. 3 (2017): 579; Lord, ‘Detecting and Investigating Transnational Corporate Bribery in Centralised and Decentralised Enforcement Systems’, 579–80.

¹³⁵ Nicholas Lord, ‘Regulating Transnational Corporate Bribery in the UK and Germany’ (PhD Thesis, Cardiff University, 2011), 176–77.

while officials appear to perform their regular duties, leaving little or no public trace of the corrupt deal¹³⁶. Because TCB does not usually produce directly harmed or identifiable victims, it is particularly difficult to detect, as there are no complainants to report the misconduct¹³⁷. It is important to note, however, that such type of corruption leads to harms for individuals¹³⁸. A corrupt deal with a company may, for example, result in diverting customers from better and cheaper products to those proposed by the briber, which may be of less quality¹³⁹. These harms are typically characterised as indirect¹⁴⁰ and less tangible when compared to other forms of corporate wrongdoing¹⁴¹, such as intentional environmental pollution by corporations for example. Additionally, money exchanges between bribe-givers and takers are often disguised as payments for legitimate business services offered and provided to the company¹⁴². Illegal cash flows between companies and public officials are therefore difficult to detect, adding to the complexities of prosecuting such crimes¹⁴³.

The transnational nature of these illicit activities further complicates matters. On the one hand, international treaties such as the OECD-ABC require member states to deploy national means in fighting global crimes¹⁴⁴. On the other hand, criminal liability for TCB offences is difficult to establish solely on national enforcement efforts¹⁴⁵. As foreign bribery crimes are partly committed outside of the prosecuting country, host states' cooperation is an important element of TCB prosecutions¹⁴⁶. Enforcement efforts thus substantially depend on effective mutual legal assistance (MLA) channels, which are often an unappealing avenue for national law enforcers¹⁴⁷. In his study of law enforcement efforts against TCB in the UK and Germany, Lord exposes several difficulties in establishing effective MLA brought forward by law enforcers¹⁴⁸. These range from simple language barriers¹⁴⁹ to difficulties in overcoming legal differences and political unwillingness towards information sharing¹⁵⁰.

¹³⁶ *Id.*, 50, 101.

¹³⁷ *Id.*, 38.

¹³⁸ *Ibid.*

¹³⁹ John Braithwaite, 'Transnational corporations and corruption: towards some international solutions', *International Journal of the Sociology of Law* 7, no. 2 (1979): 126.

¹⁴⁰ Lord, 'Regulating Transnational Corporate Bribery in the UK and Germany', 38.

¹⁴¹ *Id.*, 101.

¹⁴² Fiona Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', *Crime, Law and Social Change* 75, no. 3 (2021), 236; Lord, 'Detecting and Investigating Transnational Corporate Bribery in Centralised and Decentralised Enforcement Systems', 579-80.

¹⁴³ Lord, 'Regulating Transnational Corporate Bribery in the UK and Germany', 101.

¹⁴⁴ Nicholas Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in the UK and Germany', *Criminology & Criminal Justice* 14, no. 1 (2014): 101-02; Nikos Passas, 'Globalization, Criminogenic Asymmetries and Economic Crime', in *International Crimes*, eds. Nikos Passas (Routledge, 2017), 400.

¹⁴⁵ OECD, 'Typology on Mutual Legal Assistance in Foreign Bribery Cases' (OECD Publishing, 2012), 7.

¹⁴⁶ Ian O'Keefe, 'Hands-on Help: Establishing a Mutual Legal Assistance Task Force to Facilitate Enforcement of Laws Effective under the OECD Anti-Bribery Convention', *George Washington International Law Review* 50 (2017): 693-94.

¹⁴⁷ Matthew J. Feeley, 'Beyond "Equity": The Continued Search for Guiding Principles of Transnational Anti-Corruption Investigations', *University of Bologna Law Review* 7 (2022): 169; O'Keefe, 'Hands-on Help', 693-96.

¹⁴⁸ Lord, 'Regulating Transnational Corporate Bribery in the UK and Germany', 176-77.

¹⁴⁹ *Id.*, 176.

¹⁵⁰ *Id.*, 177.

Additionally, MNCs are often involved in multiple bribery schemes spanning different countries, further complicating criminal inquiries¹⁵¹. Prolonged, intricate, and resource-intensive efforts thus characterise TCB prosecutions¹⁵².

The late 2000s marked a shift in TCB enforcement with the internationalisation of NTRs as an enforcement tool, partially mitigating the problem of underenforcement¹⁵³. Initially introduced in the US¹⁵⁴, NTRs became a popular law enforcement tool against TCB offences in many countries¹⁵⁵. Their growth in popularity stems primarily from their ability to mitigate the potential deleterious effects of criminal law on company operations and to alleviate official TCB prosecutions¹⁵⁶.

The US's main foreign bribery enforcement authority - the Department of Justice (DoJ) - integrated two types of NTRs in its enforcement approach: Non-Prosecution and Deferred Prosecution Agreements (NPA and DPA)¹⁵⁷. Under these mechanisms, the DoJ may defer (via a DPA) or completely abandon prosecution (via an NPA) and exempt corporate offenders from criminal convictions¹⁵⁸. The conditions under which a DPA or an NPA may be considered are several, including self-reporting criminal conduct by the corporate offender, self-investigation, paying criminal fines, disgorging profits and showing self-improvement relative to internal anti-bribery compliance structures¹⁵⁹. According to the DoJ guidelines on the federal prosecution of business organisations¹⁶⁰, conducting internal corporate investigations and voluntarily sharing all relevant facts related to the offense with prosecutors, including the identities of responsible individual employees, is considered as company self-reporting and self-investigation that may favor the granting of a DPA or an NPA to corporate offenders¹⁶¹. By emphasising corporate self-improvement, the guidelines encourage companies to invest significant resources in self-regulation through the development of robust compliance programs capable of preventing and detecting wrongdoing within the organisation, as well as through mechanisms designed to sanction individuals

¹⁵¹ Hock, 'Policing Corporate Bribery', 950-53.

¹⁵² OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 77.

¹⁵³ *Id.*, 22.

¹⁵⁴ For a history of the development of NTRs in the US, see Lüth, 'The Rise of Corporate Non-Prosecution Agreements', 42-73.

¹⁵⁵ Perez, 'The Rise and Globalization of Negotiated Settlements', 8-10; Lüth, 'Corporate Non-Prosecution Agreements as Transnational Human Problems', 318.

¹⁵⁶ Sope Williams-Elegbe, 'The Implications of Negotiated Settlements for Debarment in Public Procurement: A Preliminary Enquiry', in *Negotiated Settlements in Bribery Cases*, eds. Abiola Makinwa and Tina Soreide (Edward Elgar Publishing, 2020), 80; Nicholas Lord and Karin Van Wingerde, 'Preventing and Intervening in White-Collar Crimes: The Role of Law Enforcement', in *The Handbook of White-Collar Crime*, eds. Melissa L. Rorie, 1st ed. (Wiley, 2019), 246; Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement', 113.

¹⁵⁷ For an analysis of the DoJ's principles of corporate prosecutions under the DPA/NPA regime, see: Christopher A. Wray and Robert K. Hur, 'Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice The State Federal Prosecution', *American Criminal Law Review* 43, no. 3 (2006): 1103-107.

¹⁵⁸ *Id.*, 1104-05.

¹⁵⁹ *Ibid.*

¹⁶⁰ DoJ, Justice Manual, Title 9: Criminal, §§ 9-28.000 ff.

¹⁶¹ DoJ, Justice Manual, Title 9: Criminal (Department of Justice, March 2024), §§ 9-28.700; 9-28.720.

who violate internal rules¹⁶². The company's compliance efforts are evaluated during agreement negotiations, which allows corporate offenders to improve their compliance structures after the facts in order to be eligible for a DPA or an NPA¹⁶³. The specific terms and conditions governing the granting of Swiss SPOs and UK DPAs to offending companies will be discussed in subsequent sections (section 2.3.3 for SPOs and 2.4.3 for DPAs).

Quickly after their introduction, DPAs and NPAs became “a mainstay of white-collar criminal law enforcement” according to the then Assistant Attorney General, Lanny Breuer¹⁶⁴ and were applied for a wide range of serious corporate crimes, including foreign bribery, money laundering and fraud¹⁶⁵. TCB prosecutions in the US quickly progressed from quasi-non-existent to frequent, allowing prosecutors to impose considerable fines on corporate offenders without risking their demise through criminal convictions¹⁶⁶. Facilitated prosecutions via NTRs coupled with the extraterritorial reach of the FCPA resulted equally in numerous US prosecutions against economically relevant MNCs based in Europe and Latin America, who were subjected to substantial fines, ranging in the billions of dollars¹⁶⁷.

The success of the US TCB enforcement actions piqued the interest of several OECD and non-OECD member states that started introducing their versions of NTRs¹⁶⁸. In 2014, the OECD noted a drastic increase in enforcement action for foreign bribery offences (against both individuals and corporate offenders), most of which have been concluded through NTR procedures¹⁶⁹. The prevalence of NTRs was equally highlighted by the International Bar Association's (IBA) 2018 report¹⁷⁰. Notably, Makinwa and Søreide, the authors of the IBA 2018 report, examined NTR practices through a structured questionnaire for legal practitioners in 66 countries¹⁷¹. The report found that 57 countries of the 66

¹⁶² *Id.*, §§ 9-28.600.

¹⁶³ *Id.*, §§ 9-28.800; For a discussion on the role of compliance programs in granting US companies non-conviction agreements, see generally Branislav Hock and Elizabeth Dávid-Barrett, ‘The Compliance Game: Legal Endogeneity in Anti-Bribery Settlement Negotiations’, *International Journal of Law, Crime and Justice* 71 (2022): 1–13.

¹⁶⁴ Lanny Breuer A. Assistant Attorney, ‘Speech at the New York City Bar Association’ (13 September 2012): <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association> (Accessed: 25.06.2025).

¹⁶⁵ Perez, ‘The Rise and Globalization of Negotiated Settlements’, 11; Alexander and Cohen, ‘The Evolution of Corporate Criminal Settlements’, 537.

¹⁶⁶ Oliver Charles and Umut Turksen, ‘Deferred Prosecution Agreements: A Soft Touch?’, in *Organised Crime, Financial Crime, and Criminal Justice*, eds. Dan Jasinski, Amber Phillips, and Ed Johnston (London and New York: Routledge, 2023), 182; Campbell, ‘Trying Corporations: Why Not Prosecute?’, 269; Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014), 6–7.

¹⁶⁷ Emily Willborn, ‘Extraterritorial Enforcement and Prosecutorial Discretion in the FCPA: A Call for International Prosecutorial Factors Note’, *Minnesota Journal of International Law* 22, no. 2 (2013): 429–30; Brandon L. Garrett, ‘Globalized Corporate Prosecutions’, *Virginia Law Review* 97, no. 8 (2011): 1818–821.

¹⁶⁸ Lüth, ‘Corporate Non-Prosecution Agreements as Transnational Human Problems’, 318; Perez, ‘The Rise and Globalization of Negotiated Settlements’, 2.

¹⁶⁹ OECD, ‘OECD Foreign Bribery Report’ (OECD Publishing, 2 December 2014), 7, 19.

¹⁷⁰ See generally Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’.

¹⁷¹ *Id.*, 14.

explored had some form of “cooperation process” to settle foreign bribery offences with companies and individuals¹⁷².

Subsequently, in 2019, an OECD report examining TCB prosecution practices in 27 OECD-ABC member states observed that NTRs “have been the predominant means of enforcing foreign bribery and other related offences”¹⁷³. The report further concluded that for all 44 member states of the OECD-ABC, NTRs were the primary enforcement vehicle of anti-bribery enforcement laws¹⁷⁴. The OECD 2019 report focused on NTRs in foreign bribery cases for the individuals and corporate offenders¹⁷⁵. It showcased that the proportion of NTRs is higher for corporate offenders: 91% of foreign bribery cases involving a company were resolved through an NTR compared to 72% of those involving only an individual¹⁷⁶.

This overview of their global adoption illustrates that NTRs are embraced not only in jurisdictions with extensive prosecutorial discretion but also in countries where the principle of mandatory prosecutions should theoretically inhibit such agreements¹⁷⁷. In addition, the cross-border expansion of NTRs seems to take place without express coordination through conventional international legal frameworks¹⁷⁸. In fact, the OECD-ABC and OECD Council recommendations do not explicitly mention NTRs as enforcement tools¹⁷⁹. Considering the popularity of NTRs, however, the revised 2021 version of the OECD anti-bribery *Recommendations* encompasses provisions on these mechanisms¹⁸⁰. Specifically, Recommendation number XVII encourages OECD-ABC member states to use NTRs in response to foreign bribery cases, thereby encouraging the global diffusion of the NTR trend¹⁸¹. Additionally, the Recommendations urge countries to ensure that NTRs follow the principles of due process, transparency and accountability¹⁸².

¹⁷² *Id.*, 15.

¹⁷³ OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 13.

¹⁷⁴ A considerable 78% of all foreign bribery cases from 1999 onward have been concluded with an NTR. See OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 13.

¹⁷⁵ *Id.*, 12.

¹⁷⁶ *Id.*, 22-3.

¹⁷⁷ Lüth, ‘Corporate Non-Prosecution Agreements as Transnational Human Problems’, 319; Campbell, ‘Settling with Corporations in Europe: A Sign of Legal Convergence?’, 240; Makinwa, ‘Public/Private Co-Operation in Anti-Bribery Enforcement’, 43.

¹⁷⁸ Lüth, ‘Corporate Non-Prosecution Agreements as Transnational Human Problems’, 2021, 319.

¹⁷⁹ Radha Ivory and Tina Soreide, ‘The International Endorsement of Corporate Settlements in Foreign Bribery Cases’, *International and Comparative Law Quarterly* 69, no. 4 (2020): 954.

¹⁸⁰ OECD, Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions OECD/LEGAL/0378 (OECD Recommendations, 26 November 2021), Recommendation no. XVII-XVIII.

¹⁸¹ OECD Recommendation no. XVII.

¹⁸² OECD Recommendation no. XVIII.

Despite widespread popularity, NTRs are not “culturally neutral” mechanisms¹⁸³. The OECD and IBA reports identify varying jurisdictional approaches to NTRs¹⁸⁴, attributed to differences in legal cultures and traditions¹⁸⁵. Specifically, the IBA report classifies NTRs into two main categories: *de jure* and *de facto* NTRs¹⁸⁶. *De jure* NTRs are considered to provide “true alternatives to trial” by rewarding defendant cooperation with trial avoidance and/or reduced penalties¹⁸⁷. *De facto* NTRs are conditional upon admission of guilt and centre around some form of plea and charge bargaining¹⁸⁸.

Furthermore, Makinwa and Søreide in the IBA report distinguish between explicit and non-explicit *de jure* NTRs¹⁸⁹. The first type refers to *de jure* NTR models that offer guidelines on how to exercise prosecutorial discretion¹⁹⁰. The second type refers to models that do not specify rules or guidelines under which prosecutors exercise discretion and are based on an “informal bespoke” arrangement between the defendant and the prosecutor¹⁹¹. Additionally, NTRs vary in their levels of judicial oversight¹⁹², transparency¹⁹³, and predictability¹⁹⁴. The conditions under which they can be used and the terms that can be imposed on both parties also differ among countries¹⁹⁵. Simultaneously, while some NTRs lead to convictions, others may defer prosecution or abandon it entirely¹⁹⁶.

2.2.2. Advantages and Pitfalls of Non-Trial Resolutions

Debates in professional and academic circles about the advantages and pitfalls of NTR frameworks are intimately linked to the fact that these mechanisms introduce regulatory rationales and practices to the realm of criminal law¹⁹⁷. NTRs are often characterised as hybrid legal mechanisms, encompassing

¹⁸³ Campbell, ‘Settling with Corporations in Europe: A Sign of Legal Convergence?’, 240.

¹⁸⁴ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 16-20. OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 24.

¹⁸⁵ OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 19; Campbell, ‘Settling with Corporations in Europe: A Sign of Legal Convergence?’, 240.

¹⁸⁶ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 16–7.

¹⁸⁷ *Id.*, 16.

¹⁸⁸ *Id.*, 19.

¹⁸⁹ *Id.*, 18-9.

¹⁹⁰ *Id.*, 18.

¹⁹¹ *Id.*, 19.

¹⁹² Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 20; OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 141.

¹⁹³ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 21; OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 152-58.

¹⁹⁴ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 22.

¹⁹⁵ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 16-21; OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 97-140.

¹⁹⁶ Makinwa and Søreide, ‘Structured Settlements for Corruption Offences’, 16-21; OECD, ‘Resolving Foreign Bribery Cases with Non-Trial Resolutions’, 43-64.

¹⁹⁷ For a discussion on the assimilation of criminal and regulatory law, see Nadja Capus, ‘La lutte contre la criminalité économique à l’aide du droit pénal administratif : L’administrativisation du droit pénal’, *Jusletter : Poursuivre et défendre selon le droit pénal administratif : Les défis d’aujourd’hui et de demain*, édition spéciale (2019): 5–10; Paul Larsson, ‘Regulating Corporate Crime: From Punishment to Self-Regulation’, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 13, no. 1 (2012): 31–46.

criminal and regulatory law enforcement techniques¹⁹⁸. The interactions between corporate offenders and anti-bribery enforcers within these frameworks revolve around negotiations, building trust and encouraging corporate self-investigation and regulation, practices traditionally associated with regulatory law¹⁹⁹. Specifically, NTR practices can be considered as promoting business self-regulation, reflecting processes by which public institutions support market governance, enabling both public and private entities to assume regulatory responsibilities while leveraging the cognitive and material resources possessed by the corporate actors being regulated²⁰⁰. The regulatory rationale has retained considerable influence over modern market regulation initiatives²⁰¹. It has also penetrated crime control strategies targeting corporate crimes, despite the obvious distinctions drawn between regulatory and criminal law²⁰². These regulatory strategies, often considered in opposition to criminal crime control strategies, stem from administrative and civil law frameworks designed to correct the deficiencies in the operation of markets²⁰³, a societal activity that is perceived as beneficial²⁰⁴. Indeed, the principal aim of criminal law is to punish wrongdoing and deter conduct deemed harmful to society²⁰⁵. In contrast to regulatory ones, crime control strategies are typically grounded in state-led regulatory frameworks, often drawing a clear distinction between public authority and private sector interests and responsibilities²⁰⁶.

The debates mentioned above can be grouped into three overarching themes: procedural efficiency, the underlying criminal justice purposes pursued with NTRs and concerns about regulatory weakening. The first theme centres on the tendency of NTRs to enhance the efficiency of criminal justice administration by relying on the cooperation of corporate offenders²⁰⁷, a strategy common in the realm of market regulation²⁰⁸. By encouraging corporate self-reporting and investigations, prosecutors save time and

¹⁹⁸ Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice', 211, 223; Bob Ferguson, 'Sanctions, Incentives and Better Behaved Banks', in *Integrity, Risk and Accountability in Capital Markets: Regulating Culture*, eds. Justin O'Brien and George Gilligan (Bloomsbury Publishing, 2013), 98–99; Anthony S. Barkow and Rachel E. Barkow, 'Introduction', in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct.*, eds. Anthony S. Barkow and Rachel E. Barkow (NYU Press, 2011), 2–4.

¹⁹⁹ Paulo De Sousa Mendes, 'Responsive Regulation, Enforced Self-Regulation, and Corporate Liability', *Criminal Law Forum* 33, no. 4 (2022): 218–19; Paul Almond and Judith van Erp, 'Regulation and Governance versus Criminology: Disciplinary Divides, Intersections, and Opportunities', *Regulation & Governance* 14, no. 2 (2020): 168; Capus, 'La lutte contre la criminalité économique à l'aide du droit pénal administratif', 5–10.

²⁰⁰ Nicholas Ford Mills, 'UK Corporate Bribery and Corruption: An Enforcement Paradox' (PhD Thesis, University of Reading, 2023), 31–2.

²⁰¹ OECD, 'Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance' (OECD 2002), 23.

²⁰² See generally Larsson, 'Regulating Corporate Crime'; John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control', *Michigan Law Review* 80, no. 7 (1982): 31–46.

²⁰³ Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* (Bloomsbury Publishing, 2004), 15.

²⁰⁴ Karen Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy: A Comparative Study of Competition and Consumer Agencies in the United Kingdom and Australia', *Public Administration* 87, no. 2 (2009): 275.

²⁰⁵ Hazel Croall, 'Combating Financial Crime: Regulatory versus Crime Control Approaches', *Journal of Financial Crime* 11, no. 1 (2004): 46; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 288–89; Paul Larsson, 'Regulating Corporate Crime: From Punishment to Self-Regulation', 33–4.

²⁰⁶ Hazel Croall, 'Combating Financial Crime: Regulatory versus Crime Control Approaches', 46.

²⁰⁷ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 16.

²⁰⁸ Capus, 'La lutte contre la criminalité économique à l'aide du droit pénal administratif', 5, 7.

resources in detecting and resolving TCB offences²⁰⁹. Similarly, fostering negotiation in case resolution allows the parties of the process to avoid trial proceedings, reducing the evidentiary requirements for securing a criminal conviction²¹⁰. The increasing preference for NTRs originates from their practical benefits for law enforcement²¹¹, simplifying the prosecution of intricate corporate crimes that might otherwise remain hidden²¹². However, the pursuit of efficient justice also contributes to its privatisation²¹³. This occurs firstly because the application of the law is generally negotiated among a limited circle of participants (prosecutors and corporate defence lawyers) behind closed doors²¹⁴. Secondly, public tasks (e.g. official criminal investigations, sanctioning) are delegated to or decided in collaboration with corporate offenders²¹⁵. Thus, NTRs allow corporate offenders to negotiate the criminal charges against them and the sentences imposed²¹⁶. This framework fundamentally challenges the notion of state control over the law enforcement process, which remains pertinent in cases of conventional crime²¹⁷. Consequently, a two-tiered criminal justice system is enabled, wherein the crimes of economically powerful companies are “differently enforced” compared to those of other societal actors²¹⁸.

The second theme centres on the question of the underlying criminal justice purposes pursued with NTRs²¹⁹. Proponents of NTRs, particularly law enforcement practitioners, claim that they address the restorative, deterrence and rehabilitative aims of criminal justice²²⁰. Regarding restorative criminal justice purposes, NTRs are valorised for facilitating opportunities for victim reparations in TCB

²⁰⁹ Council of Europe (CoE), ‘Liability of Legal Persons for Corruption Offences’ (CoE, May 2020), 71–2.

²¹⁰ Mégevand, ‘Accords hors procès avec des entreprises’, 61; Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice’, 213.

²¹¹ See sections 2.2.3 and 2.3.3.

²¹² The simplified identification process of corporate crimes was one of the main justifications for introducing DPAs in the UK. See Ministry of Justice (MoJ), ‘Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements’, Consultation paper CP9/2012 (Ministry of Justice, May 2012), 3.

²¹³ Mark Pieth, ‘Negotiating Settlements in a Broader Law Enforcement Context’, in *Negotiated Settlements in Bribery Cases*, eds. Abiola Makinwa and Tina Søreide (Edward Elgar Publishing, 2020), 21–2.

²¹⁴ Thomas Angeletti, ‘Quand le capitalisme négocie ses peines: Genèse de la justice négociée pour les entreprises’, *Actes de la recherche en sciences sociales*, no. 1 (2024): 90–1; Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 3.

²¹⁵ Hock, ‘Policing Corporate Bribery’, 959–60; Makinwa and Søreide, ‘Introduction’, 15.

²¹⁶ Hock, ‘Policing Corporate Bribery’, 959–60; Makinwa and Søreide, ‘Introduction’, 15.

²¹⁷ Makinwa and Søreide, ‘Introduction’, 15.

²¹⁸ King and Lord, *Negotiated Justice and Corporate Crime*, 2.

²¹⁹ Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice’, 221–23.

²²⁰ See, Breuer A. Assistant Attorney, ‘Speech at the New York City Bar Association’, considering how US NPAs and DPAs have the same punitive, deterrent and rehabilitative effects as guilty pleas. See also MoJ, ‘Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations’, 9, observing the advantages of introducing DPAs in the UK on the grounds of providing proportionate penalties for companies and restitution for victims; Office of the Attorney General of Switzerland (OAG), ‘Revision der Strafprozessordnung (StPO): Aufschub der Anklageerhebung bei Strafverfahren gegen Unternehmen (AUU)’ (OAG, 20 March 2018), 2, considering the deterrent and restorative aspects of obliging companies to implement compliance structures within a DPA framework.

cases²²¹. The resulting agreements may contain provisions for the restitution of losses²²² to the affected or victim states, i.e., the country whose officials have been bribed and where the effects of the offence are endured²²³. Alternatively, the inclusion of victim states in the NTR process may be considered, which is typically initiated by states with jurisdiction over the corporate offender and with resources to pursue complex transnational corporate crimes²²⁴. As discussed in section 2.1, TCB frequently involves MNCs based in industrialised nations - home states - engaging in the bribery of public officials in developing countries - host states. An NTR concluded in a home state could, in principle, enable the sharing of fines imposed through NTRs with the host or victim state(s)²²⁵. The negotiated and informal nature of these mechanisms are thus seen as enabling prosecutors to negotiate restitution for victims from offenders and facilitate cooperation between the states affected by TCB offences, thereby enhancing the prospects for swift reparations to victims.

The potential for victim compensation has, in fact, been one of the central justifications for adopting non-conviction-based NTRs for corporate offenders in jurisdictions such as the United Kingdom, France, and Canada²²⁶. In practice, however, the role of victim states in NTR proceedings remains limited²²⁷. Based on Capus and Brodersen's comparative analysis of NTR frameworks in France, Switzerland, and the UK, these agreements rarely result in direct compensation for victim states²²⁸. This marginalisation is partly due to legal constraints. For instance, the restrictive definitions of eligible private claimants in domestic criminal law, as is the case in Switzerland, may preclude victim states to participate in criminal proceedings against TCB²²⁹. However, the exclusion also appears to be driven by pragmatic considerations: involving additional parties in the negotiation process may prolong proceedings or jeopardise the successful conclusion of the agreement²³⁰. This interpretation is further

²²¹ See McStravick, 'Deferred Prosecution Agreements and the Restorative Justice Paradigm', 113, for a discussion on the restorative aspects of NTRs.

²²² Oduor, *Left out of the Bargain*, 10.

²²³ There is no universally accepted definition of who qualifies as a victim of corruption, as this status is determined by each country's legal framework. See in this sense Kaunain Rahman, 'Consideration of Victims in the Enforcement of the FCPA and the UKBA' (Transparency International, 2020), 5. However, many countries recognise states and public entities as victims of corruption. See Felipe Freitas Falconi *et al.*, *Victims of Corruption: Back for Payback* (World Bank, 2024), 31.

²²⁴ Hock, 'Policing Corporate Bribery', 962; Oduor, *Left out of the Bargain*, 10.

²²⁵ For a description of how prosecutors of different countries can enter in coordinated NTRs which result in the sharing of fines, see Melody Bozinova and Basilio Nunnari, 'La coordination des accords en matière de corruption transnationale : L'affaire ABB', *Nouvelle Revue de Criminologie et de Politique Pénale* 2023, no. 2 (2023): 32–3.

²²⁶ For the UK, see MoJ, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations', 12; For France, see Béatrice Lapérou-Schneider, 'La place des O.N.G. et associations dans le traitement consensuel de la corruption en droit français', in *Negotiated Justice in Transnational Corruption - Between Transparency and Confidentiality*, eds. Nadja Capus and Franziska Hohl Zürcher (Helbing Lichtenhahn, 2024), 101; for Canada, see Government of Canada, 'Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard' (Government of Canada, February 2018), 14–5.

²²⁷ See generally Nadja Capus and Kei Hannah Brodersen, 'Negotiating without the Victim State: The Exclusiveness of Anticorruption Settlements', *Journal of Financial Crime* 29, no. 4 (2021): 1249–268; Oduor, *Left out of the Bargain*.

²²⁸ Capus and Brodersen, 'Negotiating without the Victim State', 1262.

²²⁹ Capus and Brodersen, 'Negotiating without the Victim State', 1265.

²³⁰ *Ibid.*

supported by the fact that, although the NTR regimes in France and the UK formally provide for victim state remediation, such provisions are rarely invoked or given prominence in practice²³¹.

NTRs are equally lauded for their deterrent and rehabilitative effects²³². Some forms of NTRs, such as the UK's and US' DPAs, are available only in cases where the corporate offender agrees to implement internal governance plans (i.e., anti-bribery compliance structures and policies), argued to contribute to the rehabilitation of the offender company and consequently, prevent future offending²³³. In the OECD-WGB country evaluation report, US representatives note that offender companies subject to DPAs undergo "dramatic changes" by introducing multiple anti-bribery compliance structures, including creating and implementing new codes of conduct, severing ties with intermediaries resorting to bribery, withdrawing from corruption-tainted public tenders and providing anti-bribery training to employees²³⁴. Within this process, the prosecutor takes on a supervisory role, akin to that of regulators, by overseeing the compliance structures implemented by the company for an agreed-upon period before discontinuing the criminal charges²³⁵. These features, often considered as rehabilitative for the company, have prompted law enforcers, commentators and several legal scholars to characterise NTRs as deterring future reoffending and achieving the specific deterrence goals of criminal justice²³⁶. It is argued that this approach offers criminal prosecutors a more robust deterrent than the imposition of criminal fines alone, which are often deemed insufficient²³⁷. Similarly, the public disclosure of NTRs and the monetary consequences for corporate offenders (e.g., criminal fines, disgorgement of profits,

²³¹ *Id.*, 1256-262.

²³² Michael Yangming Xiao, 'Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime Note', *Cornell Journal of Law and Public Policy* 23, no. 1 (2013): 251–52; OECD-WGB, 'United-States; Follow-up to the Phase 3 Report and Recommendations' (OECD, December 2012), 10. For a review and discussion of the pro-NTR arguments and their deterrent effects, see Gabriel Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century', *University of Pennsylvania Journal of Business Law* 15, no. 3 (2013): 801–02; Brandon L. Garrett, 'Structural Reform Prosecution', *Virginia Law Review* 93 (2007): 858–59.

²³³ For the UK, see CCA, sch. 17 s. 5 ss. 3(e). For the US, see United States Attorney Manual (USAM), 'Principles of Federal Prosecution of Business Corporations', §9-28.800.

²³⁴ OECD-WGB, 'United-States; Follow-up to the Phase 3 Report and Recommendations', 10.

²³⁵ McStravick, 'Deferred Prosecution Agreements and the Restorative Justice Paradigm', 121–24; Peter Spivack and Sujit Raman, 'Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements', *American Law Review* 45 (2008): 161; Garrett, 'Structural Reform Prosecution', 889–91.

²³⁶ For distinctions between specific and general deterrence and the achievement of these goals with DPAs, see Samuel W. Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', *North Carolina Law Review* 96 (2017): 849–50; Xiao, 'Deferred/Non Prosecution Agreements', 251. See also McStravick, 'Deferred Prosecution Agreements and the Restorative Justice Paradigm', 121–24; Global Investigations Review (GIR), 'Caldwell: settlement a "more powerful tool" than convictions' (GIR, 3 December 2014): <https://globalinvestigationsreview.com/article/caldwell-settlement-more-powerful-tool-convictions> (Accessed: 25.06.2025).

²³⁷ Spivack and Raman, 'Regulating the New Regulators: Current Trends in Deferred Prosecution Agreements', 165. For a discussion on the deterrent effect of financial sanctions for corporate offenders, see John C. Coffee, 'Crime and the Corporation: Making the Punishment Fit the Corporation', *The Journal of Corporation Law* 47, no. 4 (2022): 970–74; Dorothy S. Lund and Natasha Sarin, 'The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis', *Faculty Scholarship at Penn Law*, 2020, 39–41.

restitution) are thought to contribute to general deterrence by discouraging the larger business community from engaging in bribery practices²³⁸.

Considering this discussion, it bears noting that evidence on the deterrent value of NTRs is lacking²³⁹. The question of whether adopting compliance structures effectively prevents future offending remains open, given the lack of empirical evidence in this sense²⁴⁰. Additionally, while the compliance transformations of companies after a criminal action may be considerable, it is still questionable whether these transformations are genuine or simple window-dressing activities strategically undertaken to mitigate the consequences of criminal actions²⁴¹. Hock and Dávid-Barrett have examined the role of compliance structures in anti-bribery enforcement with NTRs in the US and the UK²⁴². The authors conclude that NTRs incentivise corporate offenders to adhere to compliance structures, which are subsequently interpreted by enforcement authorities as a factor mitigating the culpability of these offenders²⁴³. This perceived cooperation often results in tangible benefits during the criminal process, including reduced financial penalties, more favourable legal characterisations of the offence, and the omission of certain incriminating facts from the resolution agreement²⁴⁴. Within this enforcement model, corporate engagement with compliance may be driven less by a genuine commitment to preventing bribery and more by the strategic value of presenting symbolic indicators of compliance that can be construed as evidence of effectiveness²⁴⁵.

The positive effect of NTRs on general deterrence is also questioned, given that the negotiated nature of these mechanisms reduces their level of transparency²⁴⁶. The shift toward anti-bribery enforcement through NTRs is marked by prosecution agencies and corporate defence lawyers, rather than courts, taking the lead in criminal procedures²⁴⁷. This results in agreements that are negotiated and concluded

²³⁸ Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', 850.

²³⁹ Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement', 60–61; Hawley, King, and Lord, 'Justice for Whom?', 314; Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty', 801.

²⁴⁰ Hawley, King, and Lord, 'Justice for Whom?', 317; Markoff, 'Arthur Andersen and the Myth of the Corporate Death Penalty', 801. See also Nicholas Lord and Michael Levi, 'Determining the Adequate Enforcement of White-Collar and Corporate Crimes in Europe', in *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, eds. Judith van Erp, Wim Huisman, and Gudrun Vande Walle (Routledge, 2015), 42–51. The authors highlight the inherent challenges in detecting corporate offending more broadly, which in turn complicates efforts to empirically assess the deterrent impact of enforcement strategies. They further address the specific difficulties associated with identifying instances of TCB, as well as the limitations of existing measurement approaches.

²⁴¹ Charles and Turksen, 'Deferred Prosecution Agreements: A Soft Touch?', 198; For a discussion on the risk of cosmetic compliance within negotiated justice frameworks, see Kimberly D. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance', *Washington University Law Quarterly* 81 (2003): 487–544.

²⁴² See generally Hock and Dávid-Barrett, 'The Compliance Game', 1–13.

²⁴³ *Id.*, 11.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law - The Making of (In-)Transparency', 20–22; Brandon L. Garrett, 'The Public Interest in Corporate Settlements', *Boston College Law Review* 58 (2017): 1535–536.

²⁴⁷ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law - The Making of (In-)Transparency', 3.

in backdoor offices, shielding the public from an overview over the process²⁴⁸. Within this framework, the extent to which NTRs and their substantive content are disclosed to the public is determined by the discretion of the negotiating parties²⁴⁹. In this sense, the OECD study relative to NTRs in TCB cases reveals inconsistent publicity practices amongst countries²⁵⁰, with some countries restricting public access to NTR decisions or denying it altogether²⁵¹. These practices undermine the presumed general deterrent effect of NTRs, as it becomes difficult for other corporate actors to assess the legal and reputational risks of engaging in similar conduct²⁵². As a result, the capacity of NTRs to function as public warnings or normative benchmarks is significantly diminished²⁵³.

Considering these realities, the legal and socio-legal literature retains a critical tone by questioning the underlying philosophy pursued by these mechanisms²⁵⁴. Indeed, doubts have been raised about the added value of NTRs to criminal law²⁵⁵. Campbell argues that NTRs create an ambiguous situation: law enforcers and legislative bodies effectively introduce them as a solution to the challenges of applying criminal law to companies while simultaneously mitigating the inevitable consequences of corporate criminal liability²⁵⁶. These mitigating strategies, comprising of avoiding convictions, reducing the negative publicity of criminal prosecutions, or other concessions in favour of the company²⁵⁷, compromise the distinguishable characteristic of criminal law to express moral condemnation against socially harmful acts²⁵⁸. As argued by Buel, criminal prosecutions and convictions are recognisable signals that assist in clearing the ambiguities often associated with corporate crime and organisational blameworthiness²⁵⁹. Avoiding criminal consequences for corporate behaviours formally defined as crimes may blur the lines between acceptable and harmful corporate behaviour²⁶⁰. Similarly, Uhlmann considers how law enforcers potentially minimise or even tacitly condone corporate misconduct by failing to adequately express societal condemnation with the use of NTRs²⁶¹. By excluding the

²⁴⁸ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law - The Making of (In-)Transparency', 3; Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2-3.

²⁴⁹ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law - The Making of (In-)Transparency', 3.

²⁵⁰ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 152-58.

²⁵¹ *Id.*, 152-54.

²⁵² Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law - The Making of (In-)Transparency', 21.

²⁵³ *Ibid.*

²⁵⁴ King and Lord, *Negotiated Justice and Corporate Crime*, 2018, 120-21, 133-34; Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice', 225-26; David M. Uhlmann, 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability', *Maryland Law Review* 72 (2012): 1341.

²⁵⁵ See generally Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice', 211-26. See also Campbell, 'Trying Corporations: Why Not Prosecute?', 269-91.

²⁵⁶ Campbell, 'Trying Corporations: Why Not Prosecute?', 286.

²⁵⁷ For a comprehensive and cross-country comparison of the benefits afforded to corporate offenders in NTR processes, see OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 43-64; 101-06.

²⁵⁸ Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement', 60; King and Lord, *Negotiated Justice and Corporate Crime*, 127-32; Uhlmann, 'The Erosion of Corporate Criminal Liability', 1336; Samuel W. Buell, 'The Blaming Function of Entity Criminal Liability', *Indiana Law Journal* 81 (2006): 498.

²⁵⁹ Buell, 'The Blaming Function of Entity Criminal Liability', 498.

²⁶⁰ *Id.*, 521-22.

²⁶¹ Uhlmann, 'The Erosion of Corporate Criminal Liability', 1336.

expressive effect of criminal law from the equation, questions arise of whether NTRs can and should be distinguished from existing regulatory market control mechanisms²⁶² and whether they bring new dimensions to the control of corporate wrongdoing in comparison to existing market regulatory frameworks that focus on the disgorgement ill-gotten profits and on bettering corporate compliance²⁶³.

Furthermore, criminologists view the implementation of NTRs as a type of “regulatory degradation”, which perpetuates established neoliberal ideologies that advocate for the self-regulation of global markets²⁶⁴. Within this framework, the regulation of the activities of MNCs through criminal law is often articulated through a crime control discourse²⁶⁵. In the realm of foreign bribery, the OECD highlights that corporate misconduct, particularly in the context of foreign bribery, can have far-reaching consequences that extend beyond national borders²⁶⁶. Consequently, holding legal entities accountable for such offences has become a cornerstone of the evolving global legal framework²⁶⁷. Without this accountability, governments face significant challenges in combating foreign bribery and other complex economic crimes²⁶⁸.

However, NTRs diverge from traditional crime-control approaches by prioritising compliance-oriented liability and self-regulation²⁶⁹. Corporate self-regulatory measures, both those in place before, during or after the criminal conduct, play a pivotal role in determining blameworthiness and shaping the severity of criminal penalties for foreign bribery²⁷⁰. In this sense, Bronitt argues that NTRs can be alternatively conceptualised as administrative tools for managing leniency, where penalties are mitigated based on the company’s prompt notification of authorities, cooperation in investigations, and contributions to identifying other responsible parties²⁷¹. While the self-regulating measures of companies are often praised as an added value to the proclaimed crime-fighting role of states, these

²⁶² King and Lord, *Negotiated Justice and Corporate Crime*, 117–18.

²⁶³ Uhlmann, ‘The Erosion of Corporate Criminal Liability’, 1307; Markoff, ‘Arthur Andersen and the Myth of the Corporate Death Penalty’, 799; Julie R. O’Sullivan, ‘How Prosecutors Apply the Federal Prosecutions of Corporations Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction’, *American Criminal Law Review* 51 (2014): 68.

²⁶⁴ Steve Tombs and David Whyte, ‘Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK’, *Regulation & Governance* 7, no. 1 (2013): 61–79, cited in Lord, ‘Prosecution Deferred, Prosecution Exempt’, 850. See also Michael Elliot and Félix Lüth, ‘Corporate Liability for Economic Crimes: A Contested Transnational History’, in *Histories of Transnational Criminal Law*, eds. Neil Boister, Sabine Gless, and Florian Jessberger (Oxford University Press, 2021), 215–16.

²⁶⁵ Lüth, ‘The Rise of Corporate Non-Prosecution Agreements’, 13.

²⁶⁶ OECD, ‘The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report’ (OECD 2016), 11.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ Elliot and Lüth, ‘Corporate Liability for Economic Crimes’, 215–16.

²⁷⁰ Hock and Dávid-Barrett, ‘The Compliance Game’, 11; Federico Mazzacuva, ‘Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice’, *The Journal of Criminal Law* 78, no. 3 (June 2014): 262.

²⁷¹ Bronitt, ‘Regulatory Bargaining in the Shadows of Preventive Justice’, 222.

strategies also keep these same states and their public penal forces in retreat²⁷². Crime control responsibilities progressively shift from law enforcement authorities to the company²⁷³. This transfer of crime-control responsibilities, exemplified by NTRs, is gaining traction at both international and national levels²⁷⁴. The trend is reflected in the OECD's recent ABC recommendations, which emphasise compliance-based corporate liability²⁷⁵. Equally, national conceptualisations of corporate criminal liability increasingly problematise corporate fault through defective compliance structures²⁷⁶.

2.3. Anti-Bribery in Switzerland

This section provides an overview of Swiss anti-bribery laws and the enforcement context. Particular emphasis is placed on the Swiss SPO, which serves as the primary enforcement mechanism against TCB crimes. Section 2.3.1 scrutinises the legislative underpinnings and modifications introduced in Swiss anti-bribery laws, detailing the incorporation of the OECD-ABC into Swiss law and the consequential challenges and debates surrounding corporate criminal liability. Section 2.3.2 explores the practical and procedural aspects of enforcing these laws within Switzerland's unique economic and political landscape. Finally, section 2.3.3 analyses SPOs and their implementation as an enforcement strategy for TCB offences.

2.3.1. The Swiss Anti-Bribery Law

The ratification of the OECD-ABC implied the addition of a new foreign bribery offence in the Swiss Criminal Code (SCC)²⁷⁷, which previously only criminalised domestic bribery²⁷⁸. Legislative work in this regard commenced shortly after the signing of the Convention in 1997²⁷⁹. This resulted in the adoption of Article 322^{septies} of the SCC in 2000, making it an offence to offer, promise or give any undue advantage to obtain a benefit from a foreign public official²⁸⁰. The legal provision further

²⁷² Dionysia Katelouzou and Peer Zumbansen, 'The Transnationalization of Corporate Governance: Law, Institutional Arrangements, & Corporate Power', *Arizona Journal of International and Comparative Law* 38 (2021): 58–9.

²⁷³ Katelouzou and Zumbansen, 'The Transnationalization of Corporate Governance', 58–9; Elliot and Lüth, 'Corporate Liability for Economic Crimes', 218.

²⁷⁴ Elliot and Lüth, 'Corporate Liability for Economic Crimes', 215–16.

²⁷⁵ *Ibid.*

²⁷⁶ Nicholas Lord and Rose Broad, 'Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the 'Organisational' Component', *European Review of Organised Crime* 4, no. 3 (2018): 31.

²⁷⁷ The Federal Department of Justice and Police (FDJP), 'Intensification de la lutte contre la corruption', (FDJP, 1 July 1998): <https://www.admin.ch/cp/f/359A4D0A.4740@mbox.gsejpd.admin.ch.html> (Accessed: 25.06.2025); Swiss Criminal Code 21 December 1937, SR 311.0 (SCC).

²⁷⁸ Federal Council, 'Federal Council Dispatch on the Amendment of the Swiss Criminal Code and the Military Criminal Code (Revision of the Criminal Provisions Applicable to Corruption) and Switzerland's Accession to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (19 April 1999) (Federal Gazette (FG) 1999 5045), 5063.

²⁷⁹ FDJP, 'Intensification de la lutte contre la corruption'.

²⁸⁰ Cf. SCC Art. 322^{septies}.

provides a specific description of what constitutes a foreign official: “a member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces who is acting for a foreign state or international organisation”²⁸¹. According to Swiss law enforcement authorities, this definition covers both formally appointed foreign officials and others, *de facto* officials exercising a public function, regardless of the official relationship between the public authority and the agent²⁸².

Unlike the introduction of the new offence of bribery of foreign public officials, extending the criminal law to corporate entities was met with controversial policy debates. Similarly to many OECD member states²⁸³, corporate criminal liability was not an established concept in Swiss criminal law²⁸⁴. Recognising criminal responsibility for companies meant going against the general principle of *nulla poene sine culpa* (no punishment without guilt)²⁸⁵ reflected in the then Article 47 of the SCC. As an organisational structure, a company is void of any psychological capacities, which renders it incompatible with classical conceptions of criminal law based on the attribution of blameworthiness²⁸⁶. In an attempt to preserve the fundamental conceptions of culpability in criminal law, the Swiss legislator opted for a subsidiary corporate criminal responsibility, articulated in Article 102 paragraph 1 of the SCC and introduced in 2003²⁸⁷. This provision states that a company can be criminally liable for its

²⁸¹ Cf. SCC Art. 322^{septies} para. 1.

²⁸² OECD-WGB, ‘Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions. Phase 2 Report: Switzerland’ (OECD Publishing, December 2004), 3–4. For a discussion on *de facto* public officials and the difficulties of enforcing anti-bribery laws in these circumstances, see Kristian Lasslett and Nadja Capus, ‘Shadow State Structures and the Threat to Anti-Corruption Enforcement: Evidence from Uzbekistan’s Telecommunications Bribery Scandal’, *Crime, Law and Social Change* 81 (2024): 356–58.

²⁸³ Katarova, ‘The World Is Broken’, 219.

²⁸⁴ Bertrand Perrin, ‘La responsabilité pénale de l’entreprise en droit Suisse’, in *Corporate Criminal Liability: Emergence, Convergence and Risk*, eds. Mark Pieth and Radha Ivory, vol. 9 (Springer, 2011), 198. While the Swiss criminal law did not recognise the criminal responsibility of legal entities, the concept of corporate criminal liability was not entirely foreign to Swiss criminal law. According to Article 7 of the Federal Act of 22 March 1974 on Administrative Criminal Law (ACLA), in effect since 1975, the prosecution of legal entities is possible for certain regulatory offences, in cases where the individual perpetrator cannot be identified. This framework created an early form of corporate liability in certain regulatory sectors long before its introduction in criminal law. For a review and historical analysis of the corporate liability framework of Article 7 ACLA, see Louis Frédéric Muskens, *Statut de la personne morale en droit pénal : Appréhension d’une construction de droit civil par le droit pénal matériel et procédural ainsi que par le droit administratif parapénal* (Helbing Lichtenhahn Verlag, 2025), 262–95.

²⁸⁵ Ursula Cassani, ‘Droit pénal économique 2003–2005 : actualité législative (responsabilité pénale de l’entreprise, financement du terrorisme, corruption)’, in *La pratique de l’avocat 2005*, eds. Walter Fellmann and Tomas Poledna (Stämpfli Verlag, 2005), 674; Federal Council, ‘Federal Council Dispatch on the Amendment of the Swiss Criminal Code (General Provisions, Entry into Force and Application on the Criminal Code) and of the Military Criminal Code as well as the Federal Law Governing the Penal Status of Minors of 21 September 1998’ (21 September 1998) (FG 1999 II 1787), 1943.

²⁸⁶ Cassani, ‘Droit pénal économique 2003–2005’, 674.

²⁸⁷ Federal Council, ‘Federal Council Dispatch on the Amendment of the Swiss Criminal Code (General Provisions, Entry into Force and Application on the Criminal Code) and of the Military Criminal Code as well as the Federal Law Governing the Penal Status of Minors of 21 September 1998’, 1948.

employees' actions only if the individual responsible is unidentifiable due to the company's disorganisation²⁸⁸.

The OECD-WGB expressed concerns about whether the chosen approach would meet the criteria for ensuring “effective, proportionate and dissuasive” sanctions against corporate entities²⁸⁹. At the time, the absence of case law highlighted issues about the challenges of proving corporate criminal liability²⁹⁰. Indeed, the dual conditions of an unidentifiable individual offender and the lack of organisation may be difficult to prove²⁹¹. Responding to critiques and anticipating the upcoming ratification of the UN convention against the financing of terrorism, equally obliging states to criminalise corporate entities, the Swiss legislator included the model of direct corporate criminal liability in Article 102 paragraph 2 of the SCC²⁹². The provision considers corporate entities directly responsible for several serious crimes with a transnational component, including foreign bribery, regardless of any individual liability:

Article 102, paragraph 2 of the SCC:

If the offence committed falls under Articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} paragraph 1 or 322^{octies}, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence²⁹³.

The Swiss corporate criminal liability model thus establishes direct corporate liability for foreign bribery crimes committed in the company's realm and in exercising its activity²⁹⁴. The liability, however, is predicated on the company's failure to have taken all “reasonable organisational measures that are required to prevent such an offence”²⁹⁵, thereby establishing an “organisational failure” model of corporate criminal liability²⁹⁶. This form of corporate criminal liability institutes a general requirement for the company to prevent criminal wrongdoing within its remit²⁹⁷. Without formally defining what reasonable and necessary measures should be, the Swiss legislator defers to the judiciary

²⁸⁸ Cf. SCC Art. 102 para. 1.

²⁸⁹ Cf. section 2.1.1. See also OECD-ABC Art. 2. This provision requires member states to impose sanctions that are “effective, proportionate and dissuasive” against corporate foreign bribery offenders. See also OECD-WGB, ‘Review of Implementation of the Convention and 1997 Recommendation Phase 1 Report: Switzerland’ (OECD Publishing, March 2000), 39.

²⁹⁰ OECD-WGB, ‘Phase 1 Report: Switzerland’, 39-40.

²⁹¹ *Id.*, 39 citing Vincent Jeanneret, ‘Une loi bâclée ? Les nouvelles dispositions seront-elles vraiment appliquées’, *L’expert-Comptable Suisse* 3 (2008): 4–9.

²⁹² Cassani, ‘Droit pénal économique 2003-2005’, 677; Perrin, ‘La responsabilité pénale de l’entreprise en droit Suisse’, 200.

²⁹³ In addition to foreign bribery, the direct model equally applies to crimes related to terrorism, money laundering and domestic corruption. Cf. SCC 102 para. 2.

²⁹⁴ Cf. SCC Art. 102 paras. 1 and 2.

²⁹⁵ Cf. SCC Art. 102 para. 2.

²⁹⁶ De Preux Pascal, ‘Entreprise et corruption : Risques et responsabilité pénale’, *Pratique Juridique Actuelle (PJA)* (2010): 1097; Roth Robert, ‘Une responsabilité sans culpabilité ? L’entreprise, la “faute d’organisation” et le droit pénal’, *Semaine Judiciaire (SJ)* (2003): 201.

²⁹⁷ Ryser Roland M. and Kuchowsky Natalie, ‘Die Strafbarkeit des Unternehmens Organisationspflichten und Strafrecht’, *Der Schweizer Treuhänder* (2005): 587.

tasked with examining this element on a case-by-case basis²⁹⁸. It is important to note that the State Secretary for Economic Affairs (SECO) devised general recommendations for businesses on effectively preventing and identifying foreign bribery in 2017²⁹⁹. The recommendations revolved around ensuring transparency in commercial transactions, training and sensitisation of company employees, the development of internal compliance codes and controlling the robustness of implemented compliance structures³⁰⁰. Regardless of how appropriate organisational measures are defined, prosecutors and judges are required to establish a causal link between the absence of such organisational structures and the foreign bribery offence³⁰¹.

The subsidiary and direct criminal liabilities of Article 102 of the SCC enact a standard of liability imputation based on a particular form of corporate negligence³⁰². Specifically, the case of Article 102 paragraph 2 of the SCC establishes a form of criminal negligence by which the company is accountable for neglecting to take all reasonable measures to prevent the commission of the crime³⁰³. This organisational negligence for corporate entities is the counterpart of fault in terms of criminal liability of individuals, thereby conserving the principle of prohibiting punishment without guilt³⁰⁴.

The maximum criminal fine for corporate offenders is set at 5 million Swiss Francs³⁰⁵, which is determined proportionally to the seriousness of the crime, the lack of organisation and the harm caused³⁰⁶. The economic situation of the corporate offender is also taken into account³⁰⁷. The maximum criminal fine, considerably insignificant for high revenue-generating MNCs, is constantly criticised by

²⁹⁸ Federal Council, 'Federal Council Dispatch on the Amendment of the Swiss Criminal Code (General Provisions, Entry into Force and Application on the Criminal Code) and of the Military Criminal Code as well as the Federal Law Governing the Penal Status of Minors of 21 September 1998', 1950-951; See also Jeanneret, 'Une loi bâclée?', 7-8.

²⁹⁹ SECO, 'Preventing corruption – Information for Swiss businesses operating abroad', (SECO, 2017), 27-34.

³⁰⁰ *Ibid.*

³⁰¹ Federal Criminal Court (FCC), SK.2020.62 (27 June 2022), para. 5.1.4.

³⁰² Perrin, 'La responsabilité pénale de l'entreprise en droit Suisse', 202; Alain Macaluso, 'Vers un véritable droit pénal Suisse des affaires : la nécessité d'une approche centrée sur l'entreprise', *Revue Suisse de Droit des Affaires et du Marché Financier* (2008): 251; Andrew M. Gabarski and Alain Macaluso, 'La responsabilité de l'entreprise et de ses organes dirigeants à l'épreuve du droit pénal administratif', *Pratique Juridique Actuelle (PJA)*, (2008): 839; Robert Roth, 'L'entreprise, nouvel acteur pénal', in *Droit pénal des affaires : la responsabilité pénale du fait d'autrui*, eds. Frédéric Berthoud (CEDIDAC - Centre du droit de l'entreprise de l'Université de Lausanne, 2002), 99-8. Some authors contrast this opinion by suggesting that Article 102 of the SCC creates a new criminal offence of "inappropriate corporate organisation". See Marcel Alexander Niggli and Diego R. Gfeller, 'Art. 102 StGB', in *Basler Kommentar – Strafrecht: Strafgesetzbuch, Jugendstrafgesetz*, eds. Marcel Alexander Niggli and Hans Wiprächtiger, 4th eds. (Helbing Lichtenhan, 2019), *ad* SCC Art. 102 N 20; Stefan Tretchel and Marc Jean-Richard-dit-Bressel, 'Art. 102 StGB', in *Schweizerisches Strafgesetzbuch Praxiskommentar*, eds. Stefan Tretchel, 4th eds. (DIKE Verlag, 2021), *ad* SCC Art. 102 N 7 ff. However, corporate criminal liability as an imputation model is more widely accepted and has also been confirmed by Swiss case law. See SFC (Swiss Federal Court), 146 IV 68 (December 12, 2019), para. 2.4; FCC, SK.2020.62 (27 June 2022), para. 5.1.4.

³⁰³ FCC, SK.2020.62 (27 June 2022), para. 5.1.4; SFC, 142 IV 333 (11 October 2016), para. 4.2.

³⁰⁴ Katia Anne Villard, *La compétence du juge pénal Suisse à l'égard de l'infraction reprochée à l'entreprise* (Collection Genevoise, 2017), 199; Federal Council, 'Federal Council Dispatch Concerning the Amendment of the Swiss Criminal Code (General Provisions, Entry into Force and Application of the Criminal Code) and the Military Criminal Code, as well as a Federal Law Governing the Criminal Status of Minors of 21 September 1998', 1948.

³⁰⁵ Cf. SCC Art. 102 para. 1.

³⁰⁶ Cf. SCC Art. 102 para. 3.

³⁰⁷ *Ibid.*

the OECD-WGB as being not sufficiently effective, proportionate and dissuasive³⁰⁸. Higher criminal fines for corporate offenders emerged as a topic during parliamentary debates in 2023 but ultimately faced rejection³⁰⁹. The rationale centred on the understanding that corporate offenders already face disgorgement and compensation orders³¹⁰, requiring them to forfeit ill-got profits or pay compensation claims where said profits are unavailable³¹¹. Disgorgement and compensation orders regarding business ventures acquired through foreign bribery can be substantial³¹², leading Swiss deputies to conclude that sufficient deterrents against committing corporate crimes already exist³¹³.

2.3.2. Enforcement Context

Switzerland has a high concentration of multinational headquarters³¹⁴ and a robust export-oriented economy³¹⁵, which exposes the country significantly to the issue of foreign bribery³¹⁶. The nation's political and economic stability draws a diverse array of businesses, including those involved in commodity trading, a sector particularly susceptible to bribery³¹⁷. A recent survey conducted by Transparency International (TI) Switzerland and the University of Applied Sciences of the canton of Graubünden revealed that Swiss companies operating internationally, regardless of size or sector, are

³⁰⁸ OECD-WGB, 'Phase 2 Report: Switzerland', 21; OECD-WGB, 'Implementing the OECD Anti-Bribery Convention. Phase 4 Report: Switzerland' (Paris: OECD Publishing, 9 October 2018), 42–4.

³⁰⁹ Noser Reudi, 'Convention anticorruption de l'OCDE. Renforcement de la mise en œuvre nationale', Motion no. 23.3844 (The Swiss Federal Assembly, 15 June 2023).

³¹⁰ Cf. SCC Art. 70 "forfeiture of assets" and SCC Art. 71 "equivalent [compensation] claim".

³¹¹ Official Bulletin of the Federal Assembly (OB), 2024 N 54 (National Council, 27 February 2024) (cf. intervention of Nantermod Philippe and Jans Beat); National Council Legal Affairs Committee, 'Rapport de la Commission des affaires juridiques du 18 janvier 2024' (National Council, 18 January 2024), 3.

³¹² Simone Nadelhofer do Canto, 'Millionenbusse gegen Alstom-Tochter wegen ungenügender Vorgehen gegen Bestechung: Besprechung des Strafbefehls der Schweizerischen Bundesanwaltschaft gegen die Alstom Network Schweiz AG vom 22. November 2011', *GesKR* 1 (2012): 134-35. For a discussion on disgorgement orders for corruption offences, see generally Bertossa Bernard, 'Confiscation et corruption : quelques réflexions sur la confiscation des avantages obtenus par le corrupteur actif', *La Semaine judiciaire (SJ)* II (2009): 371-88.

³¹³ OB, 2024 N 54 (cf. intervention of Nantermod Philippe and Jans Beat); National Council Legal Affairs Committee, 'Rapport de la Commission des affaires juridiques du 18 janvier 2024', 3.

³¹⁴ According to the Swiss Federal Office of Statistics (FOS), 60% of corporate groups were qualified as multinationals in 2022, out of which 51% were headquartered in Switzerland: OFS, 'Portrait des groupes d'entreprises en Suisse, de 2014 à 2022' (FOS, November 2023), 3. See also, OECD-WGB, 'Phase 2 Report: Switzerland', 4.

³¹⁵ According to the State Secretariat for Economic Affairs (SECO), 52% of Switzerland's GDP in 2023 was produced by exporting goods and services to other countries: SECO, 'Switzerland in the WTO' (SECO, 9 March 2023): https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/internationale_organisationen/WTO/die-schweiz-in-der-wto.html#:~:text=The%20Swiss%20economy%20is%20very,trade%20is%20less%20than%201.5%25 (Accessed: 25.06.2025). In addition, the Federal Department of Foreign Affairs (FDFA) states that "Switzerland's economy is highly dependent on foreign trade.": FDFA, 'Export' (FDFA, 29 December 2021): <https://www.eda.admin.ch/aboutswitzerland/en/home/wirtschaft/uebersicht/export.html> (Accessed: 25.06.2025).

³¹⁶ OECD-WGB, 'Phase 2 Report: Switzerland', 4-5.

³¹⁷ OECD, 'Typology of Corruption Risks in Commodity Trading Transactions' (OECD Publishing, 2021), 21; Urs Rybi and Olivier Longchamp, 'Négoce des matières premières, risques de corruption, loi sur le blanchiment d'argent et matières premières illicites. Quelques considérations', in *Blanchiment d'argent : Actualité et perspectives Suisses et internationales*, eds. Isabelle Augsburger-Bucheli (Schulthess éditions Romandes, 2014), 246-49.

notably vulnerable to foreign bribery³¹⁸. Out of the 539 companies surveyed, just over half (52%) reported facing requests for bribes in foreign countries³¹⁹. Of these, 63% generally accede to these demands³²⁰. Furthermore, 60% of the affected companies acknowledge that bribes are anticipated in relation to the awarding of public contracts³²¹.

No company faced prosecution for TCB crimes in the first 8 years following the introduction of corporate criminal liability, despite these realities³²². The identified obstacles to prosecution resonate partly with the specific national context and partly with the general difficulties associated with enforcing transnational laws using national means relayed in section 2.2.1³²³. Regarding the former, it is presumed that the lack of corporate prosecutions arose from Swiss prosecutors' unfamiliarity with the provisions pertaining to corporate criminal liability³²⁴, rather than from challenges in enforcing them³²⁵. As discussed in the previous section, prior to 2003, the principle of *societas delinquere non potest* (legal persons, i.e. companies, cannot commit a crime) governed legal reasoning³²⁶. These circumstances suggested that law enforcement authorities would require time to develop the practice of initiating investigations against corporate entities³²⁷.

Equally of a temporal and customary nature are the Swiss procedural requirements that lengthen and complicate already complex prosecutions³²⁸. The principle of substantive truth reflected in Article 6 of the Swiss Criminal Code of Procedure (SCCP)³²⁹, which requires prosecutors to conduct *ex officio* investigations into all circumstances relating to the offence, can significantly strain and prolong investigations into TCB offences³³⁰. Connected to this is the procedural requirement for prosecutors to fully respect the defendant's rights to participate during evidence-gathering³³¹. The defendant's due process rights allow them to request additional evidence gathering from the prosecutor if it is believed

³¹⁸ Christian Hauser *et al.*, 'Auslandskorruption bei Schweizer Unternehmen – Neue Erkenntnisse zu Risiken und Gegenstrategien' (Fachhochschule Graubünden/TI Schweiz, 2024), 3–4.

³¹⁹ *Id.*, 17.

³²⁰ *Id.*, 18.

³²¹ *Id.*, 19.

³²² OECD-WGB, 'Phase 3 Report: Switzerland', 16.

³²³ OECD-WGB, 'Phase 4 Report: Switzerland', 37–8; OECD-WGB, 'Phase 3 Report: Switzerland', 11, 16.

³²⁴ Cf. SCC Art. 102.

³²⁵ OECD-WGB, 'Phase 4 Report: Switzerland', 16.

³²⁶ Jeanneret, 'Une Loi Bâclée?', 11; Peter Müller, 'Petite histoire législative societas delinquere potest', *L'expert-Comptable Suisse* 7, no. 03 (2008): 11.

³²⁷ OECD-WGB, 'Phase 3 Report: Switzerland', 17.

³²⁸ Stefan Blättler and Maria Schnebli, 'La poursuite pénale efficace en Suisse dans le contexte d'enquêtes de corruption internationale – Un acte de balance entre le secret d'instruction et la transparence envers le public', in *Negotiated Justice in Transnational Corruption - Between Transparency and Confidentiality*, eds. Nadja Capus and Franziska Hohl Zürcher (Helbing Lichtenhahn, 2024), 162–63; Mégevand, 'Accords hors procès avec des entreprises', 61; Michael Lauber, Alexander Medved, and Matthias Portmann, 'Straffung von Wirtschaftsstrafverfahren gegen Unternehmen', in *Kurzer Prozess, Zu Kurzer Prozess - Im Wirtschaftsstrafverfahren*, eds. Jürg-Beat Ackermann and Marianne Johanna Hilf (Schulthess, 2019), 16.

³²⁹ Swiss Criminal Code of Procedure 5 October 2007, RS 312.0 (SCCP).

³³⁰ Blättler and Schnebli, 'La Poursuite Pénale Efficace En Suisse', 162–63.

³³¹ *Id.*, 163.

that not all reasonable lines of inquiry have been pursued³³². In addition, during propriety seizure proceedings, defendants can request the sealing of evidence considered as irrelevant to the criminal case but having the potential to reveal official, professional and private confidential information³³³. According to Blättler and Schnebli, the right to participate in the evidence gathering and the right to seal evidence are frequently asserted in TCB cases, consequently slowing the pace of proceedings, which risks exceeding the statute of limitations³³⁴.

Further obstacles to TCB prosecutions arise from the transnational nature of the crime³³⁵. Besides issues related to the detection of TCB crimes, Swiss prosecutors often encounter hurdles related to the *ne bis in idem* principle, which prohibits double prosecution for the same offence³³⁶. Bribery schemes and their concealment frequently span multiple jurisdictions, leading to concurrent enforcement actions by several states against the same corporate entity³³⁷. Such overlaps can conflict with *ne bis in idem* and double jeopardy principles in both civil and common law systems³³⁸ and encourage “forum shopping,” where companies choose to self-report in jurisdictions offering more favourable resolutions³³⁹. Recognising these potential side effects of extraterritorial enforcement, the OECD-ABC mandates states to consult to determine the most suitable jurisdiction as outlined in Article 4 paragraph 3 of the OECD-ABC. However, Swiss authorities have condemned the lack of coordination from other OECD-ABC signatory states, which has resulted in advanced investigations in Switzerland being halted after cases were resolved elsewhere without consulting with Swiss law enforcement authorities³⁴⁰. Further complicating matters, MLA requests sent to non-OECD signatory states are often left unaddressed, hindering access to critical evidence³⁴¹.

³³² Cf. SCCP Art. 107 para. 1 lit. e, art. 147. See also Joelle Vuille and William C. Thompson, ‘An American Advantage? How American and Swiss Criminal Defense Attorneys Evaluate Forensic DNA Evidence’, *International Commentary on Evidence* 14, no. 1 (2016): 7.

³³³ Cf. SCCP Art. 248. The procedure triggered by sealing of evidence requests can be considerably time-consuming. Before the prosecutor is permitted to resume the investigation, an independent judicial authority must review and separate the evidence deemed potentially protected by confidentiality rules but unrelated to the criminal matter under investigation. For a discussion on the sealing of evidence and its practical challenges, see generally Roten Christian, ‘La modification 2022 des règles du CPP concernant la procédure en matière de scellés’, in *Développements récents en droit pénal de l’entreprise IV*, eds. Alain Macaluso *et al.* (Stämpfli/CEDIDAC, 2024), 77-110.

³³⁴ Blättler and Schnebli, ‘La poursuite pénale efficace en Suisse’, 162–63. According to Swiss law, the statute of limitation for corruption offences is 15 years (Art. 97 para. 1 lit. b and Art. 322^{septies} SCC).

³³⁵ OECD-WGB, ‘Phase 4 Report: Switzerland’, 37; OECD-WGB, ‘Phase 3 Report: Switzerland’, 11.

³³⁶ Blättler and Schnebli, ‘La poursuite pénale efficace en Suisse’, 173; Bozinova and Nunnari, ‘La coordination des accords en matière de corruption transnationale’, 32–3. For a discussion on *ne bis in idem* principles for TCB offences, see Oduor, *Left out of the Bargain*, 58–62.

³³⁷ Bozinova and Nunnari, ‘La coordination des accords en matière de corruption transnationale’, 32–3; Mégevand, ‘Accords hors procès avec des entreprises’, 62–3; Hock, ‘Policing Corporate Bribery’, 955–56.

³³⁸ Oduor, *Left out of the Bargain*, 57.

³³⁹ Blättler and Schnebli, ‘La poursuite pénale efficace en Suisse’, 173; Mégevand, ‘Accords hors procès avec des entreprises’, 61; Qingxiu Bu, ‘Multijurisdictional Prosecution of Multinational Corporations: Double Jeopardy Vis-à-Vis Sovereign Rights in the Globalized Anti-Bribery Regime’, *International Annals of Criminology* 60, no. 2 (2022): 272.

³⁴⁰ OECD-WGB, ‘Phase 4 Report: Switzerland’, 37.

³⁴¹ Lauber, Medved, and Portmann, ‘Straffung von Wirtschaftsstrafverfahren gegen Unternehmen’, 10–1; OECD-WGB, ‘Phase 3 Report: Switzerland’, 36.

In 2011, Switzerland reformed its criminal justice system with the introduction of the SCCP, which replaced 26 cantonal criminal codes of procedure and the Federal Act on the Administration of Federal Criminal Justice³⁴². This overhaul aimed to standardise criminal procedures and address inconsistencies in practices across the cantons³⁴³. The reform also clarified jurisdictional issues related to crimes with an international dimension. Under Article 24 paragraph 1 of the SCCP, the Office of the Attorney General (OAG) serves as the primary authority for prosecuting offences committed abroad or across multiple cantons. Given the transnational nature of TCB cases, which by definition involve conduct occurring outside Switzerland, their prosecution is primarily handled at the federal level³⁴⁴. The OAG can nevertheless delegate the prosecution of TCB cases to cantonal prosecution offices under specific circumstances³⁴⁵.

One of the most transformative changes introduced by the SCCP was the redefinition of the prosecutor's role³⁴⁶. To address increasing caseloads and improve procedural efficiency, prosecutors were granted expanded discretionary powers, affording them greater control over pre-trial investigations, the formulation of charges, and decisions concerning case resolution³⁴⁷. As part of this reform, the SCCP introduced “special procedures” to broaden the range of case-disposition options available to prosecutors³⁴⁸. These include the SPO³⁴⁹, designed for routine criminal cases, and the accelerated proceedings, introduced, notably, for facilitating the prosecution of white-collar crimes³⁵⁰.

The broader reform of the Swiss criminal procedure was also accompanied by enhanced communication channels between the Swiss anti-money laundering (AML) reporting system and federal prosecutors, thereby improving the detection of foreign bribery cases³⁵¹. In fact, foreign bribery offences frequently involve a money laundering component to conceal the bribe or its proceeds³⁵². Consequently, it is

³⁴² Gwladys Gilliéron, ‘Wrongful Convictions in Switzerland: A Problem of Summary Proceedings’, *University of Cincinnati Law Review* 80 (2013): 1154; André Kuhn, ‘Procédure ordinaire et droit transitoire : Les risques et les avantages de la procédure pénale unifiée’, in *Procédure pénale Suisse*, eds. Yvan Jeanneret and André Kuhn (Schulthess Verlag, 2010), 3–4.

³⁴³ Gilliéron, ‘Wrongful Convictions in Switzerland’, 1154; Kuhn, ‘Procédure ordinaire et droit transitoire’, 3-4.

³⁴⁴ SCCP Art. 24 para. 1. See also OECD-WGB, ‘Phase 3 Report: Switzerland’, 46.

³⁴⁵ SCCP Art. 25 para. 2.

³⁴⁶ Arn Raphaël and Molango Isoloy, ‘Introduction : Le CPP ou le risque de toute puissance du ministère public’, in: *Dix ans de procédure pénale*, eds. Anne-Sylvie Dupont et André Kuhn (Faculté de droit de l’Université de Neuchâtel/Helbing Lichtenhahn, 2020), 37.

³⁴⁷ *Ibid.* See also Gilliéron, ‘Wrongful Convictions in Switzerland’, 1154.

³⁴⁸ Gilliéron, ‘Wrongful Convictions in Switzerland’, 1154.

³⁴⁹ SCCP Art. 352 ff. It is important to note that SPO procedures are not a novelty of the SCCP, but a mere reflection of several cantonal procedural codes already allowing the settling of minor offences with an SPO. As an example, the canton of Zürich has been settling criminal cases with SPOs since the beginning of the 20th century. For a historical analysis of SPO procedures and their form within cantonal criminal procedural codes, see Marc Thommen, *Kurzer Prozess - fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit*, (Stämpfli, 2013), 46-72.

³⁵⁰ SCCP Art. 358 ff.; Federal Council of Switzerland, ‘Federal Council Dispatch Relating to the Unification of Criminal Procedure Law’, (21 December 2005) (FG 2006 1057), 1279.

³⁵¹ OECD-WGB, ‘Phase 4 Report: Switzerland’, 18.

³⁵² Emilie van der Does de Willebois *et al.*, ‘The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It’ (Stolen Asset Recovery Initiative StAR, 2011), 2–10; David Chaikin and Jason Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Springer, 2009), 21–25.

expected that national AML reporting systems will be able to identify foreign bribery and support ongoing cases³⁵³. The Money Laundering Reporting Office (MROS) serves as Switzerland's AML reporting agency and is responsible for receiving suspicious transaction reports from financial institutions, analysing them, and forwarding them to enforcement authorities³⁵⁴. By defining the OAG as the enforcement authority that addresses transnational crimes through the SCCP, they became the primary recipient of MROS communications, thus enhancing the detection and resolution of foreign bribery cases linked to financial transactions³⁵⁵.

Furthermore, increased economic crime prosecutions in foreign countries have likewise contributed to enhanced crime detection capabilities. Switzerland is a significant global financial centre and a world leader in foreign asset management³⁵⁶. These attributes render the country a potential target for concealing the direct proceeds of bribery³⁵⁷. Consequently, Swiss enforcement authorities frequently receive MLA requests³⁵⁸. Information provided through these channels often leads to initiating foreign bribery investigations by the OAG³⁵⁹.

Within this framework, the first foreign bribery case in Switzerland involving a company was brought against Alstom Network Schweiz AG, a subsidiary of the Alstom group, and resolved by the OAG through an SPO in 2011³⁶⁰. This case marked the first conviction of a company under direct liability provisions outlined in Article 102 paragraph 2 of the SCC³⁶¹. Over time, the use of the SPO procedure became the primary method for addressing TCB, contributing to a steady increase in anti-bribery enforcement actions against companies³⁶². The 2022 TI monitoring report on anti-bribery country

³⁵³ OECD, 'The Detection of Foreign Bribery' (OECD Publishing, 11 December 2017), 84.

³⁵⁴ Federal Office of Police (Fedpol), 'Money laundering' (Fedpol, 28 November 2024): <https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei.html> (Accessed: 25.06.2025); Article 9 of the Federal Act on Combatting Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA), 10 October 1997, SR 955.0.

³⁵⁵ OECD-WGB, 'Phase 4 Report : Switzerland', 18; OAG, 'Rapport de gestion : Rapport établi par le Ministère public de la Confédération sur ses activités au cours de l'année 2014 à l'attention de l'autorité de surveillance' (OAG, 2014), 6.

³⁵⁶ Financial Action Task Force (FATF), 'Anti-money Laundering and Counter-Terrorist Financing Measures. Switzerland: Mutual Evaluation Report' (FATF, December 2016), 21. The Boston Consulting Group (BCG) evaluated that Swiss banks managed over 2 billion US dollars in foreign assets in 2022: BCG, 'Global Wealth Report: Resetting the Course' (BCG, June 2023), 4.

³⁵⁷ OECD-WGB, 'Phase 2 Report: Switzerland', 4.

³⁵⁸ Francesca Bonzanigo and Maria Ludwiczak Glassey, 'La coopération pénale entre la Suisse et les États membres de l'Union Européenne en matière de blanchiment d'argent', *Eucrim* 1 (2022): 45; OECD-WGB, 'Phase 2 Report: Switzerland', 4.

³⁵⁹ OECD-WGB, 'Phase 4 Report: Switzerland', 23.

³⁶⁰ OAG, 'Rapport de gestion : Rapport établi par le Ministère public de la Confédération sur ses activités au cours de l'année 2011 à l'attention de l'autorité de surveillance' (OAG, 2011), 23.

³⁶¹ Martin Hilti, 'Corporate Criminal Liability: Incomplete Legislation, Inadequate Enforcement, Serious Lack of Transparency' (TI Switzerland, Septembre 2020), 12.

³⁶² OECD-WGB, 'Phase 4 Report: Switzerland', 39.

enforcement classified Switzerland as an active enforcer of the OECD-ABC, reflecting significant progress in this area³⁶³. As of 2025, the OAG has secured 12 convictions for TCB offences³⁶⁴.

Further attempts to strengthen the anti-bribery enforcement framework consisted of the 2018 OAG proposal to introduce deferral of indictment procedures akin to DPAs in the UK and the US, as well as France's judicial public interest agreement (*Convention judiciaire d'intérêt public*, CJIP)³⁶⁵. This mechanism would have allowed prosecutions to be discontinued if a company fulfilled agreed-upon compliance obligations, effectively exempting it from a criminal conviction³⁶⁶. The justifications for the proposal included efficiency and expediency in criminal proceedings, facilitated by corporate self-disclosure and self-investigation³⁶⁷. More significantly, the OAG sought to mitigate, via deferral of prosecutions, the "profound collateral damage" that convictions might inflict on Swiss companies, aiming to protect corporate interests and the broader Swiss economy³⁶⁸.

In fact, the proposal intersected with the OAG's 2017 decision to cease abandoning corporate criminal liability proceedings based on Article 53 of the SCC³⁶⁹. This provision allows for resolving criminal proceedings without convictions in cases where the offender repairs the harm caused by the offence³⁷⁰. Its application for TCB cases faced significant domestic and international criticism³⁷¹. Domestically, commentators objected to its predominant use for white-collar and corporate offenders while excluding conventional offenders as potential beneficiaries of such mitigations in the application of criminal law³⁷². Internationally, the OECD-WGB deemed the practice inconsistent with Article 3 of the OECD-ABC, which requires member states to impose effective, proportionate, and dissuasive sanctions on corporate offenders³⁷³. Indeed, the OECD-WGB considered that the secrecy of the process in the absence of trial proceedings, as well as the opacity surrounding the method used to calculate the

³⁶³ TI, 'Exporting Corruption 2022: Assessing Enforcement of the OECD Anti-bribery Convention' (TI, 2022), 4.

³⁶⁴ For a list of convicted companies by the OAG until 2020 according, see Hilti, 'Corporate Criminal Liability'. The quantity of TCB cases is derived from monitoring practices adopted during the research project 'Revamping Anticorruption Criminal Law' (RevACLaw, <https://cordis.europa.eu/project/id/864498/de>, Accessed: 25.06.2025) of which this thesis is part of. A recension of all TCB cases concluded since 2011 was conducted within this context.

³⁶⁵ See generally, OAG, 'Revision der Strafprozessordnung (StPO)'.

³⁶⁶ *Id.*, 2.

³⁶⁷ *Id.*, 3.

³⁶⁸ *Id.*, 1.

³⁶⁹ OAG, 'Rapport de gestion : Rapport établi par le Ministère public de la Confédération sur ses activités au cours de l'année 2017 à l'attention de l'autorité de surveillance' (OAG, 2017), 8.

³⁷⁰ See SCCP Art. 310 for the conditions under which prosecutors can abandon proceedings. See SCC Art. 53 for the conditions under which proceedings can be abandoned if prejudices have been repaired by the offender.

³⁷¹ Katia Villard and Yves Bertossa, 'La Suisse, l'OCDE et la corruption : Enjeux actuels au regard de révisions législatives récentes', *La Semaine Judiciaire (SJ)* II (2020): 158–59; Sonja Pfaum, 'Die Erledigung von Strafverfahren gegen Unternehmen durch Wiedergutmachung: Kritische Bemerkungen zum Ermessensspielraum der Behörden bei der Anwendung von Art. 53 StGB', *GesKR* 2019, no. 1 (2019): 121; OECD-WGB, 'Phase 4 Report: Switzerland', 41-2.

³⁷² Villard and Bertossa, 'La Suisse, l'OCDE et la corruption', 158–59; Pfaum, 'Die Erledigung von Strafverfahren gegen Unternehmen durch Wiedergutmachung', 121.

³⁷³ OECD-WGB, 'Phase 4 Report: Switzerland', 41-2.

reparation owed by the corporate offender, were contrary to the principles of fairness and predictability in the criminal process³⁷⁴.

Ultimately, the Federal Council rejected the DPA proposal on several grounds³⁷⁵. A key objection was the absence of judicial oversight, which Parliament deemed incompatible with principles of procedural fairness and balance of power between the prosecution and the defence in the criminal justice system³⁷⁶. The proposal was also criticised for undermining the fundamental tenets of criminal law, including the principle of deterrence through the threat of criminal sanctions and the requirement that penalties reflect findings of guilt³⁷⁷. The National Council explicitly rejected the notion of allowing defendants to “buy their way out of justice,” viewing this as an unacceptable departure from the principle of equal treatment before the law³⁷⁸.

2.3.3. Summary Penalty Orders

SPOs are simplified criminal procedures that bypass a complete investigation and trial proceeding³⁷⁹. These mechanisms enable the prosecutor to convict and sanction an offender without an indictment or a public hearing, provided certain conditions are satisfied: firstly, the defendant has accepted responsibility for the offence, or their responsibility has been otherwise satisfactorily established; and secondly, a fine, a monetary penalty not exceeding 180 daily penalty units, or a custodial sentence of no more than 6 months is deemed appropriate³⁸⁰. Prosecutors also have the option to impose the forfeiture of assets or an equivalent claim alongside criminal sanctions³⁸¹.

The OAG has exclusively convicted corporate offenders through SPOs³⁸². These proceedings are, nonetheless, aimed at misdemeanours and straightforward offences where the facts of the case can be easily established without complications³⁸³. They were neither conceived nor designed for complex corporate criminal cases such as TCB, in which establishing the facts of the case often poses challenges

³⁷⁴ *Id.*, 41.

³⁷⁵ Federal Council, ‘Federal Council Dispatch Concerning the Amendment of the Criminal Code of Procedure (Implementation of Motion 14.3383 of the Legal Affairs Committee of the Council of States ‘Adaptation of the Criminal Code of Procedure’)’ (28 August 2019) (FG 2019 6351), 6376.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ Raluca Enescu, ‘Wrongful Convictions in Summary Proceedings: A Comparison of Penal Orders in France, Germany and Switzerland’, *Monatsschrift Für Kriminologie Und Strafrechtsreform* 106, no. 3 (2023): 194.

³⁸⁰ SCCP Art. 352 para. 1.

³⁸¹ SCCP Art. 352 para. 2.

³⁸² Hilti, ‘Corporate Criminal Liability’, 15; OECD-WGB, ‘Phase 4 Report: Switzerland’, 82-4. The OAG has, however, initiated a court proceeding against the company Trafigura: OAG, ‘Trafigura Beheer BV and three individuals referred to the Federal Criminal Court’ (OAG, 6 December 2023): <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msge-id-99242.html> (Accessed: 25.06.2025).

³⁸³ Raluca Enescu, ‘Penal Orders and the Role of Prosecutors in Switzerland’, *Journal of Legal Studies “Vasile Goldiş”* 26, no. 40 (2020): 128–29; David Mühlemann, ‘Der (Unzulässige) Strafbefehl Im Abgekürzten Verfahren’, *Recht* 2, (2018): 90; Federal Council, ‘Federal Council Dispatch on the Unification of the Law of Criminal Procedure’, 1272.

and requires the pursuit of full investigations³⁸⁴. However, the sanction imposed on companies under Article 102 of the SCC is necessarily a fine, which creates the opportunity to settle corporate criminal liability cases through SPOs³⁸⁵.

The popularity of SPOs stems from their practical advantages both for the OAG and suspected companies³⁸⁶. With SPOs, prosecutors maintain control over the proceeding until the final sanction has been handed down without judicial intervention³⁸⁷. This affords significant leeway for negotiations and agreements between the prosecutor and corporate defence attorneys³⁸⁸. In an SPO, for example, the company may agree to acknowledge certain facts in exchange for a lesser sanction or to abandon proceedings relative to further suspicions³⁸⁹. Such agreements avoid lengthy investigations in accordance with Switzerland's substantive truth principle³⁹⁰, thereby providing prosecutors with a quick resolution within the statute of limitations period³⁹¹. Companies equally benefit from shortening the impact of criminal proceedings on their business operations and maintaining reputational damages to a minimum by avoiding public trial proceedings³⁹².

An additional advantage of SPOs lies in their ability to streamline and facilitate criminal investigations. These procedures offer a framework that allows for the integration of corporate internal investigations, typically initiated by companies in the wake of allegations³⁹³. Under Article 352 paragraph 1 of the SCCP, prosecutors are authorized to close proceedings via an SPO if the defendant acknowledges the criminal allegations. In this context, internal investigations or self-reporting by the company can be

³⁸⁴ Mégevand, 'Accords hors procès avec des entreprises', 73; Jan Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', in *Unternehmensstrafrecht: Materiellrechtliche und Prozessuale Aspekte*, eds. Marianne Johanna Lehmkuhl and Wolfgang Wohlers (Helbing Lichtenhahn Verlag, 2020), 390.

³⁸⁵ Ursula Cassani, 'Droit pénal économique 2003-2005', 11; Hilti, 'Corporate Criminal Liability', 15.

³⁸⁶ Mégevand, 'Accords hors procès avec des entreprises', 73; Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', 413; Mühlemann, 'Der (Unzulässige) Strafbefehl Im Abgekürzten Verfahren', 89.

³⁸⁷ Mégevand, 'Accords hors procès avec des entreprises', 72; Capus and Brodersen, 'Negotiating without the Victim State', 1264.

³⁸⁸ Mégevand, 'Accords hors procès avec des entreprises', 72-3; Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', 406.

³⁸⁹ Mégevand, 'Accords hors procès avec des entreprises', 61; Nadja Capus and Basilio Nunnari, 'Les faits établis par des accords étrangers et des rapports internes-Une base valide pour une décision pénale Suisse ? Commentaire de l'ordonnance de la Cour des affaires pénales du Tribunal pénal fédéral SK. 2020.49 et de la décision de recours de la Cour des plaintes du Tribunal pénal fédéral BB. 2022.3', *Sui Generis*, 2022, 198.

³⁹⁰ Cf. Art. 6 SCCP.

³⁹¹ Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', 406; Michael Daphinoff, 'Das Strafbefehlsverfahren in Der Schweizerischen Strafprozessordnung' (Schulthess Verlag, 2012), 215.

³⁹² Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', 406; Ursula Cassani, 'Responsabilité(s) pénale(s) de l'entreprise', in *Responsabilité civile - Responsabilité pénale*, eds. Christine Chappuis and Bénédicte Winiger (Schulthess, 2014), 105.

³⁹³ Simon Nadelhofer and Adam El-Hakim, 'Strafrechtliche Selbstanzeige des Unternehmens: Folge einer Internen Untersuchung?', *Jusletter*, no. 22 (2021): 5; Gunhild Godenzi, 'Korruptionsaufklärung durch Unternehmen – Ein Fluchtweg ins Dunkelfeld', in *Korruption in Staat und Wirtschaft*, eds. Jürg-Beat Ackermann and Wolfgang Wohlers (Schulthess Verlag, 2010), 176.

construed as a confession, effectively admitting to the facts of the case³⁹⁴. This allows prosecutors to rely on the company's cooperation to resolve the case efficiently without further investigation³⁹⁵.

Despite these realities, SPOs are not formally regarded as negotiation tools³⁹⁶. These procedural mechanisms are conceived as an "offer" from the state (represented by the prosecutor) to the defendant, allowing them to avoid trial proceedings by accepting the proposed sentence³⁹⁷. Their right to object to this offer remains intact, as the defendant can oppose the proposal and be tried through the ordinary trial procedure³⁹⁸. The offer issued is, however, not the result of a bargaining between the defendant and the public prosecutor, since the defendant's agreement is not required³⁹⁹. The negotiations between prosecutors and corporate defence attorneys that are taking place in practice are thus occurring within an informal setting⁴⁰⁰. In this sense, the negotiated nature of SPO proceedings in corporate criminal liability cases reflects a pragmatic evolution of prosecution practice rather than a process explicitly foreseen by statutory law⁴⁰¹.

Due to these characteristics, SPOs are viewed as non-explicit *de jure* NTRs: the scope and nature of the agreement, as well as the aspects that can be negotiated, are left to the discretion of the parties, as reaching an agreement was not the intended purpose of SPOs⁴⁰². Wenk rightly clarifies that it is challenging to ascertain retrospectively which SPO outcomes result from negotiations⁴⁰³. Conclusions in this regard are difficult to draw due to the lack of transparency in SPO proceedings, the considerable discretionary powers granted to prosecutors to engage in negotiations, and the minimal requirement to justify their decisions⁴⁰⁴.

Anticipating this practice of informal negotiations, legislators introduced the accelerated proceeding with the adoption of the SCCP⁴⁰⁵. These proceedings allow the prosecutor and the defendant to enter negotiations and agree on the facts of the case, the sanction and the potential civil claims during the

³⁹⁴ Wenk, 'Strafbefehle im Unternehmensstrafverfahren', 413-14.

³⁹⁵ *Ibid.*

³⁹⁶ Deborah Hondius, 'Criminalité économique et procédures négociées : Comparaison et état des lieux', *La Semaine Judiciaire (SJ)* II (2021): 242; Wenk, 'Strafbefehle im Unternehmensstrafverfahren', 406.

³⁹⁷ Hondius, 'Criminalité économique et procédures négociées', 406 ; Gwladys Gilliéron and Martin Killias, 'Art. 352 CPP', in eds. Yvan Jeanneret, André Kuhn and Camille Depeursinge Perrier, *Code de procédure pénale suisse : Commentaire romand*, 2nd ed. (2019, Helbing Lichtenhahn Verlag), *ad* SCCP Art. 352 N 1; Gérard Piquerez and Alain Macaluso, *Procédure pénale suisse : Manuel*, ed. 3rd (Schulthess Verlag, 2011), 583.

³⁹⁸ Gilliéron and Killias, 'Art. 352 CPP', *ad* SCCP Art. 352, N 1.

³⁹⁹ *Ibid.*

⁴⁰⁰ Wenk, 'Strafbefehle im Unternehmensstrafverfahren', 406.

⁴⁰¹ *Ibid.*

⁴⁰² Makinwa and Søreide, 'Structured Settlements for Corruption Offences', 18-9. See section 2.1.2 for a definition of *de jure* NTRs.

⁴⁰³ Wenk, 'Strafbefehle Im Unternehmensstrafverfahren', 406.

⁴⁰⁴ *Ibid.* See also generally Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency' for an analysis and discussion on the publicity aspects of SPOs in TCB cases.

⁴⁰⁵ Cf. SCCP Art. 358-362.

pre-trial phase⁴⁰⁶. It ensures certain protections for defendants, notably the prohibition on using their declarations against them in subsequent ordinary proceedings, safeguarding against self-incrimination⁴⁰⁷. Originally designed to formalise negotiations⁴⁰⁸, particularly in complex economic crime cases⁴⁰⁹, the accelerated proceeding was intended to formally address prosecutor-defendant agreements that were already prevalent in practice⁴¹⁰.

However, its use in TCB cases remains limited. TI has observed that although the OAG often initiates criminal proceedings against companies under accelerated proceedings, these cases frequently culminate in SPOs⁴¹¹. The reason behind these circumstances lies in the judicial oversight required in the accelerated proceeding⁴¹². Judges must confirm the defendant's acknowledgement of the facts and ensure the alignment of these facts with the case file⁴¹³. They also assess the proportionality of the proposed sanctions and may reject the agreement if these conditions are not met⁴¹⁴. Importantly, the judge's decision in such cases is final⁴¹⁵. In contrast, SPOs require judicial intervention only when defendants contest the charges or sanctions proposed through the order⁴¹⁶. Since SPOs are typically the result of negotiated agreements between prosecutors and corporate defendants, oppositions to TCB-related SPOs have not occurred to date⁴¹⁷. This absence of opposition prevents judicial scrutiny and allows SPO decisions to gain immediate legal force, equating to a final and binding judgment⁴¹⁸. This procedural simplicity makes SPOs an attractive option for both prosecutors and corporate defendants, offering them greater certainty regarding the outcome of the case⁴¹⁹.

2.4. Anti-Bribery in the UK

This section provides an overview of UK's anti-bribery laws and the enforcement context. Section 2.4.1 explores the legislative framework established under the UK Bribery Act, highlighting the nuances that distinguish it from other international standards, particularly regarding corporate criminal liability and

⁴⁰⁶ SCCP Art. 358 al. 1; Hondius, 'Criminalité économique et procédures négociées', 245-247; Wenk, 'Strafbefehle im Unternehmensstrafverfahren', 396; Bertrand Perrin and Pascal De Preux, 'Art. 356-362', in eds. Jeanneret, Kuhn and Depeursinge Perrier, *Code de procédure pénale suisse : Commentaire romand*, ad Art. 358-362 SCCP N 1.

⁴⁰⁷ Cf. SCCP Art. 362 para. 4. See also Thommen, *Kurzer Prozess – fairer Prozess?*, 180.

⁴⁰⁸ Federal Council of Switzerland, 'Federal Council Dispatch Relating to the Unification of Criminal Procedure Law', 1295.

⁴⁰⁹ Federal Council of Switzerland, 'Federal Council Dispatch Relating to the Unification of Criminal Procedure Law', 1295; Mühlemann, 'Der (unzulässige) Strafbefehl im abgekürzten Verfahren', 85.

⁴¹⁰ Mühlemann, 'Der (unzulässige) Strafbefehl im abgekürzten Verfahren', 85.

⁴¹¹ Martin Hilti, 'Corporate Criminal Liability', 14.

⁴¹² Cf. SCCP Art. 361 para. 1 lit. a.

⁴¹³ Cf. SCCP Art. 361 al. 1 lit. b. The SCCP mandates criminal justice authorities to open and maintain a case file containing all elements of the investigation and mentioning all the procedural acts undertaken: cf. SCCP Art. 100.

⁴¹⁴ Cf. SCCP Art. 361 para. 1 and 3.

⁴¹⁵ Perrin and De Preux, 'Art. 356-362', ad Art. 362 N 8.

⁴¹⁶ Cf. SCCP Art. 354 "Rejection".

⁴¹⁷ This information is derived from monitoring practices adopted during the research project RevACLaw of which this thesis is part of.

⁴¹⁸ Cf. SCCP Art. 354 para 3.

⁴¹⁹ Mühlemann, 'Der (unzulässige) Strafbefehl im abgekürzten Verfahren', 94.

the broader scope of offenses covered. Section 2.4.2 analyses the enforcement practices and challenges faced by UK authorities in policing foreign bribery. Finally, section 2.4.3 introduces DPAs in the UK and examines how these legal tools are used to resolve TCB cases.

2.4.1. The UK Anti-Bribery Law

Implementing the OECD-ABC in the UK proved to be more challenging than in Switzerland. The UK delayed the development of a comprehensive anti-bribery framework due to a perceived lack of urgency in legislating on the matter⁴²⁰. At the time of the OECD-ABC ratification in 1998, the UK Parliament concluded that the existing statutory and common law frameworks conformed with the Convention⁴²¹. There existed, however, definitional contrasts between the OECD-ABC's conception of bribery and that of the UK⁴²². UK law traditionally viewed corruption as an offence of disloyalty tied to a principal-agent relationship⁴²³. To ascertain bribery (foreign or domestic), prosecutors needed to determine whether a breach of trust existed between the "principal" (typically an employer) whose interests required protection, and the "agent" tasked with upholding the principal's interests⁴²⁴. Agents were then exempt from prosecution when the principal consented to the corrupt practices of the former⁴²⁵. This approach contrasted that of the OECD-ABCs, which conceived bribery as a crime directed against fair competition in global markets⁴²⁶.

The UK's approach to bribery offences complicated enforcement and influenced the controversial decision to drop foreign bribery charges against the company BAE Systems, which cited the principal's consent as a justification⁴²⁷. Subsequent revelations indicated that political and economic interests equally influenced the closure of the procedure against the company⁴²⁸. The UK's handling of the BAE Systems case prompted severe criticism from the OECD-WGB, denouncing a breach of Article 5 of the OECD-ABC, which prohibits enforcement decisions influenced by national economic interests or diplomatic concerns⁴²⁹. Facing pressure from the international community, the UK revised its anti-

⁴²⁰ Peter Yeoh, 'The UK Bribery Act 2010: Contents and Implications', *Journal of Financial Crime* 19, no. 1 (2011): 37–40.

⁴²¹ OECD-WGB, 'Review of Implementation of the Convention and 1997 Recommendation Phase 1 Report: United Kingdom' (OECD Publishing, 8 September 1999), 1.

⁴²² Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', 124; Peter Alldridge, 'The UK Bribery Act: The Caffeinated Younger Sibling of the FCPA', *Ohio State Law Journal* 73 (2012): 1191.

⁴²³ Alldridge, 'The UK Bribery Act', 1191; Nick Kochan and Robin Goodyear, 'British Bribery Legislation: How the UK Bribery Act Came About', in *Corruption*, by Nick Kochan and Robin Goodyear (Palgrave Macmillan UK, 2011), 64, 66.

⁴²⁴ Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement', 40; Alldridge, 'The UK Bribery Act', 1191.

⁴²⁵ Alldridge, 'The UK Bribery Act', 1191.

⁴²⁶ Joint Committee on the Draft Corruption Bill, 'Draft Corruption Bill: Report together with formal minutes, oral and written evidence', Paper 157, HC705 (17 July 2023), 30; Liz Campbell, "'Corruption by Organised Crime" - A Matter of Definition?', *Current Legal Problems* 69, no. 1 (2016): 129; Alldridge, 'The UK Bribery Act', 1198.

⁴²⁷ For a description and analysis of the BAE Systems case, see Alldridge, 'The UK Bribery Act', 1193–198.

⁴²⁸ Heimann and Pieth, *Confronting Corruption*, 88; Kochan and Goodyear, 'British Bribery Legislation', 67.

⁴²⁹ OECD, 'OECD to conduct a further examination of UK efforts against bribery' (OECD Media Relations, 14 March 2007): [https://one.oecd.org/document/PAC/COM/NEWS\(2007\)4/en/pdf](https://one.oecd.org/document/PAC/COM/NEWS(2007)4/en/pdf) (Accessed: 25.06.2025).

bribery legislation by introducing the Bribery Act 2010 (UKBA)⁴³⁰. This new anti-bribery legislation abandoned the conception of bribery as a breach of duty in favour of an intentional act seeking to induce improper conduct, consistent with the definitional provisions of the OECD-ABC⁴³¹.

Section 6 of the UKBA explicitly criminalises the act of bribing foreign public officials and applies to both individuals and corporate entities⁴³². It prohibits any offer, promise, or provision of an undue advantage to a foreign public official, whether directly or through intermediaries, when made with the intent to influence the official in the performance of their functions⁴³³. This formulation aligns closely with the definition of foreign bribery set out in the OECD-ABC and the corresponding provision in the SCC⁴³⁴. The UKBA situates the offence within the context of commercial transactions by requiring that the undue advantage be conferred with the purpose of obtaining or retaining business⁴³⁵. The Act broadly defines a foreign public official as any individual who holds a legislative, administrative, or judicial position in a foreign state, performs public functions for such a state or for a public agency or enterprise, or serves a public function for an international organisation⁴³⁶. In addition to the specific foreign bribery offence under section 6, a corporate entity involved in TCB may also be prosecuted under the general offence of active bribery as provided in section 1 of the UKBA⁴³⁷. Like section 6, this general offence encompasses the conduct of offering, promising, or giving a bribe⁴³⁸.

A significant novelty of the bribery legislation lies in its introduction of the offence of failure to prevent bribery in section 7 UKBA⁴³⁹. This section creates a specific corporate offence for failing to prevent associated corporate persons (employees, agents, subsidiaries or other persons performing services for the company) of bribing with the intention of retaining or obtaining business and other advantages for the company⁴⁴⁰. Provided that the underlying bribery offence has taken place and can be proven, charging a company for a section 7 of the UKBA offence is possible, absent prosecutions of implicated associated persons⁴⁴¹. Attached to this is, however, a complete defence exonerating the company of any

⁴³⁰ Yeoh, 'The UK Bribery Act 2010', 24; Cf. Bribery Act 2010, c. 23.

⁴³¹ Campbell, "'Corruption by Organised Crime" - A Matter of Definition?', 129; Alldridge, 'The UK Bribery Act', 1198.

⁴³² Cf. UKBA s. 6 in conjunction with s. 12 ss. 5 and 4.

⁴³³ Cf. UKBA s. 6.

⁴³⁴ See section 2.1.1 for the OECD provision on foreign bribery and section 2.2.1 for the Swiss definition of this offence.

⁴³⁵ Cf. UKBA s. 6 ss. 2.

⁴³⁶ Cf. UKBA s. 6 ss. 5.

⁴³⁷ Cf. UKBA s. 14 ss. 1.

⁴³⁸ Cf. UKBA s. 1.

⁴³⁹ Shabir Korotana, 'The Corporate 'Failure to Prevent' Principle in the UK Bribery Act 2010: Philosophical Foundations of Economic Crime', *Statute Law Review* 45, no. 1 (2024): 5; MoJ, 'The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)', (Ministry of Justice, 2011), 6; Bob Sullivan, 'Reformulating Bribery: A Legal Critique of the Bribery Act 2010', in *Modern Bribery Law. Comparative Perspectives*, eds. Jeremy Horder and Peter Alldridge, (Cambridge University Press, 2013), 15; Celia Wells, 'Corporate Crime: Opening the Eyes of the Sentry', *Legal Studies* 30, no. 3 (2010): 387.

⁴⁴⁰ Cf. UKBA s. 7 ss. 1 in conjunction with s. 8.

⁴⁴¹ Deirdre Ahern, 'Corporate Law and Statutory Liability', in *Research Handbook on Corporate Liability*, eds. Martin Petrin and Christian Witting (Edward Elgar Publishing, 2023), 74.

wrongdoing, if it can prove that “adequate procedures” were in place during the commission of the act⁴⁴². The failure to prevent is thus not officially a strict liability offence, as no offence is committed if adequate measures are proven to have been in place⁴⁴³. Consequently, the UKBA creates a new form of criminal liability that targets the omission of ensuring reasonable precautions for preventing bribery⁴⁴⁴.

With regard to the notion of “adequate procedures,” the Ministry of Justice (MoJ) has issued general guidelines intended to assist companies in understanding the measures that may be considered sufficient to prevent bribery⁴⁴⁵. These guidelines highlight several key components of effective compliance programmes, including management commitment, risk assessment, due diligence and employee training⁴⁴⁶. Evaluations of what constitutes “adequate procedures” are, however, made on a case-by-case basis, rendering the concept inherently indeterminate⁴⁴⁷. Despite this ambiguity, the statutory framework under the UKBA introduces a reversal of the burden of proof in relation to the failure to prevent offence: the defendant company is responsible for demonstrating that adequate procedures were in place at the time of the offence to avoid liability if allegations of bribery arise⁴⁴⁸.

Section 7 of the UKBA aimed to create an exception to the standard model of corporate criminal liability in the UK, based on intent and considered to contribute to the difficulties in prosecuting corporate entities⁴⁴⁹. For offences requiring intent, such as bribery, the liability of corporate entities can be established only if the fault element of the offence can be attributed to the individual representing the “directing mind and will” of the company⁴⁵⁰. The inadequacies of this principle, known as the “identification doctrine”, render prosecuting corporate offenders particularly difficult, especially considering the diffused decision-making powers in contemporary MNCs⁴⁵¹. The identification doctrine has been widely criticised for failing to align with the complexities of modern corporate decision-making, which is often driven by established policies and procedures rather than the actions of a single individual⁴⁵². This principle reduces the legal identity of a company to the actions or attributes of a single senior individual. In this sense, it fails to account for the organisational complexity, operational

⁴⁴² Cf. UKBA s. 7 ss. 2.

⁴⁴³ Korotana, ‘The Corporate ‘Failure to Prevent’ Principle in the UK Bribery Act 2010’, 16-7.

⁴⁴⁴ Korotana, ‘The Corporate ‘Failure to Prevent’ Principle in the UK Bribery Act 2010’, 16-7; Liz Campbell, ‘Corporate Liability and the Criminalisation of Failure’, *Law and Financial Markets Review* 12, no. 2 (3 April 2018): 59.

⁴⁴⁵ See generally MoJ, ‘The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing’.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Lord and Broad, ‘Corporate Failures to Prevent Serious and Organised Crimes’, 38; Campbell, ‘Corporate Liability and the Criminalisation of Failure’, 61.

⁴⁴⁸ Cf. UKBA s. 7 ss. 2.

⁴⁴⁹ Ahern, ‘Corporate Law and Statutory Liability’, 8-9; The Law Commission, ‘Reforming Bribery’, Law Com No 313 (The Stationery Office, 19 November 2008), 103.

⁴⁵⁰ Korotana, ‘The Corporate ‘Failure to Prevent’ Principle in the UK Bribery Act 2010’, 9.

⁴⁵¹ The Law Commission, ‘Reforming Bribery’, 102; For a critical overview of the identification doctrine, see Neil Cavanagh, ‘Corporate Criminal Liability: An Assessment of the Models of Fault’, *The Journal of Criminal Law* 75, no. 5 (1 October 2011), 416-21.

⁴⁵² Cavanagh, ‘Corporate Criminal Liability: An Assessment of the Models of Fault’, 418.

scale, and institutional continuity of MNCs, which cannot be adequately represented by the conduct of any one person⁴⁵³.

Another reason for introducing the failure to prevent bribery was to encourage the prevention of bribery by the corporate offenders themselves. The law commission constituted for reforming the UK anti-bribery legislative framework recognised that companies are in the best position to prevent bribery within their remit⁴⁵⁴. Consequently, UK legislators sought to promote ethical corporate cultures⁴⁵⁵ by providing a defence of adequate procedures. As Korotana argues, the failure to prevent offences is linked to a positive duty of companies to establish and maintain ethical working policies and procedures⁴⁵⁶.

2.4.2. Enforcement Context

The Serious Fraud Office (SFO) serves as the primary enforcement authority for TCB cases in the UK, alongside various other agencies involved in combating foreign bribery⁴⁵⁷. Established under the Criminal Justice Act 1987 (CJA)⁴⁵⁸, the SFO operates as a multi-functional body responsible for detecting, investigating, and prosecuting serious fraud cases⁴⁵⁹. It operates under the so-called “Roskill model” which enables investigators and prosecutors to collaborate from the outset of an investigation, enhancing efficiency and coordination⁴⁶⁰. Additionally, the SFO wields significant statutory powers under section 2 of the CJA, granting the authority to search property, compel individuals to answer questions, and produce documents⁴⁶¹.

The enforcement of UK anti-bribery laws against corporate entities remained relatively inactive until the mid-2010s, with only two documented company convictions through guilty pleas⁴⁶²: Mabey & Johnson, convicted in 2009 and Innospec convicted in 2010⁴⁶³. Despite these realities, the UK, much

⁴⁵³ *Ibid.*

⁴⁵⁴ The Law Commission, 'Reforming Bribery', 99.

⁴⁵⁵ Ahern, 'Corporate Law and Statutory Liability', 9; Lord and Broad, 'Corporate Failures to Prevent Serious and Organised Crimes', 38; Campbell, 'Corporate Liability and the Criminalisation of Failure', 59.

⁴⁵⁶ Korotana, 'The Corporate 'Failure to Prevent' Principle in the UK Bribery Act 2010', 9.

⁴⁵⁷ Cf. UKBA s. 10 ss. 1; OECD-WGB, 'Implementing the OECD Anti-Bribery Convention Phase 4 Report: United Kingdom' (Paris: OECD Publishing, 11 May 2017), 28; Her Majesty's Government (HM Government), 'UK Anti-Corruption Plan' (HM Government December 2014), 38.

⁴⁵⁸ Criminal Justice Act 1987 (CJA) c. 38.

⁴⁵⁹ Cf. CJA s. 1; Gary Jonas Fooks, 'The Serious Fraud Office: A Political History' (PhD Thesis, University of Southampton, 1997), 70.

⁴⁶⁰ Cf. CJA s. 1 ss. 3 ff. While the task of prosecuting crimes in the UK is solely within the remits of prosecuting services, detecting and investigating crimes is the competence of the police force. Under the Roskill model, the SFO is afforded investigative and prosecution competencies. For a description and review of the Roskill model, see generally Michael Levi, 'Reforming the Criminal Fraud Trial: An Overview of the Roskill Proposals', *Journal of Law and Society* 13, no. 1 (1986): 117–30.

⁴⁶¹ Cf. CJA s. 2.

⁴⁶² OECD-WGB, 'Phase 3 Report: United Kingdom', 8.

⁴⁶³ OECD-WGB, 'Phase 3 Report: United Kingdom', Annexe 4.

like Switzerland, is regarded as vulnerable to TCB according to the OECD-WGB⁴⁶⁴. Indeed, UK-based MNCs lead in multiple sectors susceptible to bribery, such as defence, extractive industries, telecommunications, pharmaceuticals, and engineering⁴⁶⁵.

The UK's slow progress in addressing TCB offences stemmed from procedural hurdles, limited resources and challenges in establishing corporate criminal liability⁴⁶⁶. Procedural barriers revolved around the prosecutor's disclosure obligations in criminal cases, which can be time- and resource-consuming in complex foreign bribery cases⁴⁶⁷. Prosecutors must pursue all reasonable lines of inquiry and document and retain all relevant material, while also meeting the legal requirements pertaining to material-disclosure to the defence⁴⁶⁸. Disclosure obligations extend to both materials supporting the prosecutor's case ("used material") and those that may undermine it or aid the defence ("unused material")⁴⁶⁹. Regarding the latter, the prosecution is compelled to adopt the perspective of the defence, reviewing, assessing and scheduling for potential release each document as if acting on behalf of the defendant⁴⁷⁰. In practice, fulfilling these obligations presents significant challenges for the SFO, particularly considering the vast volumes of digital data generated in modern economic crime investigations⁴⁷¹, and diverts resources away from investigative efforts⁴⁷². The 2024 Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) oversight report has found that the practical hurdles of disclosure requirements, coupled with insufficient resourcing, technological limitations, and high staff turnover, has led to procedural delays, adjournments, and even the collapse of high-profile prosecutions⁴⁷³.

⁴⁶⁴ OECD-WGB, 'Phase 3 Report: United Kingdom', 7.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ OECD-WGB, 'Phase 3 Report: United Kingdom', 59; Jessica De Grazia, 'Review of the Serious Fraud Office' (UK Parliament, June 2008), 63-4; OECD-WGB, 'Report on the Application of the Convention On Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions Phase 2 Report: United Kingdom' (OECD Publishing, 17 March 2005), 64-65.

⁴⁶⁷ OECD-WGB, 'Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions Phase 2bis Report: United Kingdom' (OECD Publishing, 18 October 2008), 58-59.

⁴⁶⁸ For disclosure requirements in general, see Criminal Procedure and Investigations Act 1996 (CPIA) c. 25 (Part I "Disclosure"). For the disclosure and material recording ("scheduling") process, as well as the specific disclosure duties, see MoJ, 'CPIA Code of Practice' (MoJ, March 2015), paras. 3.5, 4.1-4.4, 5.1-5.6.

⁴⁶⁹ For an analysis of disclosure requirements in the UK and a critical overview of prosecutorial obligations to disclose unused material, see Maro Polykarpou, 'Prosecutorial and Police Disclosure Ethics in Criminal Evidence Review in the UK and the US. A Comparative Account', *Criminal Justice Ethics* 41, no. 1 (2022): 48-49, 56-57.

⁴⁷⁰ De Grazia, 'Review of the Serious Fraud Office', 80-1. For a review of the legal requirements related to the management of unused material in criminal cases, see Jonathan Fischer KC, 'Disclosure in the Digital Age: Independent Review of Disclosure and Fraud Offences' (Secretary of State for the Home Department, March 2025), 43-77.

⁴⁷¹ Fischer KC, 'Disclosure in the Digital Age', 4-5; Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), 'Serious Fraud Office – Disclosure: An inspection of the handling and management of disclosure in the Serious Fraud Office' (HMCPSI, April 2024), 17-8, 109-08.

⁴⁷² OECD-WGB, 'Phase 3 Report: United Kingdom', 59; De Grazia, 'Review of the Serious Fraud Office', 81-2.

⁴⁷³ HMCPSI, 'Serious Fraud Office – Disclosure', 43-61.

Effective disclosure management is further impeded by persistent underfunding of SFO⁴⁷⁴. According to OECD-WGB findings, the SFO's budget remains disproportionately low compared to other UK enforcement agencies, limiting its ability to manage disclosure obligations effectively⁴⁷⁵. In some cases, these resource constraints have led to halting investigations prematurely⁴⁷⁶.

Another significant barrier relates to the challenges of prosecuting companies under the UK's traditional corporate criminal liability framework⁴⁷⁷. As discussed in the previous section (2.3.2), ascertaining corporate criminal liability relied on identifying the "controlling mind", an individual within the company who possessed the requisite *mens rea* for the alleged offence. This approach proved problematic given the decentralised and dispersed decision-making structures of modern MNCs⁴⁷⁸.

Because of these difficulties, the SFO, like the Swiss OAG, favoured negotiation and settlement when managing TCB cases⁴⁷⁹. They were addressed through Civil Recovery Orders (CROs), a civil law mechanism established by the Proceeds of Crime Act 2002 (POCA)⁴⁸⁰, which enables law enforcement authorities to undertake proprietary actions to recover the proceeds of criminal activity without necessarily opening criminal proceedings⁴⁸¹. The advantage of such proceedings lies in their ability to facilitate a negotiated resolution between prosecutors and corporate suspects regarding the amount of the financial order and other settlement terms, without judicial intervention⁴⁸². This process offers both parties a degree of procedural efficiency and legal certainty concerning the outcome⁴⁸³. The CRO approach adopted by the SFO was, however, explicitly criticised by the OECD-WGB for its lack of transparency⁴⁸⁴. CROs enter into effect without any indications about the factual and legal basis for the financial order, consequently precluding potential assessments of the proportionality and fairness of the fines issued⁴⁸⁵.

⁴⁷⁴ HMCPSP, 'Serious Fraud Office – Disclosure', 109-08; OECD-WGB, 'Phase 2bis Report: United Kingdom' (OECD Publishing, 18 October 2008), 59–62.

⁴⁷⁵ OECD-WGB, 'Phase 2bis Report: United Kingdom', 59.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ OECD-WGB, 'Phase 3 Report: United Kingdom', 102-03; House of Lords and House of Commons, 'Draft Bribery Bill', vol. I, HL Paper 115-I, HC 430-I (Joint Committee on the Draft Bribery Bill, 16 July 2009), 31; The Law Commission, 'Reforming Bribery', 102-03.

⁴⁷⁸ House of Lords and House of Commons, 'Draft Bribery Bill', 31.

⁴⁷⁹ OECD-WGB, 'Phase 3 Report: United Kingdom', 22.

⁴⁸⁰ Proceeds of Crime Act 2002 c. 29.

⁴⁸¹ Cf. POCA s. 276 ss. 1. For an overview of the CRO process and an of criminal cases involving MNCs resolved through CROs, see King and Lord, 'Negotiated Justice', 38-66.

⁴⁸² Cf. S. 276 ss. 1 POCA. See also, OECD-WGB, 'Phase 3 Report: United Kingdom', 22-3.

⁴⁸³ The preference towards a civil rather than criminal resolve for TCB cases was expressly addressed by 2009 the official SFO policy on the matter, encouraging companies to self-report with the prospect of reaching an agreement via CROs: SFO, 'Approach of the Serious Fraud Office to Dealing with Overseas Corruption' (July 2009): https://www.millerchevalier.com/sites/default/files/resources/uk_sfo_guidance.pdf.

⁴⁸⁴ OECD-WGB, 'Phase 3 Report: United Kingdom', 21-4, 64-73.

⁴⁸⁵ *Id.*, 22-24.

To address the lack of effective responses to corporate economic crimes, the UK introduced DPAs for corporate offenders in 2014⁴⁸⁶. Drawing inspiration from the US approach, the MoJ justified the introduction of DPAs with several key arguments⁴⁸⁷. First DPAs were argued to provide a suitable alternative in contrast to the existing UK enforcement mechanisms, which offered limited options for prosecuting authorities⁴⁸⁸. Prosecutors could either pursue a criminal prosecution against corporate offenders or, where appropriate, utilise CROs⁴⁸⁹. This binary approach lacked the flexibility necessary to effectively address complex corporate misconduct⁴⁹⁰. Indeed, criminal prosecutions often encountered significant evidentiary barriers due to the identification principle⁴⁹¹. In contrast, victim compensation and the ability to address defective compliance structures were of limited scope when addressing corporate crime through CROs⁴⁹². Against this backdrop, DPAs were considered as a pragmatic solution to bridge the enforcement gap and provide prosecutors with additional tools enabling more effective responses to corporate wrongdoing⁴⁹³.

Second, the MoJ identified opportunities to reduce enforcement resources by incentivising companies to cooperate with prosecutors through DPAs⁴⁹⁴. Without the assurance of avoiding conviction or debarment, companies hesitated to self-report or assist with state-led investigations⁴⁹⁵. This lack of cooperation was viewed as a barrier to uncovering wrongdoing and punishing individual offenders⁴⁹⁶. In contrast, DPAs provided an efficient opportunity, allowing for quicker resolutions while avoiding convictions and thus providing incentives for corporate cooperation⁴⁹⁷.

Third, a further justification for introducing DPAs stemmed from the issue of forum shopping⁴⁹⁸. The US DPA framework provided significant advantages for companies, placing the UK at a competitive disadvantage in attracting corporate cooperation and, consequently, successfully prosecuting corporate

⁴⁸⁶ DPAs were introduced by schedule 17 of the CCA, which entered into force on the 24th of February 2014.

⁴⁸⁷ MoJ, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations'.

⁴⁸⁸ MoJ, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations', 8-9.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² MoJ, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations', 12.

⁴⁹³ *Id.*, 9

⁴⁹⁴ *Id.*, 10-2.

⁴⁹⁵ *Ibid.* Companies convicted of participating in criminal organisations, corruption, fraud and money laundering are subject to debarment according to Art. 45 of the European Union's (EU) Directive 2004/18/EC (implemented by Regulation 23 of the Public Contract Regulations 2006, Regulation 23 in the UK), effectively limiting their possibilities to participate in UK an EU public tenders.

⁴⁹⁶ *Id.*, 10-1.

⁴⁹⁷ *Id.*, 12.

⁴⁹⁸ *Id.*, 11-2. For a discussion of the issue of forum shopping in transnational enforcement, see generally Sara George, Alan Ward, and Richard McGarry, 'Deferred Prosecution Agreements - in Jeopardy of Falling Short?', *Business Law International* 15, no. 2 (2014): 118-22. See also section 2.2.2 for a discussion of forum shopping issues in the Swiss enforcement context.

actors for TCB offences⁴⁹⁹. Without a comparable tool, companies often opted to engage with US authorities, sidelining UK prosecution efforts due to double jeopardy constraints⁵⁰⁰. The MoJ thus considered that UK DPAs would encourage earlier and closer cooperation between foreign counterparts, enabling the settling of TCB cases through global resolutions⁵⁰¹.

Indeed, following the introduction of DPAs, the SFO reached global resolutions with the US to settle TCB allegations against Rolls-Royce and with France and the US regarding TCB allegations against Airbus⁵⁰². The SFO further recognised the added value of these mechanisms by citing the voluntary corporate disclosure of criminal conduct to authorities as the primary source of detection for foreign bribery offences⁵⁰³. In contrast, detection through the UK's AML framework is limited in this context, unlike Switzerland⁵⁰⁴.

2.4.3. Deferred Prosecution Agreements

Schedule 17 of the Crime and Courts Act 2013 (CCA) defines DPAs as an agreement between the prosecutor and a corporate entity against whom the former is considering prosecuting for an offence⁵⁰⁵. These instruments are available only for a specific set of offences, including foreign bribery⁵⁰⁶. DPA proceedings can be initiated by the Director of Public Prosecutions and the SFO and are only available for corporate entities, excluding individual offenders⁵⁰⁷. The prosecutor is required to formally indict the defendant company⁵⁰⁸. However, the indictment is immediately suspended for the benefit of reaching an agreement⁵⁰⁹. In this process, the facts of the case, their legal qualification, and the consequences of the offence are negotiated and determined jointly between the prosecutor and the defendant company⁵¹⁰.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² Serious Fraud Office v. Rolls-Royce PLC and Rolls-Royce Energy Systems INC, Southwark Crown Court, case no. U20170036 (17 January 2017); Serious Fraud Office v. Airbus SE, Southwark Crown Court, case no. U20200108 (31 January 2020).

⁵⁰³ OECD-WGB, 'Phase 4 Report: United Kingdom', 16.

⁵⁰⁴ *Id.*, 21-2. See section 2.2.2 for the Swiss enforcement context.

⁵⁰⁵ Cf. CCA sch. 17 s. 1 ss. 1.

⁵⁰⁶ Cf. CCA sch. 17 s. 15 ff.

⁵⁰⁷ Cf. CCA sch. 17 s. 4 ss. 1.

⁵⁰⁸ Cf. CCA sch. 17 s. 2 ss. 1, 2.

⁵⁰⁹ *Ibid.*

⁵¹⁰ SFO and the Crown Prosecution Service (CPS), 'Deferred Prosecution Agreements Code of Practice' (DPA Code) (SFO and CPS, 2013), paras. 6 ff, 7 ff, 8 ff.

There is significant prosecutorial discretion regarding the appropriateness of a DPA⁵¹¹. The Deferred Prosecution Agreement Code of Practice (DPA Code) emphasises that the decision to offer a DPA is at the discretion of the prosecutor⁵¹², indicating that corporate offenders do not have the right to request such an arrangement⁵¹³. However, the DPA Code encourages prosecutors to consider public interest factors when deciding whether to extend an invitation to negotiate⁵¹⁴. These factors include but are not limited to the seriousness of the offence, where greater severity weighs against the appropriateness of a DPA, the existence of any prior misconduct or a history of similar offending from the defendant, the extent of the company's cooperation with the investigation, and whether a conviction would lead to disproportionate collateral consequences for the organisation or the broader public⁵¹⁵. Considering these characteristics, DPAs can be understood as explicit *de jure* settlement mechanisms in which prosecutorial discretion is structured by rules and guidelines that determine how such discretion should be exercised⁵¹⁶.

Significant importance is placed on corporate cooperation for entities seeking to benefit from a DPA, as outlined in both the DPA Code and additional guidelines provided by the SFO⁵¹⁷. In his 2014 address at the Anti-Corruption in Oil & Gas Conference, Alford QC, who served as the then Joint Head of Fraud at the SFO, emphasised that the SFO's decision to pursue a DPA will largely hinge on the level of corporate cooperation involved⁵¹⁸. He further noted that the required type of cooperation will vary according to the specific circumstances of each case⁵¹⁹. Notwithstanding, to provide further guidance for companies, the SFO has outlined various forms of cooperation that it considers desirable, including the identification of potential witnesses and the waiver of attorney-client privilege for relevant documents⁵²⁰. Importantly, self-reporting and self-investigation have been consistently highlighted as essential prerequisites for entering into DPAs⁵²¹, which are also considered in the DPA Code⁵²². However, the approval of the Rolls-Royce DPA in 2017 significantly modified these expectations, as

⁵¹¹ DPA Code para. 2.1. See also Costantino Grasso, 'Peaks and Troughs of the UK Deferred Prosecution Agreement: The Lesson Learned from the First-Ever DPA between the SFO and ICBC SB PLC', *Journal of Business Law*, no. 223 (2016): 395–96.

⁵¹² *Ibid.*

⁵¹³ Grasso, 'Peaks and Troughs of the UK Deferred Prosecution Agreement', 395.

⁵¹⁴ DPA Code Para. 2.7 ff.

⁵¹⁵ *Ibid.*

⁵¹⁶ For a definition of explicit *de jure* settlements, see Makinwa and Søreide, 'Structured Settlements for Corruption Offences', 18–9..

⁵¹⁷ Cf. DPA Code para. 2.1; SFO, 'Corporate Co-operation Guidance' (SFO, 6 August 2019).

⁵¹⁸ Stuart Alford QC, 'Enforcing the UK Bribery Act - The UK Serious Fraud Office's Perspective' (Speech at the Anti-Corruption in Oil & Gas Conference 2014): <https://www.sfo.gov.uk/2014/11/17/stuart-alford-qc-enforcing-uk-bribery-act-uk-serious-fraud-offices-perspective/> (Accessed: 25.06.2025).

⁵¹⁹ *Ibid.*

⁵²⁰ SFO, 'Corporate Co-operation Guidance'.

⁵²¹ SFO, 'Corporate Self Reporting' (SFO, October 2012); Hawley, King, and Lord, 'Justice for Whom?', 324; House of Lords, Select Committee on the Bribery Act 2010, 'The Bribery Act 2010: post-legislative scrutiny', HL Paper 303 (House of Lords, 4 March 2019), 77.

⁵²² Cf. DPA Code para. 2.9.1–2.9.3.

the lack of voluntary disclosure from the defendant was not deemed a barrier to the conclusion of the agreement⁵²³.

DPAAs contain a defined set of terms, the content and scope of which are determined at the discretion of the parties involved⁵²⁴. Neither the prosecutor nor the corporate entity is under an obligation to accept any specific terms, given that the DPA agreement is entered into on a voluntary basis⁵²⁵. Nevertheless, they usually consist of a combination of requirements for the company, such as a financial order, the establishment of a compliance program and further cooperation with an official investigation⁵²⁶. A period is set for the accomplishment of these agreements during which the prosecution is deferred⁵²⁷. The criminal proceedings are discontinued once this period has elapsed, provided the obligations have been met⁵²⁸. No subsequent charges for the same conduct can be brought unless it is established that the company intentionally provided misleading or incomplete information⁵²⁹. The amount of the financial penalty under a DPA is equally determined through negotiations between the prosecutor and the corporate entity⁵³⁰. However, the agreed sum should be broadly comparable to the fine that a court would have imposed following a conviction secured through a guilty plea⁵³¹.

Although the decision to enter into a DPA lies with the prosecutor, it remains subject to judicial approval⁵³². This characteristic distinguishes UK DPA proceedings from those in the US, which provide for little to no judicial involvement⁵³³. The inclusion of the judiciary in the UK model partly reflects institutional and normative concerns raised by earlier attempts to resolve corporate crime cases through negotiated settlements without sufficient judicial oversight⁵³⁴. High-profile cases such as Innospec and BAE Systems generated significant backlash after prosecutors sought to present pre-negotiated plea agreements to the courts for formal endorsement⁵³⁵. In Innospec, for instance, Thomas LJ strongly rejected any arrangement that would relegate the court to a mere ratifying body, insisting on the judiciary's responsibility to rigorously scrutinise plea arrangements in open court to ensure transparency

⁵²³ Serious Fraud Office v Rolls-Royce PLC, Rolls-Royce Energy Systems INC, Southwark Crown Court, case no. U20170036 (17 January 2017), para. 22.22. See also Hawley, King, and Lord, 'Justice for Whom?', 324.

⁵²⁴ Cf. CCA sch.17 s. 5 ss. 3.

⁵²⁵ DPA Code para. 3.3.

⁵²⁶ SFO and the Crown Prosecution Service (CPS), 'Deferred Prosecution Agreements Code of Practice' (hereafter: DPA Code) (SFO and CPS, 2013), paras. 7.8, 7.10.

⁵²⁷ Cf. CCA sch. 17 s. 5 ss. 2.

⁵²⁸ Cf. CCA sch. 17 s. 11.

⁵²⁹ Cf. CCA sch. 17 s. 11 ss. 3 lit. a, b.

⁵³⁰ Cf. CCA sch. 17 s. 5 ss. 3.

⁵³¹ Cf. CCA sch. 17 s. 5 ss. 4.

⁵³² Cf. CCA sch. 17 s. 7, 8. See also Frederick T. Davis, 'Judicial Review of Deferred Prosecution Agreements: A Comparative Study', *Columbia Journal of Transnational Law* 60 (2021): 37–39.

⁵³³ For a comparative analysis of the nature and scope of judicial oversight in UK and US DPAs, see Davis, 'Judicial Review of Deferred Prosecution Agreements', 13–45.

⁵³⁴ Alldridge, 'Bribery and the Changing Pattern of Criminal Prosecution', 234–38.

⁵³⁵ Alldridge, 'Bribery and the Changing Pattern of Criminal Prosecution', 230, 237–38.

and to uphold the public interest⁵³⁶. These events underscored the need to safeguard prosecutorial discretion from appearing overly accommodating toward corporate defendants and ultimately informed the architecture of the DPA framework⁵³⁷.

Against this background, the DPA statutory framework requires the prosecutor to apply to the Crown Court for a preliminary hearing, during which the judge assesses whether the proposed agreement is in the interests of justice and whether its terms are fair, reasonable, and proportionate⁵³⁸. The CCA does not define the concept of the “interests of justice”, thereby leaving its interpretation to judicial discretion on a case-by-case basis⁵³⁹. In the first UK DPA concluded between the Serious Fraud Office and Standard Bank PLC, Leveson LJ expressly referred to the public interest factors outlined in the DPA Code when determining whether the proposed agreement satisfied the statutory interests of justice requirement. Subsequent judicial approvals of DPAs have followed this precedent, effectively establishing the DPA Code’s public interest criteria as a guiding framework for interpreting the “interests of justice” under section 7 of the CCA. With respect to the assessment of fairness, reasonableness, and proportionality, the rationale behind judicial involvement is to ensure transparency and to prevent the risk of collusive or overly lenient agreements being reached between prosecutors and companies⁵⁴⁰. This safeguard also serves to place a check on the exercise of prosecutorial discretion⁵⁴¹.

Once an agreement has been reached, the prosecutor and the company then apply for a second and final approval by the Crown Court⁵⁴². During this final hearing, the court establishes whether the now concluded DPA is in the interest of justice and whether the terms are fair, reasonable and proportionate⁵⁴³. The reasons for approving the DPA are given in open court⁵⁴⁴, which according to the MoJ ensures transparency and openness in these proceedings⁵⁴⁵.

⁵³⁶ Cf. *Regina v. Innospec Ltd*, Southwark Crown Court, case no. EW Misc 7 (19 March 2010), para. 36; Alldridge, ‘Bribery and the Changing Pattern of Criminal Prosecution’, 237-38.

⁵³⁷ Alldridge, ‘Bribery and the Changing Pattern of Criminal Prosecution’, 230.

⁵³⁸ Cf. CCA sch. 17 s. 7. The Crown Court is the first instance court for all proceedings on indictment. Cf. Senior Courts Act 1981 c. 54 s. 45, 46.

⁵³⁹ Lord, ‘Prosecution Deferred, Prosecution Exempt’, 852; Davis, ‘Judicial Review of Deferred Prosecution Agreements’, 42-3; Michael Bisgrove and Mark Weekes, ‘Deferred Prosecution Agreements: A Practical Consideration’, *Criminal Law Review* 6 (2014): 429-30.

⁵⁴⁰ MoJ, ‘Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations’, 21. See also Bisgrove and Weekes, ‘Deferred Prosecution Agreements’, 430-31.

⁵⁴¹ Qingxiu Bu, ‘The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance’, *European Business Organization Law Review* 22, no. 1 (2021): 187-86.

⁵⁴² Cf. CCA sch. 17 s. 8.

⁵⁴³ Cf. CCA s. 8.

⁵⁴⁴ Cf. CCA sch. 17 s. 8 ss. 6.

⁵⁴⁵ MoJ, ‘Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations’, 28.

2.5. Summary and Concluding Remarks

Chapter 2 of the thesis has explored the international and national legal frameworks and practices relative to TCB and NTRs. It highlighted the pivotal role of the US in shaping global anti-bribery norms. This influence was instrumental in transforming the perception of foreign bribery from a commonplace business practice into a criminal activity and the subsequent adoption of the OECD-ABC. Despite the rapid implementation of the Convention, many countries, including Switzerland and the UK, exhibited reluctance in prosecuting MNCs for foreign bribery. Reservations stemmed from the inherent complexities of these offences, rendering them difficult to tackle through unilateral country-level enforcement means. Subsequently, national governments exhibited reluctance to pursue criminal convictions against economically significant entities, due to concerns that such prosecutions could undermine national economic interests. Against this backdrop, the US approach of resolving TCB cases through NTRs offered a pragmatic framework that served the interests of both prosecutors and corporate actors by enabling the pursuit of criminal accountability while simultaneously mitigating the adverse consequences typically associated with criminal convictions. It was then emulated by multiple OECD member states, thereby placing NTRs as the preferred mechanisms for addressing TCB cases. While pragmatically advantageous, legal and criminological scholars have critically observed that NTRs reflect broader trends in neoliberal governance that prioritise self-regulation and corporate interests. This shift in enforcement practices is seen to come at the expense of rigorous criminal law enforcement, raising concerns about equality in criminal justice, effective deterrence, and the loss of the symbolic function of criminal law.

This chapter equally provided an overview of the Swiss and UK legal and enforcement frameworks, along with their respective NTR mechanisms, whose resulting legal decisions are the subjects of this thesis' empirical analysis. Comparatively, similarities can be pointed out between the legal definitions of bribery in the two legal systems, reflecting the cross-border convergence of anti-bribery laws. In both systems, foreign bribery is an intentional offence that undermines fair competition within global markets.

Similarities in the corporate criminal liability models of Switzerland and the United Kingdom are also apparent. Both legal systems have established corporate criminal liability laws that address failures to prevent bribery, which are often linked to internal organisational dysfunctions. Indeed, Switzerland establishes a corporate criminal liability model based on "organisational failure", whereby liability arises from the company's negligence in implementing and maintaining organisational measures preventing the commission of specified offences, including foreign bribery. In a similar vein, the UK introduces a "failure to prevent" offence under section 7 of the UKBA, which holds companies liable for failing to prevent bribery by associated persons, unless they can demonstrate that adequate

procedures were in place to avert such misconduct. Both frameworks predicate corporate criminal liability on failures in the self-regulatory capacity of the company, embedding corporate self-regulation obligations into the legal structure of liability. By linking criminal liability to failures in internal governance, these models reflect a broader shift towards self-regulatory approaches to corporate criminal liability. International legal frameworks and organisations increasingly recommend such approaches as a means for states to fulfil their obligations under international treaties that require the regulation of harmful activities committed by MNCs⁵⁴⁶.

In contrast, significant differences are identified in terms of the NTR approach of each system. The Swiss OAG enforces foreign bribery laws primarily through SPOs, a conviction-based mechanism that enables informal negotiations between prosecutors and defendant companies, without the intervention of a judicial authority. Because SPOs were not designed initially as a response to complex corporate offences, they do not formally incentivise self-reporting and self-investigations. In contrast, DPAs defer and ultimately exempt companies from convictions⁵⁴⁷. Expressly conceived for corporate offenders, DPAs encourage the cooperation of defendant companies for the detection and investigation of TCB offences, in exchange for a negotiated agreement resulting in their conditional acquittal. Negotiations between the prosecutor and the defendant company are expressly foreseen within the DPA legal framework and constitute an integral part of these proceedings. Differing from SPOs, a judicial authority intervenes in the process, as decisions to defer prosecutions must be approved by a Crown Court.

⁵⁴⁶ For a discussion on the shift towards self-regulatory standards regarding corporate criminal liability and the OECD-ABC recommendations in this sense, see Elliot and Lüth, 'Corporate Liability for Economic Crimes', 215-16.

⁵⁴⁷ The criminal charges brought against corporate offenders that meet the terms of the agreement at the end of the trial period are dropped, effectively exempting companies from criminal convictions. Cf. CCA sch. 17 s. 10. See generally Lord, 'Prosecution deferred, prosecution exempt', 848-66 for an analysis and discussion on how Crown Court judges justify decisions to defer prosecutions for corporate offenders.

3. Theoretical and Conceptual Framework

This chapter introduces the theoretical and conceptual foundations that underpin the analysis of the empirical findings and guide the interpretation of the research questions. It brings together insights from legal and socio-legal scholarship concerned with how legal narratives are constructed, communicated, and interpreted within institutional contexts.

Section 3.1 outlines the narratological approach to law as framed by the *Law as Narrative* academic movement. This framework provides the conceptual tools to define and operationalise the notion of “narrative” in legal discourse, not simply as a mode of discourse but also as an epistemological concept. Section 3.2 shifts to the theoretical perspective of *narrative expressivism*, which addresses the communicative function of criminal law. Finally, section 3.3 considers the recipients of legal narratives and the construction of legal audiences. This section draws on both theoretical and conceptual insights to analyse how different legal actors are addressed, implicated, or excluded in NTR narratives.

3.1. Law as Narrative: A Narratological Approach to Law

The Law as Narrative movement gained academic prominence in the 1980s as a critical response to the predominant positivistic paradigm in legal scholarship⁵⁴⁸. Socio-legal scholars of this movement dispute the foundational theories and interpretations rooted in universal truths and contest the restricted positivistic viewpoint on objectivity and neutrality in law⁵⁴⁹. The central claim of the Law as Narrative movement is that law is a collection of stories, explanations and performances, a subjective rendering of experiences and meanings among many⁵⁵⁰. As stipulated by Di Donato, objectivity in law is perceived as the result of a discovery process rather than as a given, incontestable starting point⁵⁵¹. Legal meaning is thus not fixed but constructed through discursive processes, where narratives compete for legitimacy within specific institutional and cultural settings⁵⁵².

⁵⁴⁸ Flora Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge, 2019), 38; Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton University Press, 2000), 201; Brooks, ‘The Law as Narrative and Rhetoric’, 14–5; Scheppele, ‘Foreword: Telling Stories’, 2088.

⁵⁴⁹ Di Donato, *The Analysis of Legal Cases*, 38; Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986), 36–7.

⁵⁵⁰ Di Donato, *The Analysis of Legal Cases*, 38; Binder and Weisberg, *Literary Criticisms of Law*, 206; Gewirtz, ‘Narrative and Rhetoric in the Law’, 1; Scheppele, ‘Foreword: Telling Stories’, 2077; Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’, *Michigan Law Review* 87, no. 8 (1989): 2416.

⁵⁵¹ Di Donato, *The Analysis of Legal Cases*, 39.

⁵⁵² See generally James Boyd White, ‘An Old-Fashioned View of the Nature of Law’, *Theoretical Inquiries in Law* 12, no. 1 (2011): 381–402. See also Linda L. Berger, ‘How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes’, *Southern California Interdisciplinary Law Journal* 18 (2008): 259.

The term "narrative" is frequently applied broadly to encompass a variety of phenomena⁵⁵³. There is often a lack of conceptual clarity regarding the meanings of the term in socio-legal studies and other branches of the humanities⁵⁵⁴. However, it is argued that legal scholars of the Law as Narrative movement usually conceptualise narratives in two interrelated ways, which are also adopted in the present study: narratives as an epistemological construct and narratives as a communicative tool (mode of discourse)⁵⁵⁵.

Firstly, narratives are regarded as an epistemological concept, a means of knowing that functions as a cognitive tool enabling individuals to comprehend both themselves and their environment⁵⁵⁶. The Law as Narrative scholarship aligns with Bruner's arguments that knowledge about reality is narratively structured: humans learn, describe, explain and think in narrative terms⁵⁵⁷. Bruner refers to narratives as "mental models" whose defining characteristic is their ability to order and represent human experience in a diachronic and coherent manner⁵⁵⁸. The human mind cannot represent nor apprehend events without placing them into a continuum or by linking them to readily provided and shared meta-stories, such as cultures, histories, traditions or legal systems⁵⁵⁹. Narratives are thus seen as devices for making sense of experiences by connecting these happenings to dominant historical or cultural meanings⁵⁶⁰.

Against this background, a key objective of the Law as Narrative movement is to call attention to the connection between legal texts and practices on the one hand and the narrative process on the other⁵⁶¹. Whether in the textual formulations of legal norms, judicial opinions, or legal processes⁵⁶², law's

⁵⁵³ Greta Olson, 'Futures of Law and Literature: A Preliminary Overview from a Culturalist Perspective', in *Recht und Literatur im Zwischenraum / Law and Literature In-Between. Aktuelle Inter- und Transdisziplinäre Zugänge / Contemporary Inter- and Transdisciplinary Approaches*, eds. Christian Hiebaum, Susanne Knaller, and Doris Pichler (transcript Verlag, 2015), 43. See also Robert and Shenhav, 'Fundamental Assumptions in Narrative Analysis', 4-7.

⁵⁵⁴ Shadd Maruna and Marieke Liem, 'Where Is This Story Going? A Critical Analysis of the Emerging Field of Narrative Criminology', *Annual Review of Criminology* 4 (2021): 129; Jeanne Gaakeer, 'The Perplexity of Judges Becomes the Scholar's Opportunity', *German Law Journal* 18, no. 2 (2017): 334; Marie-Laure Ryan, 'Toward a Definition of Narrative', in *The Cambridge Companion to Narrative*, eds. David Herman (Cambridge University Press, 2007), 22-3; David Rudrum, 'On the Very Idea of a Definition of Narrative: A Reply to Marie-Laure Ryan', *Narrative* 14, no. 2 (2006): 197; Ewick and Silbey, 'Subversive Stories and Hegemonic Tales', 200.

⁵⁵⁵ In this sense Frode Helmich Pedersen and Espen Ingebrigtsen, 'Why Narrative (Still) Matters', in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen, Espen Ingebrigtsen, and Werner Gephart (Klostermann, 2021), 11-12; Gaakeer, 'The Perplexity of Judges Becomes the Scholar's Opportunity', 334-35.

⁵⁵⁶ Pedersen and Ingebrigtsen, 'Why Narrative (Still) Matters', 11; Gaakeer, 'The Perplexity of Judges Becomes the Scholar's Opportunity', 339; Brooks, 'The Law as Narrative and Rhetoric', 14.

⁵⁵⁷ Jerome Bruner, 'The Narrative Construction of Reality', *Critical Inquiry* 18, no. 1 (1991): 3-4.

⁵⁵⁸ *Id.*, 6.

⁵⁵⁹ *Id.*, 6, 22.

⁵⁶⁰ *Id.*, 4. See also Jane B. Baron and Julia Epstein, 'Is Law Narrative', *Buffalo Law Review* 45 (1997): 147.

⁵⁶¹ Pedersen and Ingebrigtsen, 'Why Narrative (Still) Matters', 11-2; Di Donato, *The Analysis of Legal Cases*, 48; Étienne Cloutier, 'A Tale of Two Metaphors: A Narrative Take on the Canadian Constitution', *McGill Law Journal* 64, no. 3 (2019): 449; Baron and Epstein, 'Is Law Narrative', 147.

⁵⁶² Cf. Andreas von Arnould, 'Norms and Narrative', *German Law Journal* 18, no. 2 (2017): 309-30 for narratives in legal norms; W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American*

accounts gain both legal and moral significance when structured in a narrative form and interpreted through the lens of prevailing cultural, institutional and ideological narratives⁵⁶³.

Secondly, narratives are understood structurally as a communicative device⁵⁶⁴. As Robert and Shenhav explain, “narrative is a way to represent experience in an organised fashion in order to produce persuasive messages, meanings, and also to motivate or legitimate actions”⁵⁶⁵. In this sense, narratives are not merely expressive but are instrumental tools, used to convey specific messages to their intended audiences and shape their beliefs about the issues relayed⁵⁶⁶.

Understanding legal narratives as communicative instruments underscores the idea that they are constructed to advance a particular perspective or argument, rather than to provide neutral or objective representations of facts⁵⁶⁷. In contrast to literary fiction, which often aims to explore or reveal the human condition, legal narratives are constructed around a determinate purpose⁵⁶⁸. Consequently, they are subordinated to the requirements of persuasion and governed by notions of relevance: only information directly related to the legal issues at stake, such as facts bearing on culpability, procedural fairness, or evidentiary admissibility, is included within a specific legal account⁵⁶⁹. Within criminal law, the aims of such narratives are multifaceted. They seek to secure public legitimacy for prosecution and judicial decisions, establish the credibility of the factual claims presented, and attribute responsibility to the accused⁵⁷⁰.

Culture (Quid Pro Books, 2014) for narratives in judgments; Bernard S. Jackson, *Law, Fact and Narrative Coherence* (Deborah Charles, 1988) for narratives in legal processes.

⁵⁶³ Pedersen and Ingebrigtsen, ‘Why Narrative (Still) Matters’, 11-2.; Jane B. Baron and Epstein, ‘Is Law Narrative’, *Buffalo Law Review* 45 (1997): 147.

⁵⁶⁴ Binder and Weisberg, *Literary Criticisms of Law*, 232; Baron and Epstein, ‘Is Law Narrative’, 147.

⁵⁶⁵ Robert and Shenhav, ‘Fundamental Assumptions in Narrative Analysis’, 5. See also Baron and Epstein, ‘Is Law Narrative’, 147.

⁵⁶⁶ Yovel, ‘Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death’, *Law & Literature* 16, no. 1 (2004): 130; Marsha Witten, ‘Narrative and the Culture of Obedience at the Workplace’, in *Narrative and Social Control: Critical Perspectives*, eds. Dennis K. Mumby (Sage Publications, 1993), 106.

⁵⁶⁷ Di Donato, *The Analysis of Legal Cases*, 56; Robert and Shenhav, ‘Fundamental Assumptions in Narrative Analysis’, 5; Rigney, ‘The Point of Stories’, 266; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 137-38.

⁵⁶⁸ Shulamit Almog, ‘As I Read, I Weep-In Praise of Judicial Narrative’, *Oklahoma City University Law Review* 26 (2001): 488; Rigney, ‘The Point of Stories’, 266.

⁵⁶⁹ Anna Offit, ‘Storied Justice: The Narrative Strategies of US Federal Prosecutors’, in *The Emerald Handbook of Narrative Criminology*, eds. Jennifer Fleetwood, Lois Presser, Sveinung Sandberg and Thomas Ugelvik (Emerald Publishing Limited, 2019), 51; Terezie Smejkalová, ‘Story-Telling in Judicial Discourse’, *Comparative Legilinguistics* 2011, no. 5 (2011): 96; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 130; Almog, ‘As I Read, I Weep-In Praise of Judicial Narrative’, 488; Nancy Pennington and Ried Hastie, ‘A Cognitive Theory of Juror Decision Making: The Story Model Decision and Interference Litigation’, *Cardozo Law Review* 13, no. 2-3 (1991): 528. For the notion of persuasiveness in legal storytelling, see Amsterdam and Bruner, *Minding the Law*, 134-39.

⁵⁷⁰ Godzimirska and Orina, ‘Scapegoats and Underdogs’, 451-54. Offit, ‘Storied Justice’, 52-9; Steven Cammiss, ‘Law as Narrative: Narrative Interpretation and Appropriation as an Element of Theft’, *Statute Law Review* 40, no. 1 (2019): 27.

Against this backdrop, scholars associated with the Law and Narrative movement identify narrative coherence as a defining characteristic of legal storytelling⁵⁷¹, considering it crucial for establishing the narrative's credibility and securing its acceptance within cultural and institutional contexts⁵⁷². Coherence, in this regard, is not simply an aesthetic ideal but a functional necessity that supports the narrative's authority and legitimacy⁵⁷³. A distinction is usually made between internal and external coherence⁵⁷⁴. Internal coherence is found in the narrative form⁵⁷⁵. It is achieved by including relevant factual elements, while excluding others, eliminating or weakening contradictions and temporally organising the different events⁵⁷⁶. Specifically, internal coherence is exerted when the narrative episodes are causally and temporally interrelated with the point of the story⁵⁷⁷. Narrative causality demands a causal and logical frame uniting the separate narrative episodes and connecting them to the point of the story, which is presented as a logical outcome⁵⁷⁸. This feature of the narrative structure is often defined as *emplotment*⁵⁷⁹. The temporal ordering, in turn, ensures narrative closure by presenting the events within a beginning-middle-end structure⁵⁸⁰. External coherence refers to the unity between the story told and the context in which it is created⁵⁸¹. As stated by Yovel, external coherence implies invoking connotations and associations that supply the story with meaning⁵⁸². To be coherent, a legal story must “ring true” with the standard social, cultural and institutional views and understandings of its audience⁵⁸³.

Based on these understandings, Law as Narrative scholarship argues for integrating methods from narratology and the social sciences to examine law and legal practice, such as linguistics, conversational analysis, discourse analysis and narrative analysis⁵⁸⁴. These approaches provide a more critical approach

⁵⁷¹ Cammiss, ‘Law as Narrative’, 27; Offit, ‘Storyed Justice’, 59–60; Bernard S. Jackson, ‘Narrative Theories and Legal Discourse’, in *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy, and Literature*, eds. Cristopher Nash (Routledge, 2005), 27–31; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 129–31; Neil MacCormick, ‘Coherence in Legal Justification’, in *Theory of Legal Science*, eds. Aleksander Peczenik, Lars Lindahl, and Bert Van Roermund (Springer Netherlands, 1984), 235.

⁵⁷² Smejkalová, ‘Story-Telling in Judicial Discourse’, 100.

⁵⁷³ Monica Den Boer, ‘Legal Whispers: Narrative Transformations in Dutch Criminal Evidence’ (PhD Thesis, European University Institute, 1990), 137.

⁵⁷⁴ Dan Jerome S. Barrera, ‘Narrative Criminal Justice’, *International Journal of Law, Crime and Justice* 58 (2019): 36–37; J. Christopher Rideout, ‘A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling’, *Legal Communication and Rhetoric: JALWD* 10 (2013): 71; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 131; Walter R. Fisher, ‘Narration as a Human Communication Paradigm: The Case of Public Moral Argument’, *Communication Monographs* 51, no. 1 (1984): 64.

⁵⁷⁵ Rideout, ‘A Twice-Told Tale’, 71; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 131.

⁵⁷⁶ Den Boer, ‘Legal Whispers’, 137.

⁵⁷⁷ Witten, ‘Narrative and the Culture of Obedience at the Workplace’, 106.

⁵⁷⁸ Ewick and Silbey, ‘Subversive Stories and Hegemonic Tales’, 200.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ Rideout, ‘A Twice-Told Tale’, 71; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 131–33.

⁵⁸² Rideout, ‘A Twice-Told Tale’, 71; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 131.

⁵⁸³ Amsterdam and Bruner, *Minding the Law*, 224; Mark J. Osiel, ‘Ever Again: Legal Remembrance of Administrative Massacre’, *University of Pennsylvania Law Review* 144, no. 2 (1995): 477.

⁵⁸⁴ Cammiss, ‘Law as Narrative’, 27; Michael Freeman and Fiona Smith, ‘Law and Language: An Introduction’, in *Law and Language*, eds. Michael Freeman and Fiona Smith, Volume 15 (Oxford University Press, 2011), 5–6.

to legal texts and practice than the traditional doctrinal analysis as a primary interpretative tool⁵⁸⁵. As pointed out by Delgado, interpreting law and legal practice as stories supports efforts to understand how legal and judicial reality and meanings are socially constructed⁵⁸⁶. It allows researchers to consider the storyteller's method of structuring legal stories for specific audiences, a specific purpose and within a specific culture or ideological frame⁵⁸⁷.

Highlighting the inherent selectivity akin to legal storytelling does not presuppose that each narrator will interpret the law to their liking⁵⁸⁸. But rather to invite a new perspective into the reading of prescriptive legal texts⁵⁸⁹. It is to acknowledge that the legal storyteller is not so much guided by a syllogism in interpreting the law to the facts of the case⁵⁹⁰. But rather by cultural, institutional and ideological worlds in which the teller is embedded⁵⁹¹. Consequently, examining law through a narrative perspective illuminates both the symbiotic relationship between law and the environment in which it is generated, as well as its constructive power as a means to challenge and change that same environment⁵⁹².

Perhaps the most obvious example of the significant role of narratives in law is the legal construction of facts of a criminal case⁵⁹³. Socio-legal scholars consistently demonstrate that facts are not merely discovered or neutrally recorded but are actively constructed through the interpretive and selective processes of legal storytelling⁵⁹⁴. What is recognised as a legal fact emerges from a narrative process in which certain events, actors, and interpretations are highlighted while others are marginalised or excluded⁵⁹⁵. The representation of factual accounts within legal decisions is shaped not only by the perspectives of the various actors involved in the criminal process but also by a range of substantive,

⁵⁸⁵ Di Donato, *The Analysis of Legal Cases*, 15; Greta Olson, 'Narration and Narrative in Legal Discourse', in *Handbook of Narratology*, eds. Peter Hühn et al. (De Gruyter, 2014), 372.

⁵⁸⁶ Delgado, 'Storytelling for Oppositionists and Others', 2411-412.

⁵⁸⁷ Werner Gephart, 'Law as Narration in Light of the Law as Culture Paradigm', in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen and Werner Gephart (Klostermann, 2021), 7; Cammiss, 'Law as Narrative', 226; Delgado, 'Storytelling for Oppositionists and Others', 2411-412.

⁵⁸⁸ Di Donato, *The Analysis of Legal Cases*, 1.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Di Donato, *The Analysis of Legal Cases*, 39-40.; Owen M. Fiss, 'Objectivity and Interpretation', *Stanford Law Review* 34, no. 4 (1981): 744-45.

⁵⁹¹ Di Donato, *The Analysis of Legal Cases*, 14, 39-40.; Fiss, 'Objectivity and Interpretation', 744-45.

⁵⁹² Di Donato, *The Analysis of Legal Cases*, 15; Lucia Zedner, 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany', *Social & Legal Studies* 4, no. 4 (1995): 519.

⁵⁹³ Gewirtz, 'Narrative and Rhetoric in the Law', 2-3; Scheppele, 'Foreword: Telling Stories', 2082-083.

⁵⁹⁴ Ralph Grunewald, 'Forces Beyond Linear Reasoning: The Evidentiary Power of Narrative in Wrongful Conviction Cases', in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen, Espen Ingebrigtsen, and Werner Gephart (Klostermann, 2021), 198-200; Binder and Weisberg, *Literary Criticisms of Law*, 261-64; Ewick and Silbey, 'Subversive Stories and Hegemonic Tales', 214. See generally, Frode Helmich Pedersen, 'The Court's Story of Facts: A Narratological Approach to the Narrative in the Judgement', in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen, Espen Ingebrigtsen, and Werner Gephart (Klostermann, 2021), 63-91; Richard K. Sherwin, 'Law Frames: Historical Truth and Narrative Necessity in a Criminal Case', in *Popular Culture and Law*, eds. Richard K. Sherwin (Routledge, 2017), 39-83.

⁵⁹⁵ See in this sense, Grunewald, 'Forces Beyond Linear Reasoning', 214-15; Scheppele, 'Foreword: Telling Stories', 2094-097; Den Boer, 'Legal Whispers', 56-7.

procedural, and professional factors that influence how narratives are constructed, interpreted, and institutionalised⁵⁹⁶. In this sense, Scheppele argues that factual accounts in criminal law are never neutral depictions of objective reality but are instead the result of narrative choices that reflect particular perspectives, interests, and interpretive frames⁵⁹⁷. The author illustrates that the same set of facts may be narrated in profoundly different ways depending on the narrator's social position, interpretive framework, and experiential background⁵⁹⁸. These narrative disparities can result in the systematic exclusion of outsider perspectives, particularly when courts privilege supposedly objective or “point-of-viewless” descriptions that obscure the social conditions and lived realities of subordinated actors⁵⁹⁹. Similarly, Brookman *et al.* show the reciprocal relationship between forensic evidence and narrative construction in homicide investigations, highlighting how the facts ultimately retained in the case narrative are contingent on the availability, interpretation, and perceived reliability of forensic findings⁶⁰⁰. In this sense, the narrative of “what happened” is not a straightforward reflection of objective events but the result of an iterative process of evidentiary selection and narrative alignment, in which only those facts that can be substantiated and rendered legally meaningful through available evidence are retained and brought to court⁶⁰¹. Additionally, Stahn argues that employing narrative methods in the analysis of case constructions in criminal trials highlights the institutional constraints criminal justice authorities face when tasked with finding the truth about past crimes⁶⁰². Criminal investigations are inevitably guided and eventually restrained by budgetary and material resources, evidence availability, and the chosen investigative strategies⁶⁰³.

Beyond factual construction, narrative also plays a central role in the structure of legal reasoning itself⁶⁰⁴. Binder and Weisberg further illustrate how some of the most fundamental patterns of legal reasoning appear to be organised in a narrative form⁶⁰⁵. Storytelling is, for example, inherent in the general legal problem of assigning or denying cause and blame for a harmful action⁶⁰⁶. When adjudicators assign causal responsibility to an individual, they select only one among many necessary conditions, a simple act or omission, and call that a cause⁶⁰⁷. Lengthening the narrative chain may negate

⁵⁹⁶ Tim Hillier and Gavin Dingwall, *Criminal Justice and the Pursuit of Truth* (Bristol University Press, 2021), 117-21; Griffin, ‘Narrative, Truth, and Trial’, 301-15; Peter Brooks, “‘Inevitable Discovery’ – Law, Narrative, Retrospectivity”, *Yale Journal of Law & the Humanities* 15, no. 17 (2003): 81-5; Scheppele, ‘Foreword: Telling Stories’, 2081-082.

⁵⁹⁷ Scheppele, ‘Foreword: Telling Stories’, 2091-092.

⁵⁹⁸ *Id.*, 2082-084.

⁵⁹⁹ *Id.*, 2089.

⁶⁰⁰ Fiona Brookman *et al.*, ‘Crafting Credible Homicide Narratives: Forensic Technoscience in Contemporary Criminal Investigations’, *Deviant Behavior* 43, no. 3 (2020): 361.

⁶⁰¹ *Ibid.*

⁶⁰² Stahn, *Justice as Message*, 51–3.

⁶⁰³ *Ibid.*

⁶⁰⁴ Binder and Weisberg, *Literary Criticisms of Law*, 264-66.

⁶⁰⁵ Binder and Weisberg, *Literary Criticisms of Law*, 264.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

the inculpatory inference of bad character⁶⁰⁸. Many simple criminal scenarios can be narratively conceived as inculpatory or exculpatory depending on the time frame that the narrator chooses in establishing blame⁶⁰⁹.

Narrative approaches to law are increasingly integrated in comparative legal studies and legal transplants literature⁶¹⁰, in addition to their prominence in critical legal scholarship. Indeed, these approaches is frequently recognised for their ability to augment research sensitivity to national legal distinctions and integrate external legal concepts and practices within local contexts⁶¹¹. This perspective is particularly pertinent to the research design of this thesis, which employs a comparative framework and centres on the adaptation of foreign legal mechanisms within distinct national contexts. The theoretical underpinnings of the Law as Narrative approach provide a lens through which to examine how practices associated with NTRs are contextualised and interpreted across different legal and cultural landscapes. This approach facilitates an exploration of the transnational influence on local legal practices and highlights the interplay between global legal standards and domestic legal realities⁶¹².

Considering the theoretical foundations of Law as Narrative, Ewick and Silbey discuss two approaches to narrative inquiry in socio-legal scholarship⁶¹³. The first approach examines legal narratives as social constructs through which individuals or institutions express their perceptions of the world⁶¹⁴. This entails investigating the content of legal narratives and the circumstances in which they are formed, with the objective of evidencing their cultural, institutional and ideological presuppositions⁶¹⁵. The second approach focuses on using narratives as a research method for studying law and legal practice⁶¹⁶. This research integrates both approaches. Using narrative methods, it examines the content of the stories told within NTRs and the conditions for storytelling in relation to cultural, institutional and ideological frameworks⁶¹⁷.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

⁶¹⁰ The legal transplant literature refers to a body of comparative socio-legal and legal scholarship that studies how laws and legal institutions move across borders. *Legal transplant* is a metaphor drawing on the imagery of an organ transplant to depict law as a dynamic, living entity that can integrate, resist, or modify external influences. See Toby S. Goldbach, 'Why Legal Transplants?', *Annual Review of Law and Social Science* 15, no. 1 (2019), 583; cf. *infra* no. 695.

⁶¹¹ Sergi, "Three Tales/Two Threats", 224; Merry, *Human Rights & Gender Violence*, 218; Zedner, 'In Pursuit of the Vernacular', 519.

⁶¹² See John Gillespie, 'Relocating Global Legal Scripts in Local Networks of Meaning', in *Law and Development and the Global Discourses of Legal Transfers*, eds. John Gillespie and Pip Nicholson (Cambridge University Press, 2012), 29–55; Langer, 'From Legal Transplants to Legal Translations', 1–64 analysing legal transplants from the perspective of language, discourses and legal meanings.

⁶¹³ Ewick and Silbey, 'Subversive Stories and Hegemonic Tales', 201–05.

⁶¹⁴ *Id.*, 201–02.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Id.*, 202–03

⁶¹⁷ Cf. chapter 4.

Building on the Law as Narrative perspective, this thesis approaches SPO and DPA decisions as institutional narratives through which prosecutors and courts construct and communicate understandings of TCB prosecutions, offences and corporate criminal liability. Rather than treating these documents solely as technical legal instruments, the study examines them as narrative artefacts that organise events, actors and causal explanations in order to justify specific prosecutorial outcomes. The analytical focus on narrative construction directly informs the research questions of this thesis, which investigate how prosecutions, offences and corporate offenders are narratively represented within these decisions and how these representations differ across legal contexts. By analysing the narrative structures and communicative strategies embedded in SPOs and DPAs, the research explores how these mechanisms convey particular interpretations of corporate crime and how such interpretations are shaped by the institutional logics and procedural cultures of the respective legal systems.

3.2. Narrative Expressivism

Narrative expressivism combines insights from expressive theories of criminal law with the analytical framework provided by narrative analyses and draws attention to the communicative aspects of criminal proceedings and acts⁶¹⁸.

Houge effectively defines the contours of narrative expressivism by contrasting the theory with *legal expressivism*⁶¹⁹. Legal expressivism is a normative approach to criminal law grounded in the assumption that criminal punishment is justified by its ability to express moral condemnation and stigma towards crimes and criminals⁶²⁰. Narrative expressivism aligns with legal expressivism as both approaches consider criminal law and practice as communicative devices⁶²¹. Indeed, both theories affirm that the power of criminal law is not primarily derived from its capacity to enforce compliance through fear of punishment but instead from its ability to make statements - to communicate - rather than simply managing conduct via deterrence and rehabilitation⁶²². In this regard, Sargent argues that the expressive conception of criminal law implies acknowledging that legal language operates in a way that favours specific interpretations of social structure and power dynamics while making alternative interpretations implausible⁶²³. Accordingly, legal discourse is argued to carry an animating potential outside of the

⁶¹⁸ Houge, “‘Thugs’ on Trial”, 21.

⁶¹⁹ Houge, ‘Narrative Expressivism’, 281-83.

⁶²⁰ Joshua Glasgow, ‘The Expressivist Theory of Punishment Defended’, *Law and Philosophy* 34, no. 6 (2015): 601-04; Joel Feinberg, ‘The Expressive Function of Punishment’, *The Monist* 49, no. 3 (1965): 400-01.

⁶²¹ Houge, ‘Narrative Expressivism’, 281. For the communicative function of criminal law, see also: Igor Primoratz, ‘Punishment as Language’, *Philosophy* 64, no. 248 (1989): 191; R. A. Duff, ‘Penal Communications: Recent Work in the Philosophy of Punishment’, *Crime and Justice* 20 (January 1996): 1–97.

⁶²² Houge, “‘Thugs’ on Trial”, 22-3.; Cass R. Sunstein, ‘On the Expressive Function of Law’, *University Pennsylvania Law Review* 144, no. 5 (1996): 2024; Garland, ‘Punishment and Culture’, 200.

⁶²³ Neil Sargent, ‘Law, Ideology and Corporate Crime: A Critique of Instrumentalism’, *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société* 4 (1989): 100.

concrete legal sphere in which it is produced⁶²⁴. Concretely, within the context of criminal proceedings, expressivist theories recognise the procedure's potential to confirm or change a moral order and project the rule of law beyond its immediate function of determining guilt and sentencing individual offenders⁶²⁵. Thus, criminal punishment is deemed justified due to its ability to convey and reinforce common moral principles and positions when transgressed⁶²⁶. In this sense, criminal punishment serves a normative and educational purpose primarily, endorsing and reaffirming society's fundamental principles⁶²⁷.

Narrative expressivism, however, diverges from traditional understandings of legal expressivism in two interrelated ways⁶²⁸. First, narrative expressivism shifts the emphasis from punishment to procedure⁶²⁹. Legal expressivism is primarily regarded as a theory of criminal punishment oriented towards the communicative function of criminal sanctions⁶³⁰. In contrast, narrative expressivism highlights the communicative role of all procedural acts, not merely the criminal sentence⁶³¹. Houge argues that the sentence is considerably less significant than the process itself, as it provides a platform for discursive formulations about how criminal actions are best understood, explained, and addressed⁶³². In this respect, narrative expressivism aligns with socio-legal scholarship regarding the communicative function of criminal justice practices⁶³³. This body of research acknowledges that all communicative acts produced for or facilitated by criminal justice convey and construct meaning, not solely about right and wrong through punishment, but also about power, legitimacy, normality, and social relations⁶³⁴. Law enforcement decisions regarding investigative and prosecution strategies, trial procedures, press releases, and various other criminal justice practices are viewed as a form of communication, expressing

⁶²⁴ Houge, 'Narrative Expressivism', 280; Avlana Eisenberg, 'Expressive Enforcement', *UCLA Law Review* 61 (2013): 860; Sunstein, 'On the Expressive Function of Law', 2024–29.

⁶²⁵ Houge, 'Narrative Expressivism', 281; Garland, 'Punishment and Culture', 192; Feinberg, 'The Expressive Function of Punishment', 418–21.

⁶²⁶ Christopher Ciocchetti, 'Wrongdoing and Relationships: An Expressive Justification of Punishment', *Social Theory and Practice* 29, no. 1 (2003): 65 ff.; Feinberg, 'The Expressive Function of Punishment', 418–20.

⁶²⁷ Houge, "'Thugs' on Trial", 22; Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007), 11–2.

⁶²⁸ Houge, 'Narrative Expressivism', 281–84.

⁶²⁹ *Id.*, 283–84.

⁶³⁰ *Id.*, 282.

⁶³¹ *Id.*, 282–83.

⁶³² *Id.*, 282.

⁶³³ See generally Stahn, *Justice as Message*; Trevaskes, 'Propaganda Work in Chinese Courts', 5–21; Jeff Ferrell, 'Cultural Criminology', *Annual Review of Sociology* 25, no. 1 (1999): 395–418. See also Garland, 'Punishment and Culture', 191. For the communicative function of law enforcement decisions in corporate criminal and regulatory enforcement see Lord, 'Prosecution Deferred, Prosecution Exempt', 848–66; Judith van Erp, 'Anti-Cartel Thrillers as a New Film Genre: How Regulator-Produced Films Portray and Problematize Cartels and Communicate Deterrence', *Crime, Media, Culture: An International Journal* 14, no. 2 (2018): 229–46; Judith Van Erp, 'Naming without Shaming: The Publication of Sanctions in the Dutch Financial Market', *Regulation & Governance* 5, no. 3 (2011): 287–308; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 274–94; Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, USA, 2002).

⁶³⁴ Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 274–75.; Van Erp, 'Naming without Shaming', 289–291.; Hawkins, *Law as Last Resort*, 206–08.; Garland, 'Punishment and Culture', 195.

the dominant justice understandings and values adopted by legal actors and transmitted to general audiences⁶³⁵. Thus, narrative expressivism expands the expressivist perspective to encompass all criminal justice practices as communicative acts to define, delimit and declare specific conceptions of the issues they deal with⁶³⁶.

Second, narrative expressivism deviates from the normative foundations of legal expressivism⁶³⁷. Legal expressivists tend to adopt a Durkheimian perspective on legal communication⁶³⁸. Criminal punishment is normatively evaluated for its potential or ability to communicate moral condemnation towards the criminal act and stigma towards the offender⁶³⁹. It is envisioned as what Garfinkel refers to as a “status degradation ceremony”, where the offender is transformed from a member of society into an outcast through public denouncement and trial⁶⁴⁰. In contrast, narrative expressivism is not a normative theory of criminal law; rather, it is a descriptive one⁶⁴¹. It encompasses all communicative facets of criminal procedures, regardless of whether they reflect pre-established ideals concerning morality, right, and wrong⁶⁴². Narrative expressivism analyses how criminal proceedings determine which aspects are considered pertinent or insignificant, as well as what is deemed truthful or false⁶⁴³.

Specifically, criminal proceedings are considered to be “‘epistemic engines’ in which knowledge is produced and for which knowledge is constructed”⁶⁴⁴. This statement implies a recognition that public knowledge about complex social phenomena primarily stems from legal adjudication⁶⁴⁵. As argued by Godzimirska and Orina, enforcement decisions are disseminated through newspapers, magazines, television, and radio on both global and local news platforms⁶⁴⁶. Accordingly, they have a significant impact on shaping public perceptions of the institution, legal proceedings, involved parties, and the broader conflicts at hand. This is particularly true in the context of TCB enforcement. The predominant

⁶³⁵ Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 2; Van Erp, ‘Anti-Cartel Thrillers as a New Film Genre’, 207; Hawkins, *Law as Last Resort*, 207.

⁶³⁶ Houge, ‘Narrative Expressivism’, 281.

⁶³⁷ *Id.*, 281-82.

⁶³⁸ The foundations of legal expressivism can be traced back to Emile Durkheim’s theory of *conscience collective*, which considers law as the expression of collective moral values. Cf. Emile Durkheim, *De la division du travail social* (Quadrige, Presses Universitaires de France, 1893). For the foundations of expressivist theories, see Stahn, *Justice as Message*, 26-8.

⁶³⁹ Kevin Hearty, “‘Standing with Soldier F’: Bloody Sunday, Disrupting the Degradation Ceremony and the Court of Public Opinion”, *Punishment & Society* 27, no. 1 (2025): 114–16; Houge, ‘Narrative Expressivism’, 282.

⁶⁴⁰ See Harold Garfinkel, ‘Conditions of Successful Degradation Ceremonies’, *American Journal of Sociology* 61, no. 5 (1956): 420–24. See also Hearty, “‘Standing with Soldier F’”, 114-15.

⁶⁴¹ Houge, ‘Narrative expressivism’, 282-83.

⁶⁴² *Id.*, 284.

⁶⁴³ Houge, “‘Thugs on Trial’”, 33-4.

⁶⁴⁴ Houge, ‘Narrative expressivism’, 285, citing Jakob v.H. Holtermann, “‘One of the Challenges That Can Plausibly Be Raised Against Them’? On the Role of Truth in Debates about the Legitimacy of International Criminal Tribunals”, in *The Legitimacy of International Criminal Tribunals*, eds. Cecilia M. Bailliet and Nobuo Hayashi, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2017), 206–27.

⁶⁴⁵ *Ibid.* For a similar discussion, see Garland, ‘Punishment and Culture’, 194-97.

⁶⁴⁶ Godzimirska and Orina, ‘Scapegoats and Underdogs’, 445.

use of NTRs as official responses to TCB crimes makes them unique and primary spaces where the nature, causes, and solutions to these crimes are narrated, explained, and described⁶⁴⁷.

Houge further explains how criminal procedures systematically display, make sense of, and generate beliefs about past experiences in adjudicating criminal matters, authoritatively declaring their statements as truths⁶⁴⁸. The significance of this epistemic output extends beyond jurisprudential development, as it informs and shapes the understanding of these crimes for a wide range of onlookers⁶⁴⁹. In this sense, legal professionals, such as judges and prosecutors, acquire gatekeeping powers over interpretations of public understandings of crimes and justice⁶⁵⁰.

Against this background, narrative expressivism highlights the legal narratives - the stories, explanations, and descriptions - produced within criminal justice procedures and advocates for a narrative approach to the communicative dimensions of criminal processes⁶⁵¹. While emphasising the epistemic properties of legal narratives, the theory also addresses their instrumental purpose⁶⁵². Houge contends that the knowledge generated in criminal proceedings is *juridified* as the encompassing descriptions and explanations adhere to the specific logic of the institutional framework in which they are created⁶⁵³. As a result, procedural statements are moulded by legal frameworks and institutional practices and are directed towards the various objectives storytellers aim to achieve⁶⁵⁴. Despite their instrumental purpose, the legal narratives formulated within criminal justice procedures increasingly permeate culture, literature, art, politics, and the deliberate public life of society at large⁶⁵⁵. In this context, they engage with and contribute to broader societal discourses about the phenomena they address, regardless of their veracity and selectivity⁶⁵⁶.

Narrative expressivism provides a theoretical framework for analysing the communicative function of SPO and DPA decisions within the enforcement of TCB offences. Rather than focusing solely on the punitive function of criminal law, this perspective highlights the expressive role of criminal procedures in shaping public understandings of crime, criminal liability and justice. In line with the view that criminal procedures function as “epistemic engines” that generate knowledge about past events, these

⁶⁴⁷ Similarly, see Lord, ‘Prosecution Deferred, Prosecution Exempt’, 856.

⁶⁴⁸ Houge, ‘Narrative expressivism’, 283.

⁶⁴⁹ Holtermann, “‘One of the Challenges That Can Plausibly Be Raised Against Them’?”, 211.

⁶⁵⁰ Houge, ‘Narrative expressivism’, 285.

⁶⁵¹ Houge, ‘Narrative expressivism’, 278-79.

⁶⁵² Houge, ‘Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts’, 422. This conception overlaps with the foundational tenets of the Law as Narrative scholarship. See section 3.1 above.

⁶⁵³ Houge, ‘Narrative expressivism’, 285; Houge, “‘Thugs’ on Trial”, 24.

⁶⁵⁴ Houge, “‘Thugs’ on Trial”, 24.

⁶⁵⁵ Anette Bringedal Houge, ‘Imageries of Self: Guilty Plea Statements in Sexual Violence Cases at the ICTY’, *International Criminal Justice Review* 33, no. 2 (2023): 181, citing Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, 2002), 4.

⁶⁵⁶ Houge, ‘Imageries of Self’, 182.

decisions are analysed not merely as procedural outcomes but as narrative expressions of how corporate wrongdoing is understood, explained and addressed within specific legal systems. Because NTRs constitute the predominant response to TCB offences, the narratives contained within these documents become key sites where the nature of such crimes, the responsibility of corporate actors, and the legitimacy of enforcement strategies are publicly constructed and communicated. Examining these decisions through the lens of narrative expressivism therefore enables an analysis of how prosecutorial and judicial narratives contribute to shaping broader understandings of corporate crime and justice.

3.3. The Question of Audience

Approaching law enforcement decisions through a narrative lens is predicated on the assumption that these acts are crafted with an audience in mind⁶⁵⁷. Within the context of law enforcement relative to corporate harms, socio-legal scholars highlight that the decisions arising from both criminal law and regulatory bodies are profoundly influenced by presentational concerns⁶⁵⁸. The storytellers behind enforcement decisions develop a keen awareness of how these decisions will be received and interpreted by their various audiences⁶⁵⁹.

Consequently, a narrative expressivist approach to law enforcement decisions necessitates consideration of the recipients of the messages conveyed from an analytical standpoint. Since legal narratives are crafted for a specific audience, analysing them involves contemplating not only what these stories communicate but also to whom⁶⁶⁰. This chapter explores how the question of the audience has been addressed in socio-legal studies relative to criminal or regulatory enforcement decisions. While not claiming to be exhaustive, it examines offenders, criminal defence lawyers, the broader business community and the public as audiences of NTR enforcement decisions.

According to Garland, convicted offenders are the most immediate recipients of penal communications⁶⁶¹. Enforcement decisions communicate a definite meaning of condemnation and disapproval to the convicted offender⁶⁶². The communicative dimensions of law enforcement serve a didactic purpose, as the sentence and condemnation attempt to persuade the individual offender of the

⁶⁵⁷ Godzimirska and Orina, 'Scapegoats and Underdogs', 448-49; Houge, 'Imageries of Self', 181; Megan Denver and Alec Ewald, 'Credentialing Decisions and Criminal Records: A Narrative Approach', *Criminology* 56, no. 4 (2018): 720; Marouf Hasian, 'Judicial Rhetoric in a Fragmentary World: "Character" and Storytelling in the Leo Frank Case', *Communication Monographs* 64, no. 3 (1997): 251; Gewirtz, 'Narrative and Rhetoric in the Law', 6.

⁶⁵⁸ Van Erp, 'Anti-Cartel Thrillers as a New Film Genre', 230-31; Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', 836-37; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 275; Hawkins, *Law as Last Resort*, 208.

⁶⁵⁹ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2-3.; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 275.

⁶⁶⁰ See e.g. Hawkins, *Law as Last Resort*, 210-17; Garland, 'Punishment and Culture', 203-207 for a similar perspective.

⁶⁶¹ Garland, 'Punishment and Culture', 203.

⁶⁶² *Id.*, 203-04.

wrongfulness of their actions⁶⁶³. Similarly, expressivist perspectives on corporate criminal liability recognise the unique proprieties of the criminal law of sending a “moral message” to corporate offenders in an attempt to persuade them of the wrongfulness of their actions⁶⁶⁴. Buell illustrates this point by considering that, beyond the imposition of penalties, the criminal justice system plays a crucial role in broadcasting a moral stance against corporate misconduct⁶⁶⁵. This moral communication is articulated through the legal process, which publicly attributes blame to companies, thus enhancing their accountability and urging a revaluation of their corporate practices to align with societal ethical standards⁶⁶⁶. This aspect is particularly salient as it leverages the authoritative voice of the law to reinforce societal norms and expectations, ultimately aiming to deter future misconduct from the corporate offender by signalling the consequences of its legal and moral transgressions⁶⁶⁷. Communicating moral disapproval through public law enforcement decisions is commonly assumed to achieve the specific deterrence goals of corporate criminal or regulatory liability⁶⁶⁸.

From this perspective, however, neutral, formalistic, and technical language emphasising the financial consequences of corporate noncompliance rather than the moral implications undermines the deterrent effect of enforcement decisions⁶⁶⁹. Compliance may be regarded merely as a cost of doing business without a moral dimension rather than a responsibility⁶⁷⁰. Such communication may lead to minimal compliance, where businesses do just enough to avoid sanctions without embracing the spirit of the law⁶⁷¹.

As public and official acts, the narratives of enforcement decisions appeal to various audiences and not just those directly involved in the process, such as offenders and victims⁶⁷². Hawkins distinguishes between special and general audiences⁶⁷³. The former refers to specific groups, such as criminal defence

⁶⁶³ *Ibid.* See also Duff, ‘Penal Communications: Recent Work in the Philosophy of Punishment’.

⁶⁶⁴ Christine Parker, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’, *Law & Society Review* 40, no. 3 (2006): 604-05; Buell, ‘The Blaming Function of Entity Criminal Liability’, 503. See also Colin King and Nicholas Lord, ‘Deferred Prosecution Agreements in England & Wales: Castles Made of Sand?’, *Public Law*, no. 2 April (2020): 127-29; David M. Uhlmann, ‘The Pendulum Swings: Reconsidering Corporate Criminal Prosecution’, *University of California Davis Review* 49 (2015): 1242-243.; Parker, ‘The “Compliance” Trap’, 604-05; Buell, ‘The Blaming Function of Entity Criminal Liability’, 503.

⁶⁶⁵ Buell, ‘The Blaming Function of Entity Criminal Liability’, 503.

⁶⁶⁶ *Id.*, 477-78.

⁶⁶⁷ *Id.*, 502-05, 520-22.

⁶⁶⁸ Van Erp, ‘Naming without Shaming’, 288; Toni Makkai and John Braithwaite, ‘Reintegrative Shaming and Compliance with Regulatory Standards’, *Criminology* 32, no. 3 (1994): 347.

⁶⁶⁹ Van Erp, ‘Naming without Shaming’, 303; Parker, ‘The “Compliance” Trap’, 605.

⁶⁷⁰ Van Erp, ‘Naming without Shaming’, 291; Parker, ‘The “Compliance” Trap’, 605.

⁶⁷¹ Parker, ‘The “Compliance” Trap’, 609-11.

⁶⁷² Lord, ‘Prosecution Deferred, Prosecution Exempt’, 856; Jaber F. Gubrium and James A. Holstein, *Analyzing Narrative Reality* (Sage Publications, 2009), 33; Hawkins, *Law as Last Resort*, 210–17; Garland, ‘Punishment and Culture’, 203–7.

⁶⁷³ Hawkins, *Law as Last Resort*, 210-17.

attorneys or potential future offenders, that is, other companies that might find themselves in similar situations to the defendant⁶⁷⁴.

Law enforcement decisions are generally aimed at the wider business community, according to Van Erp⁶⁷⁵. These decisions serve as communicative tools that educate and inform companies about the correct interpretation of the law⁶⁷⁶. This is especially relevant given that compliance-oriented criminal and administrative corporate liability consist of broad principles rather than straightforward, unilaterally imposed prescriptions or prohibitions⁶⁷⁷. In this context, enforcement decisions fulfil general deterrence objectives by clarifying and establishing the boundaries between accepted and unlawful behaviour⁶⁷⁸.

Enforcement decisions also represent a significant source of information regarding the strategies, expectations, and other elements of importance for prosecutors during an enforcement action⁶⁷⁹. These decisions similarly inform defence attorneys and potential corporate offenders, guiding their behaviour in comparable situations⁶⁸⁰.

An important audience for law enforcement decisions is the general public⁶⁸¹. Authorities in the criminal justice system place significant emphasis on the public dimension, as they perceive themselves as representatives of the public's interests⁶⁸². Law enforcement agencies strategically shape their narratives to align with public expectations regarding the legal process and the perceived identity of the enforcement institution⁶⁸³. These narratives are not merely informational but are carefully crafted to serve as a platform through which these agencies can articulate and reinforce their institutional identity⁶⁸⁴. In doing so, they seek to secure legitimacy and acceptance from the public, effectively managing how they are perceived externally⁶⁸⁵.

⁶⁷⁴ Hawkins, *Law as Last Resort*, 214.

⁶⁷⁵ Van Erp, 'Naming without Shaming', 289.

⁶⁷⁶ *Id.*, 290-91.

⁶⁷⁷ *Id.*, 290.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 4.

⁶⁸⁰ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 4; Jonathan Evans, 'Artful Dodgers: The Role of Unreliable Narrators in the Production of Authorized Histories and Assessments of Young People in Conflict with the Law', *Deviant Behavior* 38, no. 9 (2017): 1042-043.

⁶⁸¹ Godzimirska and Orina, 'Scapegoats and Underdogs', 451-52.; Alexandra L Cox and Camila Gripp, 'The Legitimation Strategies of "Progressive" Prosecutors', *Social & Legal Studies* 31, no. 5 (2022): 673-74.; Hawkins, *Law as Last Resort*, 211.

⁶⁸² Cox and Gripp, 'The Legitimation Strategies of "Progressive" Prosecutors', 658; Hawkins, *Law as Last Resort*, 211.

⁶⁸³ Godzimirska and Orina, 'Scapegoats and Underdogs', 451-52; Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 275.

⁶⁸⁴ Godzimirska and Orina, 'Scapegoats and Underdogs', 451-52.

⁶⁸⁵ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2; Karen Bullock, '(Re)Presenting "Order" Online: The Construction of Police Presentational Strategies on Social Media', *Policing and Society* 28, no. 3 (2018): 346; Rob C Mawby, 'The Presentation of Police in Everyday Life: Police-Press Relations, Impression Management and the Leveson Inquiry', *Crime, Media, Culture* 10, no. 3 (2014): 245.

In the realm of corporate crime prosecution and regulation, law enforcement institutions grapple with challenges to their legitimacy⁶⁸⁶. This is primarily due to significant divergences between public expectations regarding corporate crime control and the limits of national enforcement tools to regulate transborder and complex corporate crime⁶⁸⁷. These discrepancies are further compounded by the dual expectations placed on corporate crime law enforcers: to punish corporate offenders rigorously while simultaneously preserving the economic relevance of state-based corporate actors⁶⁸⁸. Within this framework of conflicting values and goals, adopting a narrative approach to law enforcement decisions offers a valuable lens through which to explore how these actors navigate these paradoxes in their quest to secure public legitimacy for their professional identities and actions⁶⁸⁹.

3.4. Summary

This chapter outlined the theoretical and conceptual framework that informs the study of NTR narratives. First, from the field of legal and socio-legal studies, this chapter delved into the Law as Narrative scholarship, emphasising the narrative qualities of various communications and interactions within the law⁶⁹⁰. This body of scholarship argues that interpreting law and legal practice through the lens of narratives and storytelling enhances our understanding of how legal and judicial realities are socially constructed⁶⁹¹. It also developed the definition of narratives as understood by this academic field and adopted in the current study, grounding the analysis in a conception of narratives as structured accounts that organise, construct and convey meaning.

Second, Houge's narrative expressivism is presented, a theoretical framework that combines legal and criminological perspectives, particularly those pertaining to legal expressivism and narrative criminology. This theory, developed in the context of international criminal justice studies, draws insights from expressive theories of criminal law regarding the communicative function of criminal procedures and applies the analytical framework provided by narrative analyses to study these features⁶⁹². As such, it informs the theoretical approach of the present study.

⁶⁸⁶ Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', 847–48.

⁶⁸⁷ Lord, 'Detecting and Investigating Transnational Corporate Bribery in Centralised and Decentralised Enforcement Systems', 580; Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', 841; Brown, 'The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement Symposium', 522–24.

⁶⁸⁸ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2; Van Erp, 'Anti-Cartel Thrillers as a New Film Genre', 243; Yeung, 'Presentational Management and the Pursuit of Regulatory Legitimacy', 275–76.

⁶⁸⁹ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 2. Similarly, see Buell, 'Why Do Prosecutors Say Anything: The Case of Corporate Crime', 841.

⁶⁹⁰ See chapter 3.1.

⁶⁹¹ Di Donato, *The Analysis of Legal Cases*, 15; Gaakeer, 'The Perplexity of Judges Becomes the Scholar's Opportunity', 337.

⁶⁹² Houge, 'Narrative Expressivism', 281; Houge, '"Thugs" on Trial', 21.

Third, the expressivist dimension of legal narratives implies that these stories are crafted with an audience in mind⁶⁹³. This chapter complements these assumptions by examining the theoretical considerations of the socio-legal literature relative to the presentational aspects of criminal justice decisions.

⁶⁹³ Godzimirska and Orina, 'Scapegoats and Underdogs', 449; Houge, 'Narrative Expressivism', 279; Hawkins, *Law as Last Resort*, 210; Garland, 'Punishment and Culture', 203.

4. Methodology

Chapter 4 provides an account of the research methodology, laying the groundwork for the subsequent analysis and discussion of findings in the following chapters. This research is grounded in the narrative paradigm, whose ontological, epistemological and methodological views are presented in section 4.1. The next section, 4.2, discusses the conceptual underpinnings of the comparative research design and elaborates on the rationale for selecting Switzerland and the UK as case studies. The characteristics of the data sources – Swiss SPOs and UK DPAs – are detailed in section 4.3, providing an overview of the types of documents analysed and the specific cases included in the study, as well as the data collection processes. Section 4.4 introduces the narrative analysis techniques employed to examine the collected data. Finally, section 4.5 provides an overview of the narrative components of SPOs and DPAs.

4.1. Ontological, Epistemological and Methodological Stance

This section sets out the ontological, epistemological, and methodological assumptions that underpin this thesis⁶⁹⁴. These are informed by the narrative paradigm which is increasingly recognised as a distinctive research framework in the humanities⁶⁹⁵.

Narrative scholarship engages with narrative at multiple levels, with certain authors advancing claims that elevate it to the level of ontology⁶⁹⁶. In his seminal work “The Narrative Construction of Reality”, Bruner argues that narrative is not merely a mode of representation, but a fundamental cognitive framework through which human beings organise experience and make sense of the world⁶⁹⁷. Rather than accessing reality in a direct or unmediated way, individuals structure their understanding of human action and social life through narrative forms that impose temporal order, causality, and meaning on events⁶⁹⁸. For Bruner, this implies that what is commonly understood as “reality” in the domain of human affairs is inseparable from the narrative structures through which it is interpreted⁶⁹⁹. He suggests

⁶⁹⁴ For a discussion on the relationship between ontology, epistemology and methodology, see Mukhles M. Al-Ababneh, ‘Linking Ontology, Epistemology And Research Methodology’, *Science & Philosophy* 8, no. 1 (2020), 76.

⁶⁹⁵ Robert and Shenhav, ‘Fundamental Assumptions in Narrative Analysis’, 8-9.; Gabriela Spector-Mersel, ‘Narrative Research: Time for a Paradigm’, *Narrative Inquiry* 20, no. 1 (13 October 2010): 204–24; Stefinee Pinnegar and J. Gary Daynes, ‘Locating Narrative Inquiry Historically’, in *Handbook of Narrative Inquiry: Mapping a Methodology*, eds. Jean D. Clandinin (Sage Publications, 2007), 28–30; Robert C. Rowland, ‘Narrative: Mode of Discourse or Paradigm?’, *Communication Monographs* 54, no. 3 (1987): 264–75; Walter R. Fisher, ‘The Narrative Paradigm: An Elaboration’, *Communications Monographs* (1985): 347–67.

⁶⁹⁶ For a comprehensive synthesis of the status attributed to narratives in narrative scholarship within the humanities, see generally Robert and Shenhav, ‘Fundamental Assumptions in Narrative Analysis’, 1-17.

⁶⁹⁷ Bruner, ‘The Narrative Construction of Reality’, 4-5.

⁶⁹⁸ *Id.*, 4.

⁶⁹⁹ *Id.*, 4-5.

that experience itself tends to take the form of the narratives available within a given culture, such that the distinction between the world as lived and the world as narrated becomes increasingly difficult to sustain⁷⁰⁰. Narrative is thus not simply a way of describing reality after the fact, but a means through which reality is actively constituted, insofar as it shapes how events are perceived, remembered, and communicated.

A complementary perspective is offered by Niles through his concept of *homo narrans*, suggesting that humans are inherently storytelling beings, for whom narratives function as the basic tools for organising meaning and understanding social life⁷⁰¹. Niles argues that human beings do not merely use narratives to describe their world but actively shape and sustain it through storytelling practices that are deeply embedded in social life⁷⁰². Narrative, in this view, is not only a cognitive tool but a fundamentally social activity through which individuals construct shared meanings, transmit cultural knowledge, and maintain continuity with the past⁷⁰³. Telling stories is thus understood as a distinctive human trait, one that underpins the formation of culture itself and enables individuals to situate themselves within a broader social and historical context⁷⁰⁴. Taken together, these perspectives suggest that narrative can be seen as possessing an ontological dimension, insofar as it shapes the conditions under which reality is experienced and understood, while remaining embedded in cultural, institutional, and communicative contexts.

While this study recognises that narratives play a constitutive role in shaping social reality, it does not adopt a fully relativist position. Rather, it proceeds from the assumption that a material and institutional reality exists independently of narrative accounts, but that such reality is accessed, interpreted, and rendered meaningful through narrative practices⁷⁰⁵. In this sense, narratives are not equated with reality itself but are understood as mediated representations that organise and communicate particular interpretations of it.

This distinction is particularly important in avoiding the conflation of ontology and epistemology. Narratives are approached in this study as tools through which knowledge about social phenomena is

⁷⁰⁰ *Id.*, 2-3, 4.

⁷⁰¹ John D. Niles, *Homo Narrans: The Poetics and Anthropology of Oral Literature* (University of Pennsylvania Press, 1999), 3; See also Ronald R Krebs *et al.*, 'Analysing Social Narratives', *European Political Science* 16, no. 4 (2017): 530; Sveinung Sandberg and Thomas Ugelvik, 'The Past, Present, and Future of Narrative Criminology: A Review and an Invitation', *Crime, Media, Culture* 12, no. 2 (2016): 130; Fisher, 'Narration as a Human Communication Paradigm', 6.

⁷⁰² Niles, *Homo Narrans*, 4.

⁷⁰³ *Ibid.*

⁷⁰⁴ *Ibid.* See also Pinnegar and Daynes, 'Locating Narrative Inquiry Historically', 30.

⁷⁰⁵ For a similar perspective, see Bera Vall Castelló, 'Bridging Constructivism and Social Constructionism: The Journey from Narrative to Dialogical Approaches and Towards Synchrony', *Journal of Psychotherapy Integration* 26, no. 2 (2016): 130; Biba Bela, 'Narrative and Reality', 24-33, *Journal of the Finnish Anthropological Society* 32 no. 4 (2007): 29-31; Richard Dunford and Deborah Jones, 'Narrative in strategic change', *Human Relations* 53, no. 9 (2000): 1207; Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin Books, 1966), 54-6.

constructed and conveyed, rather than as ontological accounts of reality⁷⁰⁶. They are therefore considered inherently partial, selective, and situated, reflecting specific perspectives, institutional positions, and communicative purposes⁷⁰⁷. As such, the narratives contained in NTR decisions are not treated as transparent or unmediated truths about prosecutorial practices or corporate conduct, but as structured representations that foreground certain elements while omitting others⁷⁰⁸.

In this sense, this study acknowledges that narratives do not emerge in a vacuum but are produced within structured social, legal, and institutional environments. Enforcement regimes, procedural rules, resource constraints, and broader political and economic conditions shape not only the outcomes of NTR processes but also the range of narratives that can be plausibly constructed within them. These structural conditions do not merely provide a backdrop to narratives but actively delimit and enable particular forms of storytelling.

Accordingly, the philosophical stance adopted in this research does not claim that narratives reveal an objective truth about NTR practices. Rather, it understands the narratives contained in SPO and DPA decisions as situated knowledge claims that reflect particular institutional perspectives and communicative purposes. Their epistemic value lies not in their capacity to accurately mirror an external reality, but in their ability to show how legal actors construct, interpret, and communicate understandings of TCB offences, corporate responsibility, and enforcement strategies.

These considerations carry several methodological implications. First, the philosophical stance adopted here aligns with a narrative methodology that prioritises interpretation over verification⁷⁰⁹. It shifts the analytical focus from assessing whether legal narratives correspond to an underlying reality, to examining how these narratives produce meaning, establish credibility, and achieve coherence within specific legal and institutional contexts. In doing so, it acknowledges both the constitutive power of narrative and its limitations as a partial and context-dependent form of knowledge. Second, the narrative

⁷⁰⁶ For a similar approach, see Pedersen and Ingebrigtsen, 'Why Narrative (Still) Matters', 11-2; Cigdem Esin, Mastoureh Fathi, and Corinne Squire, 'Narrative Analysis: The Constructionist Approach', eds. Uwe Flick, *The SAGE Handbook of Qualitative Data Analysis*, 2013, 204-05; Anne Bell, 'A Narrative Approach to Research', *Canadian Journal of Environmental Education* 8 (2003): 95-110.

⁷⁰⁷ For a similar perspective on the nature of narratives, see Lois Presser and Sveinung Sandberg, 'Narrative Criminology as Critical Criminology', *Critical Criminology* 27 (2019): 137, 139; Sergi, "'Three Tales/Two Threats'", 224-25; Anna De Fina and Alexandra Georgakopoulou, 'Introduction', in *The Handbook of Narrative Analysis*, eds. Anna De Fina and Alexandra Georgakopoulou (Wiley Blackwell, 2015), 3.

⁷⁰⁸ For a similar perspective, see Catherine Kohler Riessman, *Narrative Methods for the Human Sciences* (Sage Publications, 2008), 105.

⁷⁰⁹ Spector-Mersel, 'Narrative Research: Time for a Paradigm', 208-10.

itself is the focus of investigation, given that the stories are considered as social acts and not as passive conduits for transmitting pre-existing knowledge⁷¹⁰.

Third, qualitative methods, favouring interpretative analytical approaches, are prioritised given their potential to capture the social processes of meaning-making and drive the researcher to consider the contextual factors that shape the phenomenon under study⁷¹¹. Indeed, narrative epistemology emphasises that narratives are not simply given; they are created and understood within specific contexts⁷¹². From this perspective, a context-sensitive interpretation of the data is underscored, suggesting an analytical focus that extends beyond the narrative text⁷¹³. Gubrium and Holstein explain that stories are interpreted *in situ* with a recognition of the storytelling practices and contexts that inform and provide meaning to narrative accounts⁷¹⁴. The significance of acknowledging these aspects aligns with the understanding that narratives are co-created between tellers and audiences and adapted to the circumstances of their telling⁷¹⁵. Consequently, the ways in which stories are interpreted is crucial to narrative methodology⁷¹⁶.

Fourth, the story of an event is approached as a whole, a unit, thus privileging a holistic analysis of narrative texts⁷¹⁷. The holistic approach is contrasted with the categorical analysis that fragments the story into segments⁷¹⁸. It implies that the parts within it are interpreted in relation to other parts of the story⁷¹⁹. Maintaining complete accounts enhances understanding of the storyteller's intent in structuring the narrative⁷²⁰.

⁷¹⁰ Robert and Shenhav, 'Fundamental Assumptions in Narrative Analysis', 8; Esin, Fathi, and Squire, 'Narrative Analysis: The Constructionist Approach', 207; Spector-Mersel, 'Narrative Research: Time for a Paradigm', 214; Sveinung Sandberg, 'What Can "Lies" Tell Us about Life? Notes towards a Framework of Narrative Criminology', *Journal of Criminal Justice Education* 21, no. 4 (December 2010): 458.

⁷¹¹ Diane Beeson, 'Nuance, Complexity, and Context: Qualitative Methods in Genetic Counseling Research', *Journal of Genetic Counseling* 6, no. 1 (1997): 26.

⁷¹² Riessman, *Narrative Methods for the Human Sciences*, 105; Spector-Mersel, 'Narrative Research: Time for a Paradigm', 214.

⁷¹³ Esin, Fathi, and Squire, 'Narrative Analysis: The Constructionist Approach', 207.

⁷¹⁴ Gubrium and Holstein, *Analyzing Narrative Reality*, 31.

⁷¹⁵ Lois Presser and Sveinung Sandberg, 'Research Strategies for Narrative Criminology', in *Qualitative Research in Criminology* (Routledge, 2017), 95–97; Lois Presser and Sveinung Sandberg, 'Introduction: What Is the Story?', in *Narrative Criminology* (New York University Press, 2015), 1; Esin, Fathi, and Squire, 'Narrative Analysis: The Constructionist Approach', 204–6; Riessman, *Narrative Methods for the Human Sciences*, 106; Andrew C. Sparkes and Brett Smith, 'Narrative Constructionist Inquiry', in *Handbook of Constructionist Research*, eds. James A. Holstein and Jaber F. Gubrium (The Guilford Press, 2008), 300.

⁷¹⁶ Spector-Mersel, 'Narrative Research: Time for a Paradigm', 214.

⁷¹⁷ Spector-Mersel, 'Narrative Research: Time for a Paradigm', 214; Riessman, *Narrative Methods for the Human Sciences*, 12; Susan E. Chase, 'Narrative Inquiry. Multiple Lenses, Approaches, Voices', in *The Sage Handbook of Qualitative Research*, eds. Norman K. Denzin and Yvonna S. Lincoln, 3rd ed. (Sage Publications, 2005), 663.

⁷¹⁸ Claudia C. Beal, 'Keeping the Story Together: A Holistic Approach to Narrative Analysis', *Journal of Research in Nursing* 18, no. 8 (2013): 694; Riessman, *Narrative Methods for the Human Sciences*, 12.

⁷¹⁹ Claudia C. Beal, 'Keeping the Story Together', 694; Riessman, *Narrative Methods for the Human Sciences*, 12.

⁷²⁰ Spector-Mersel, 'Narrative Research: Time for a Paradigm', 214; Riessman, *Narrative Methods for the Human Sciences*, 12; Chase, 'Narrative Inquiry. Multiple Lenses, Approaches, Voices', 663.

To summarise, the narrative paradigm privileges a methodology that encompasses a focus on the form (how the story is told), content (what is said in the story and why), and context (where the story is produced and told) of the story⁷²¹, dimensions that are also included in this study⁷²². In the present research context, the last tenet implies a thorough understanding of the laws, practices, and ideologies guiding NTRs both internationally and nationally (in Switzerland and the UK), as described and discussed in chapter 1. These contextual factors constitute an essential element of the narrative analysis pursued in this study.

4.2. Comparative Research Design

Hantrais conceptualises the comparative research design as exploring issues or phenomena with a particular focus on their specific socio-cultural setting (e.g., institutions, traditions, value systems)⁷²³. Building on this framework, the present research compares the narratives embedded within the two contrasting institutional and cultural settings of Swiss and UK NTRs.

The rationale for incorporating a cross-jurisdictional comparison is twofold. First, it arises from the interest to devote particular attention to the conditions of storytelling within and in relation to specific NTR legal frameworks, as mentioned in chapter 1, section 1.2. In fact, many jurisdictions with adversarial and inquisitorial procedural frameworks are resolving TCB cases through NTRs⁷²⁴. However, due to the absence of global standards, each nation develops unique NTR procedures, thus creating notable disparities in NTR practices across different legal systems⁷²⁵.

A comparative OECD study highlights significant variations in jurisdiction-specific NTR procedures concerning the mode of settlement of TCB cases and outcomes (whether conviction-based or non-conviction-based), as well as levels of transparency⁷²⁶. Depending on the country, NTRs with companies may be reached before or after a criminal indictment, with or without an admission of guilt, and may or may not imply a conviction⁷²⁷. Furthermore, law enforcement agencies in different jurisdictions consider various factors when resolving a TCB case with an NTR⁷²⁸. These factors may

⁷²¹ Jacqueline Anne Marie O'Toole, 'Narratives of Slimming: Women and Weight Management in Irish Society' (PhD Thesis, University of Galway, 2016), 104–5; Riessman, *Narrative Methods for the Human Sciences*, 11.

⁷²² Cf. section 4.4.

⁷²³ Linda Hantrais, *International Comparative Research: Theory, Methods and Practice* (Bloomsbury Publishing, 2008), 6.

⁷²⁴ Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', 250; Lüth, 'Corporate Non-Prosecution Agreements as Transnational Human Problems', 318; Makinwa, 'Public/Private Co-Operation in Anti-Bribery Enforcement', 48-55.

⁷²⁵ Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement', 110; Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', 250; OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 79.

⁷²⁶ OECD, 'Resolving Foreign Bribery Cases with Non-Trial Resolutions', 43, 54, 65-96, 152.

⁷²⁷ *Id.*, 65-96, 54-6, 43-64.

⁷²⁸ *Id.*, 67-81.

include the public interest in prosecuting a case, the strength of the evidence, the behaviour of the company during investigations, or a combination of these elements⁷²⁹. Additionally, there are varying degrees of transparency regarding the communication of NTRs⁷³⁰. Some countries announce NTR decisions through press releases or by publishing the agreements⁷³¹, while the extent of information provided in these decisions varies between jurisdictions⁷³².

Observed divergences are attributed to differences in the criminal justice system of each country in which NTRs operate⁷³³. As indicated by Campbell, NTRs do not represent culturally neutral crime control procedures⁷³⁴. Their introduction in national criminal justice systems necessarily undergoes an adaptation process to fit pre-established substantive and procedural laws guiding corporate criminal punishment, anti-bribery policies, and political sensibilities surrounding the issue of TCB⁷³⁵. The adaptation process led to the development of jurisdiction-specific NTR procedures integrating and exemplifying local criminal justice practices and attitudes towards TCB crimes⁷³⁶.

Procedural differences are particularly insightful when approaching NTR through a narrative lens. The socio-legal literature pertaining to the narratives of justice emphasises the contextual embeddedness of narrative formations⁷³⁷. Different legal cultures, social practices, and legal and institutional requirements convey divergent narratives about crime, justice and punishment⁷³⁸. A comparative research design related to enforcement practices inevitably brings to the forefront inter-jurisdictional variations in legal frameworks and cultures that underpin these procedures⁷³⁹. In considering these variations, we can observe how narratives of TCB prosecutions, offences and offenders are variously scripted in relation to nation-specific NTR procedures and underlying assumptions about the organisation and role of criminal law. For instance, decisions resulting from conviction-based NTRs,

⁷²⁹ *Ibid.*

⁷³⁰ *Id.*, 152.

⁷³¹ *Id.*, 152-54.

⁷³² *Id.*, 155.

⁷³³ Davis, 'Judicial Review of Deferred Prosecution Agreements', 66.

⁷³⁴ Campbell, 'Settling with Corporations in Europe: A Sign of Legal Convergence?', 237, 247.

⁷³⁵ *Id.*, 237-238. See also Elitza Katzarova and Jessica Ansart, 'The Americanization of International Anti-Corruption: The Influence of the FCPA on the OAS and OECD Conventions', in *The Transnationalization of Anti-Corruption Law* (Routledge, 2021), 44.

⁷³⁶ Davis, 'Judicial Review of Deferred Prosecution Agreements', 66.

⁷³⁷ David Baker, 'Using Narrative to Construct Accountability in Cases of Death after Police Contact', *Australian & New Zealand Journal of Criminology* 52, no. 1 (2019): 63-4; Houge, 'Narrative Expressivism', 283; Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 544; Andrea Leverentz, 'Narratives of Crime and Criminals: How Places Socially Construct the Crime Problem', *Sociological Forum* 27, no. 2 (2012): 350-51; Zedner, 'In Pursuit of the Vernacular', 518-20.

⁷³⁸ Baker, 'Using Narrative to Construct Accountability in Cases of Death after Police Contact', 63-4; Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 544.

⁷³⁹ Anna Sergi, 'Divergent mind-sets, convergent policies: Policing models against organized crime in Italy and in England within international frameworks', *European Journal of Criminology* 12, no. 6 (2015): 660.

such as SPOs, may tend to adopt a more condemnatory tone toward TCB offences than those emerging from a non-conviction-based NTRs, such as DPAs.

Second, a comparative research design facilitates the analysis of the impact of NTRs within specific legal systems⁷⁴⁰. As stated by Field and Nelken, comparative perspectives enable assessment of the impact of transnational trends, such as resolving TCB cases through NTRs, by considering the convergences and divergences between legal frameworks and practices⁷⁴¹. Bilateral comparisons serve as a corrective to tendencies toward overgeneralisation that may arise from perceived transnational commonalities⁷⁴².

A key question to be addressed at the beginning of every comparative research design is how to select jurisdictions for study⁷⁴³. A focused two-country comparison seemed the most appropriate for assessing the new criminal justice narratives crafted within enforcement mechanisms. Narrative inquiries necessitate sensitivity to the historical, institutional, and cultural contexts in which stories are produced, thus favouring a small-scale sampling rationale that permits in-depth examinations of the country-specific conditions⁷⁴⁴.

For Pakes, two methods of case selection are available in focused comparison: the “most similar” or the “most different” design⁷⁴⁵. The most similar design compares similar countries based on the assumption that the more alike the cases are, the easier it becomes to isolate the factors responsible for the differences⁷⁴⁶. By contrast, in the most different design, similar practices or occurrences are studied in two different settings⁷⁴⁷. This thesis employs a most different design given its objective to study NTR narratives across different legal and social contexts.

Switzerland and the UK were chosen as case studies for two reasons. First, both countries resolve TCB cases primarily through NTRs and were considered as active prosecutors against TCB offences at the

⁷⁴⁰ While cross-border adaptations of NTR differ significantly, they share three interrelated practices and principles: negotiation, public-private cooperation in case-making and leniency towards corporate offenders. See chapter 1.1.

⁷⁴¹ Field and Nelken, ‘Reading and Writing Youth Justice in Italy and (England and) Wales’, 303.

⁷⁴² *Id.*, 303-04. See also Joachim J. Savelsberg, ‘Globalization and States of Punishment’, in *Comparative Criminal Justice and Globalization*, eds. David Nelken (Routledge, 2011), 73.

⁷⁴³ Francis Pakes, *Comparative Criminal Justice* (Routledge, 2010), 16; Steen Mangel, ‘Qualitative Research Methods in Cross-National Settings’, *International Journal of Social Research Methodology* 2, no. 2 (1999): 113 for a definition of the most similar and the most different systems design.

⁷⁴⁴ Spector-Mersel, ‘Narrative Research: Time for a Paradigm’, 212; Riessman, *Narrative Methods for the Human Sciences*, 106; Mangel, ‘Qualitative Research Methods in Cross-National Settings’, 113.

⁷⁴⁵ Pakes, *Comparative Criminal Justice*, 16. See also Adam Przeworski, *The Logic of Comparative Social Inquiry*. (John Wiley and Sons, 1970), 32–9.

⁷⁴⁶ Todd Landman and Edzia Carvalho, *Issues and Methods in Comparative Politics: An Introduction*, 4th ed. (Routledge, 2017), 70; Rod Hague, Martin Harrop, and Shaun Breslin, *Comparative Government and Politics: An Introduction*, 3rd ed. (Macmillan, 1992), 281.

⁷⁴⁷ Landman and Carvalho, *Issues and Methods in Comparative Politics*, 70; Hague, Harrop, and Breslin, *Comparative Government and Politics*, 281.

beginning of this research project⁷⁴⁸. They, however, adopt substantially different NTR procedures⁷⁴⁹. Second, Switzerland and the UK adhere to contrasting procedural systems: Switzerland is a predominantly inquisitorial procedural system⁷⁵⁰ while the UK has a predominantly adversarial one⁷⁵¹.

Swiss SPOs⁷⁵² and UK DPAs⁷⁵³ represent two different methods for resolving TCB offences, which lead to different outcomes. Table 1 briefly summarises the main differences between SPO and DPA NTR procedures. SPOs are conviction-based procedures leading to out-of-court criminal sentences⁷⁵⁴. These enforcement mechanisms were initially envisioned for misdemeanour offences⁷⁵⁵. As such, the legal framework does not expressly foresee the possibility of an agreed statement of facts⁷⁵⁶, typical for NTR-oriented procedural frameworks dealing with complex corporate crimes⁷⁵⁷. The involvement of a criminal court within these proceedings is not automatic and is predicated upon the defendant's choice to contest the criminal charges and sanctions stipulated in the SPO⁷⁵⁸. In contrast, DPAs are non-conviction-based procedures specifically designed for corporate offenders and allow for a negotiated statement of facts⁷⁵⁹. The criminal court plays, however, a more significant role in DPAs than in SPOs by revising prosecution decisions and validating the agreed-upon criminal fines⁷⁶⁰.

⁷⁴⁸ TI, 'Exporting Corruption. Progress Report 2020: Assessing enforcement of the OECD Anti-Bribery Convention' (2020), 12.

⁷⁴⁹ Cf. Table 1.

⁷⁵⁰ Enescu, 'Penal Orders and the Role of Prosecutors in Switzerland', 135; Laura Macula, 'The Potential to Secure a Fair Trial through Evidence Exclusion: A Swiss Perspective', in *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules*, eds. Sabine Gless and Thomas Richter (Springer Open, 2019), 15; Sabine Gless and Jeannine Martin, 'Water Always Finds Its Way-Discretion and the Concept of Exclusionary Rules in the Swiss Criminal Procedure Code', in *Discretionary Criminal Justice in a Comparative Context*, ed. Michele Caianiello and Jacqueline S. Hodgson (Carolina Academic Press, 2015), 164.

⁷⁵¹ Craig Bradley, 'The Prosecutor's Role: Plea Bargaining and Evidentiary Exclusion', in *The Prosecutor in Transnational Perspective*, eds. Erik Luna and Marianne L. Wade (Oxford University Press, 2012), 91; Jacqueline S. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', *North Carolina Journal of International Law* 35 (2009): 320.

⁷⁵² Cf. SCCP Art. 352-357.

⁷⁵³ Cf. CCA sch. 17.

⁷⁵⁴ Cf. SCCP Art. 352.

⁷⁵⁵ Enescu, 'Penal Orders and the Role of Prosecutors in Switzerland', 126–28; Mühlemann, 'Der (Unzulässige) Strafbefehl Im Abgekürzten Verfahren', 90.

⁷⁵⁶ Cf. SCCP Art. 352-357.

⁷⁵⁷ OECD, 'Resolving Bribery Cases with Non-Trial Resolutions', 69.

⁷⁵⁸ Cf. SCCP Art. 354.

⁷⁵⁹ Cf. CCA sch. 17 s. 4 ss. 1, s. 5 ss. 1.

⁷⁶⁰ Cf. CCA sch. 17 s. 7, s. 8.

Table 1: Main differences between SPOs and DPAs

SPO	DPA
Conviction-based	Non-conviction based
Designed for misdemeanour offences	Designed for corporate crimes
Intervention of a criminal court if the defendant contests to the SPO	The DPA agreement requires the validation of a criminal court
Does not foresee the negotiation of the facts	Possibility to negotiate the statement of facts

Regarding the inquisitorial-adversarial divide, it is essential to note that contemporary European procedural systems integrate features from both systems⁷⁶¹. For example, in 2011, the unified SCCP introduced a simplified procedure inspired by plea bargaining, commonly known in Anglo-Saxon adversarial-based systems⁷⁶². In the UK, the pre-trial stage adopts inquisitorial features, as the investigation is led by a neutral figure, usually a judge⁷⁶³.

Recognising the traditional adversarial-inquisitorial dichotomy between the Swiss and the UK criminal procedure is nevertheless significant in this study for three reasons. First, SPOs and DPAs operate under distinct conceptualisations of the criminal process⁷⁶⁴. The criminal process in the Swiss inquisitorial system is imagined as an official inquiry designed to uncover the substantial truth of past behaviours⁷⁶⁵. Under this system, nonpartisan state officials take charge of most procedural action⁷⁶⁶. Matters include gathering and assessing the evidence, which is attributed to state officials⁷⁶⁷ - in our case, the prosecutor.

⁷⁶¹ Beatrice Coscas-Williams and Michal Alberstein, 'A Patchwork of Doors: Accelerated Proceedings in Continental Criminal Justice Systems', *New Criminal Law Review* 22, no. 4 (2019): 598; John R. Spencer, 'Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?', *The International Journal of Human Rights* 20, no. 5 (2016): 601; Janet Ainsworth, 'Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models', *Language and Law* 2, no. 1 (2015): 3.

⁷⁶² André Kuhn and Camille Perrier, 'Quelques points problématiques du Code de Procédure Pénale Suisse', *Jusletter* 22 (2008): 4–6.

⁷⁶³ See generally Field and Nelken, 'Reading and Writing Youth Justice in Italy and (England and) Wales', 287–308. See also Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', 321.

⁷⁶⁴ For a discussion on the differences between inquisitorial and adversarial systems, see generally Peter J. Koppen and Steven D. Penrod, 'Adversarial or Inquisitorial', in *Adversarial versus Inquisitorial Justice*, eds. Peter J. Koppen and Steven D. Penrod, Perspectives in Law & Psychology (Springer US, 2003), 1–19. For a discussion on how the different features of these procedural systems impact legal storytelling, see generally Ainsworth, 'Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models', 366–89.

⁷⁶⁵ Cf. SCCP Art. 6. See also Macula, 'The Potential to Secure a Fair Trial through Evidence Exclusion', 15–16; Gilliéron, 'Wrongful Convictions in Switzerland', 1149–151.

⁷⁶⁶ Macula, 'The Potential to Secure a Fair Trial through Evidence Exclusion', 18–9; Gilliéron, 'Wrongful Convictions in Switzerland', 1150.

⁷⁶⁷ Macula, 'The Potential to Secure a Fair Trial through Evidence Exclusion', 18-9; Vuille and Thompson, 'An American Advantage?', 5. See also Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986), 4 for a discussion on the divergent evidence-gathering procedures in inquisitorial and adversarial systems.

The defence and other parties play a limited role in the pre-trial phase⁷⁶⁸. They can request that certain lines of inquiry be pursued, but the prosecutor retains decision-making powers in this regard⁷⁶⁹. In contrast, UK's adversarial system conceptualises the criminal process as a contest between two adversaries before a passive decision-maker⁷⁷⁰. It affords a shared responsibility to the prosecutor and the defence in establishing the facts of the case⁷⁷¹. Defendants can conduct their investigation and propose evidence in their favour⁷⁷². The two systems differ fundamentally in their authority structure, the allocation of responsibility for the accomplishment of certain procedural tasks, and investigation styles. These divergences undoubtedly affect how the parties of the process, their roles and responsibilities are narrated and how criminal offences are narratively reconstructed.

Second, the inquisitorial-adversarial divide goes beyond conceptual and practical differences. It pertains to the mode of legal reasoning as well⁷⁷³. Inquisitorial-based legal professionals tend to argue deductively from legal principles⁷⁷⁴. Legal reasoning follows a specific methodology of identifying and matching the facts of the case to abstract legal norms⁷⁷⁵. In this sense, inquisitorial style legal reasoning tends to be abstract and less consequentialist⁷⁷⁶. In contrast, adversarial-based legal professionals rely on an inductive method of legal reasoning based on comparative factual analysis⁷⁷⁷. Legal reasoning is, therefore, a comparative analysis of the facts with the aim of declaring a certain precedent applicable based on this comparison⁷⁷⁸. Against this background, it is important to note how the distinctive traits of each system are translated into case-specific narratives.

Thirdly, differences in procedural systems reflect distinct cultural sensibilities - encompassing attitudes, expectations, and perceptions about criminal law and its societal role⁷⁷⁹. Procedural systems are intrinsically tied to legal cultures and represent, therefore, much more than a collection of rules that determine how the criminal process is or should be: "[...] they embody deeply rooted, historically

⁷⁶⁸ Gary Edmond and Joelle Vuille, 'Comparing the Use of Forensic Science Evidence in Australia, Switzerland, and the United States: Transcending the Adversarial-Nonadversarial Dichotomy', *Jurimetrics* 54 (2013): 238.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Muhammad Ramzan Kasuri, Sheer Abbas, and Tahir Mahmood, 'Adversarial and Inquisitorial; Two Rival Models of Criminal Procedure and Theory of Convergence: An Appraisal', *Journal of Law Social Studies (JLSS)* 6, no. 1 (2024): 75; Chrisje Brants and Allard Ringnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales* (Wolf Legal Publishers, 2011), 8; Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', 320.

⁷⁷¹ Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain', 320.

⁷⁷² *Ibid.*

⁷⁷³ Ruth Blufarb, 'Law as Narrative Und Das Deutsche Recht – Chancen Und Grenzen', in *Erzählen und Recht/Narrative and Law*, eds. Monika Fludernik and Frank L. Schäfer (Ergon Verlag, 2022), 33; Peter Alldridge, 'Scientific Expertise and Comparative Criminal Procedure', *The International Journal of Evidence & Proof* 3, no. 3 (1999): 146.

⁷⁷⁴ Blufarb, 'Law as Narrative und das Deutsche Recht', 33; Alldridge, 'Scientific Expertise and Comparative Criminal Procedure', 146.

⁷⁷⁵ Blufarb, 'Law as Narrative Und Das Deutsche Recht', 33.

⁷⁷⁶ Alldridge, 'Scientific Expertise and Comparative Criminal Procedure', 146.

⁷⁷⁷ Blufarb, 'Law as Narrative Und Das Deutsche Recht', 33.

⁷⁷⁸ *Id.*, 31.

⁷⁷⁹ Chrisje Brants, 'Comparing Criminal Process as Part of Legal Culture', in *Comparative Criminal Justice and Globalization*, eds. David Nelken (Routledge, 2016), 83.

conditioned attitudes about the nature of law, its role in society and about the proper organisation and operation of a legal system”⁷⁸⁰. This, in turn, affects how TCB cases are narrated to fit local cultures and how these narratives are received and understood by various stakeholders, legal professionals, businesses, and NGOs. Contrasting differences in legal cultures and the language of the law offers a fertile ground for inquiry into how foreign inventions, such as the negotiated justice approach to TCB cases, are translated into local legal systems⁷⁸¹.

4.3. Data Sources and Access

The following chapters outline the primary data sources - SPOs in Switzerland and DPAs in the UK - alongside the methodology employed to access these decisions.

4.3.1. Data Sources: SPO and DPA Decisions

The data sources for accessing the narratives produced within the context of settling TCB cases are NTR decisions - SPOs in Switzerland and DPAs in the UK. Indeed, this thesis aims to analyse the narratives embedded within SPOs and DPAs, positioning SPO and DPA decisions as suitable sources of data. It is worth noting that expert semi-structured interviews⁷⁸² were conducted with defence attorneys and prosecutors exercising in the field of anti-bribery enforcement, both in Switzerland and in the UK, by the researcher and team-members of the research project from which this thesis emerged. These interviews were crucial for contextualising NTR practices in both countries, as well as for providing insights into informal procedural practices and the specific interactions between the main actors involved. However, the data obtained from these interviews were excluded from the present study, as the research questions focus on publicly promulgated and authoritative NTR narratives intended for a broader audience, independent of the individual actors’ intentions, interpretations, and rationalisations.

In relation to SPO and DPA decisions, the sample size was determined using a purposive sampling method, which relies on the researcher’s prior knowledge on the nature and characteristics of the issues explored⁷⁸³. This method consists of selecting cases with specific attributes that can provide an understanding of the concepts under study with a wide range of variability⁷⁸⁴. To identify common

⁷⁸⁰ *Id.*, 84.

⁷⁸¹ For a similar perspective on language and legal culture, see Zedner, ‘In Pursuit of the Vernacular’, 517–34.

⁷⁸² For a discussion of the utility and objectives of expert interviews in criminological research, see Olga Petintseva, Rita Farina and Yarin Eski, *Interviewing Elites, Experts and the Powerful in Criminology* (Palgrave Macmillan, 2020).

⁷⁸³ Miriam Boeri and Aukje K. Lamonica, ‘Sampling Designs and Issues in Qualitative Criminology’, in *The Routledge Handbook of Qualitative Criminology*, eds. Heith Copes and Miller Mitchell (Routledge, 2015), 128; Alan Bryman, *Social Research Methods* (Oxford university press, 2012), 418.

⁷⁸⁴ Boeri and Lamonica, ‘Sampling Designs and Issues in Qualitative Criminology’, 128-129.

themes and patterns in NTR narratives, this study focused on all TCB NTR decisions concluded by the main enforcement authorities (the OAG in Switzerland and the SFO in the UK) from 2011 to 2023. The choice of the start year (2011) relates to changes in the legal landscape of Switzerland. The entry into force of the SCCP in 2011 introduced SPOs as an enforcement tool available to the OAG. 2011 equally marked the first SPO case related to TCB⁷⁸⁵.

This resulted in 15 TCB NTRs, 10 SPOs, and 5 DPAs that comprise the data set of the present research and presented in tables 2 and 3.

⁷⁸⁵ OAG, 'Rapport de gestion : 2011', 23.

Table 2: SPOs concluded by the OAG between 2011 and 2023

No.	Year of NTR decision	Name of the company group	No. of company defendants	Industry	Criminal fine	Other monetary consequences (total)
1	2011	Alstom	1	Transport, rail	CHF 2.5 million	CHF 36.4
2	2016	Odebrecht	2	Engineering, construction, chemicals	CHF 4.5 million and CHF 0	CHF 117.1 million
3	2016	Nitrochem	1	Fertilizers and grain trading	CHF 750'000	CHF 73'345
4	2017	KBA-Notasys	1	Banknote printing	CHF 1	CHF 30.04 million
5	2017	Dredging International Services	2	Infrastructure of harbours, dredging	CHF 1 and 1 million	CHF 36.7 million
6	2019	Gunvor	2	Oil	CHF 4 million	CHF 90 million
7	2019	Andrade Gutierrez	1	Engineering	CHF 2 million	CHF 16.6 million
8	2021	SBM-Offshore	3	Oil and Gas	CHF 4.2 million	CHF 2.8 million
9	2022	ABB	1	Engineering	CHF 4 million	CHF 50'000
10	2023	SICPA	1	Security inks for banknotes and provider of services for identification, traceability, and authentication	CHF 1 million	CHF 49'253

Table 3: DPAs concluded by the SFO between 2011 and 2023

No.	Year of NTR decision	Name of the company group	No. of company defendants	Industry	Criminal fine	Other monetary consequences (total)
1	2015	Standard Bank	1	Banking	USD 16.8 million	USD 29.1 million
2	2017	Rolls-Royce	2	Civil and defence aerospace, energy	GBP 239 million	GBP 258 million
3	2019	Güralp Systems	1	Seismic monitoring instrumentation	none	GBP 2 million
4	2020	Airbus	1	Aviation	EUR 398 million	EUR 593 million
5	2021	Amec Foster Wheeler (Amec)	1	Oil and Gas	GBP 46 million	GBP 57 million

SPO decisions comprise a single document detailing the investigation, prosecution, TCB offences, and the consequences imposed on defendant companies for these offences. On average, the selected SPOs span 17.8 pages, with a minimum length of 8 pages per document and a maximum of 37 pages. Out of the 10 SPOs included in this study, 6 are rendered in German⁷⁸⁶ and 4 in French⁷⁸⁷ as two of the three official languages in Switzerland⁷⁸⁸. The excerpts shown in the results chapters⁷⁸⁹ are translated into English by the author.

DPAs consist of three types of documents: the preliminary and final DPA judgment, the statement of facts, and the agreement. Consequently, the selected DPAs are considerably larger in volume than

⁷⁸⁶ OAG, ‘Alstom Summary Penalty Order’, no. EAI.1.04.0325-LEN (22 November 2011); OAG, ‘Odebrecht Summary Penalty Order’, no. SV.16.1280-LEN (21 December 2016); OAG, ‘Nitrochem Summary Penalty Order’, no. SV.12.0120-DCA (31 Mai 2016); OAG, ‘KBA-Notasys Summary Penalty Order’, no. SV.15.0584-MAD (23 March 2017); OAG, ‘ABB Summary Penalty Order’, no. SV.19.0989-POM (2 December 2022); OAG, ‘SICPA Summary Penalty Order’, no. SV.14.1618-KOU (27 April 2023).

⁷⁸⁷ OAG, ‘Dredging International Services Summary Penalty Order’, no. AV.14.0177-DCA (1 May 2017); OAG, ‘Gunvor Summary Penalty Order’, no. SV.18.0958-SAG (14 October 2019); OAG, ‘Andrade-Gutierrez Summary Penalty Order’, no. SV.15.0787-BECY (15 November 2019); OAG, ‘SBM-Offshore Summary Penalty Order’, no. SV.20.1217-MGR (18 November 2021).

⁷⁸⁸ Switzerland has 3 official languages: German, French and Italian.

⁷⁸⁹ Cf. chapters 5, 6, 7.

SPOs, with an average of 85 pages per DPA. The longest DPA comprised 126 pages, while the shortest contained 39 pages. All DPAs were validated by the Southwark Crown Court in London⁷⁹⁰.

The initial sample included the Sarclad Ltd DPA⁷⁹¹. The criminal charges against Sarclad Ltd, as announced by the official SFO press release, concern bribery to secure contracts in foreign jurisdictions⁷⁹². Upon closer examination, the beneficiaries of the bribes were not identified in the DPA⁷⁹³. Consequently, it could not be determined whether Sarclad Ltd had bribed foreign officials. Therefore, this DPA was excluded from this study.

The implicated companies operate in different regions across the globe and span a variety of industries, including banking, engineering, and oil and gas, as demonstrated in tables 2 and 3. Some NTRs are directed at multiple company defendants within the same company group. This situation concerns mainly SPOs⁷⁹⁴. Indeed, Modern companies are characterised by group complexity, often functioning through parent-subsidary relationships⁷⁹⁵. These subsidiary companies represent the parent company's business interests in various countries or perform specific tasks⁷⁹⁶ while maintaining a separate legal identity⁷⁹⁷. The complexities of modern-day MNCs raise questions relative to group liability: To what extent should a parent company be held accountable for the actions of its subsidiaries⁷⁹⁸? Conversely, can a sister company be held liable for the actions of another company within the same group⁷⁹⁹? In Switzerland, questions relative to group liability remain underdeveloped⁸⁰⁰.

⁷⁹⁰ UK Government, Southwark Crown Court: <https://www.find-court-tribunal.service.gov.uk/courts/southwark-crown-court> (Accessed: 25.06.2025).

⁷⁹¹ Serious Fraud Office v. Sarclad Limited, case no. U20150856, Southwark Crown Court (11 July 2016).

⁷⁹² UKBA s. 7.

⁷⁹³ Serious Fraud Office v. Sarclad Limited, Statement of Facts.

⁷⁹⁴ Cf. Table 2.

⁷⁹⁵ Simeon Obidairo, *Transnational Corruption and Corporations: Regulating Bribery through Corporate Liability* (Routledge, 2016), 181; Vivian Grosswald Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations', *Chicago Journal of International Law* 17 (2016): 407.

⁷⁹⁶ Obidairo, *Transnational Corruption and Corporations*, 181; Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations', 408; Karl Hofstetter, 'Parent Responsibility for Subsidiary Corporations: Evaluating European Trends', *The International and Comparative Law Quarterly* 39, no. 3 (1990): 576–77.

⁷⁹⁷ Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals', *Business and Human Rights Journal* 4, no. 2 (2019): 267; Hofstetter, 'Parent Responsibility for Subsidiary Corporations', 576.

⁷⁹⁸ Martin Petrin and Barnali Choudhury, 'Group Company Liability', *European Business Organization Law Review* 19, no. 4 (2018): 772–73; Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations', 409–17; Hofstetter, 'Parent Responsibility for Subsidiary Corporations', 507–08.

⁷⁹⁹ Katia Anne Villard, *La compétence du juge pénal Suisse à l'égard de l'infraction reprochée à l'entreprise*, 403–10; Petrin and Choudhury, 'Group Company Liability', 784.

⁸⁰⁰ Villard, *La compétence du juge pénal Suisse à l'égard de l'infraction reprochée à l'entreprise*, 361; Hofstetter, 'Parent Responsibility for Subsidiary Corporations', 590; See also generally, Maria Ingold, 'La responsabilité pénale d'une société mère Suisse en cas d'infraction commise au sein de la société fille à l'étranger', *Revue Pénale Suisse* 133 (2015): 228–57 discussing possible legal avenues in Swiss law for attributing criminal liability to parent companies for the actions of their subsidiaries.

Irrespectively, in the Odebrecht, Dredging International Services, Gunvor, and SBM-Offshore SPOs, the OAG has adopted a cumulative responsibility approach, where corporate criminal liability claims are directed simultaneously towards more than one company in the same group for the same underlying offence⁸⁰¹. In the first three instances, the parent and its subsidiary are held liable for TCB offences. The Odebrecht SPO concerns two defendants, the parent company of Odebrecht SA and its subsidiary, Construtora Norberto Odebrecht SA (CNO)⁸⁰². The Dredging International Services SPO implicates the parent company of Dredging, Environmental and Marine Engineering NV and its subsidiary, Dredging International Services (Cyprus) Ltd⁸⁰³. The defendants in the Gunvor SPO are the parent company, Gunvor SA, and its subsidiary, Gunvor International BV⁸⁰⁴. The SBM-Offshore SPO concerns three SBM-Offshore subsidiaries: SBM Holding Inc. SA, Single Buoy Moorings Inc., and SBM Production Contractors Inc. SA⁸⁰⁵. It presents a case of cumulative liability asserted against sister companies belonging to the same group. In contrast, the ABB SPO concerns the subsidiary ABB Management Services SA only. For simplicity reasons, these SPOs will be referred to by the names of the parent companies convicted or to which the convicted companies belong.

NTR company defendants incurred criminal fines⁸⁰⁶. In Switzerland, the maximum criminal fine that can be imposed on corporate offenders is 5 million⁸⁰⁷. As shown in Table 2, none of the defendant companies within the current SPO sample received the maximum criminal fine. The largest criminal fine imposed was 4.5 million in the Odebrecht SPO case. In contrast, there is no maximum criminal fine for TCB offences in the UK⁸⁰⁸. Criminal fines incurred under DPAs are generally calculated in accordance with the general UK sentencing guidelines⁸⁰⁹. Consequently, the largest fine stands at EUR

⁸⁰¹ For a definition of the cumulative liability approach, see Villard, *La compétence du juge pénal Suisse à l'égard de l'infraction reprochée à l'entreprise*, 376-77. For a discussion on potential legal obstacles of attributing corporate liability through a cumulative liability approach, see Ingold, 'La responsabilité pénale d'une société mère Suisse en cas d'infraction commise au sein de la société fille à l'étranger', 251-55.

⁸⁰² OAG, 'Complexe d'affaires Petrobras – Odebrecht : Le Ministère public de la Confédération condamne des entreprises brésiliennes et exige le paiement de plus de CHF 200 millions' (21 December 2016) : <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-65077.html> (Accessed: 25.06.2025).

⁸⁰³ Gotham City, 'Condamné pour corruption, le groupe belge DEME devra verser 37 millions à la Confédération' (1 July 2017) : <https://gothamcity.ch/2017/06/01/condamne-pour-corruption-le-groupe-belge-deme-devra-verser-37-millions-a-la-confederation/> (Accessed: 25.06.2025).

⁸⁰⁴ OAG, 'Le négociant en matières premières Gunvor condamné pour responsabilité pénale en lien avec des actes de corruption' (17 October 2019) : <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-76725.html#:~:text=actes%20de%20corruption-.Le%20n%C3%A9gociant%20en%20mati%C3%A8res%20premi%C3%A8res%20Gunvor%20condamn%C3%A9%20pour%20responsabilit%C3%A9%20p%C3%A9nale,avec%20des%20actes%20de%20corruption&text=Berne%2C%2017.10.2019%20%2D%20Le.CHF%204%20millions%20d'amende> (Accessed: 25.06.2025).

⁸⁰⁵ OAG, 'Three Swiss subsidiaries of the oil-related group SBM Offshore convicted of corruption offences' (23 November 2021): https://www.bundesanwalt.ch/mpc/en/home/medien/archiv-medienmitteilungen/nsb_medienmitteilungen.msg-id-86009.html (Accessed: 25.06.2025).

⁸⁰⁶ Cf. Tables 2 and 3.

⁸⁰⁷ Cf. SCC Art. 102 para. 1. Cf. chapter 2, section 2.3.1.

⁸⁰⁸ Cf. Bribery Act 2010, Explanatory Notes, 1.

⁸⁰⁹ Cf. DPA Code para. 8.3.

398 million in the Airbus DPA⁸¹⁰. Other non-punitive monetary consequences were equally imposed on defendants, including disgorgement of profits, costs incurred by the prosecution and compensation. The total amounts of the non-punitive monetary consequences for each SPO and DPA are presented in Tables 2 and 3.

Two SPOs levied symbolic criminal fines of CHF 1.-⁸¹¹. The first instance concerns the KBA-Notasys SPO, which was rewarded with a symbolic fine for self-disclosing its criminal conduct⁸¹². The second instance involves the Dredging International Systems SPO. One of the defendant companies was found to have engaged in a “mitigatory act in a situation of necessity”⁸¹³ in the sense of Article 18 of the SCC. According to the SPO, the company’s estate and its employees were subject to threats in the foreign country. The connection between these circumstances and the bribes is, however, not explicated⁸¹⁴. These circumstances, along with the “good cooperation” during the proceedings⁸¹⁵, led to a symbolic fine of CHF 1. In a similar vein, the DPA in the Güralp Systems case did not include a fine, given the precarious financial situation of the defendant at the time of the sentencing⁸¹⁶.

Two of the ten SPOs include criminal charges unrelated to an SPO or a TCB offence. The Nitrochem SPO is presented as a mixed proceeding, encompassing elements of an SPO and a ruling abandoning proceeding in the sense of Article 319 and the following of the SCCP⁸¹⁷. The OAG is mandated to end a commenced criminal procedure with ruling abandoning proceedings when suspicions of criminal offences cannot be substantiated⁸¹⁸. Against this background, two out of the three criminal charges relayed in the Nitrochem case were settled with a ruling abandoning proceeding⁸¹⁹, and only one is subject to an SPO⁸²⁰. In furtherance, the Odebrecht SPO incorporates criminal charges for money laundering in combination with TCB ones⁸²¹. The charges subject to a ruling abandoning proceeding and those related to money laundering were excluded from the analysis.

Offence segments demonstrate that a single SPO or DPA case covers multiple instances of bribery of foreign officials from the same or different country as showcased in Charts 1 and 2 hereafter and

⁸¹⁰ Cf. Table 3.

⁸¹¹ Cf. Table 2.

⁸¹² OAG, ‘KBA-Notasys Summary Penalty Order’, para. 3.1-3.5.

⁸¹³ Official Article title from the English version of the SCC.

⁸¹⁴ OAG, ‘Dredging International Services Summary Penalty Order’, para. 28.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Serious Fraud Office v. Güralp Systems Limited*, case no. U20190840, Southwark Crown Court (22 October 2019), para. 34.

⁸¹⁷ Cf. SCCP Art. 319.

⁸¹⁸ Cf. SCCP Art. 319 al. 1 lit. a.

⁸¹⁹ OAG, ‘Nitrochem Summary Penalty Order’, para. 10-18.

⁸²⁰ *Id.*, para. 1-9.

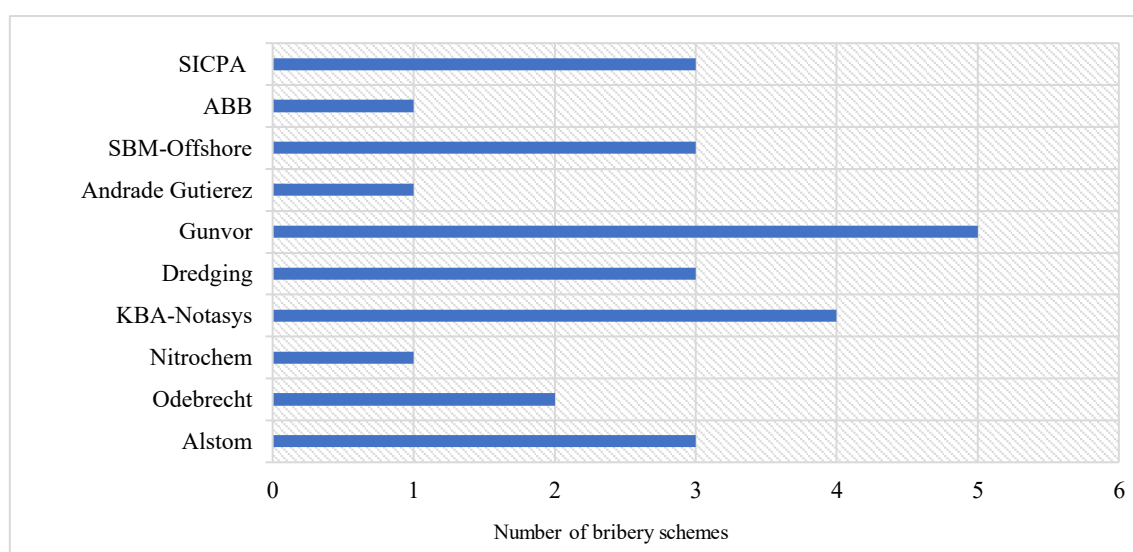
⁸²¹ OAG, ‘Odebrecht Summary Penalty Order’, s. III, para. 2.2.

committed in various parts of the world. Instances of bribery of foreign officials will be referred to as bribery schemes.

In SPOs, all cases are formally charged as one count of bribery of foreign public officials, according to Article 322^{septies} of the SCC. Several bribery schemes are, however, extracted from the SPOs in the present sample. The bribery schemes are devised either by country⁸²² or by bribery payments⁸²³.

In DPAs, a single bribery scheme usually includes a single or multiple payments to one or several foreign officials when acquiring a particular project or service. Each bribery scheme corresponds to one count of conspiracy to corrupt or failure to prevent. In fact, TCB conduct prior to the 2011 UKBA is formally charged as conspiracy to corrupt according to section 1 of the Criminal Law Act 1977⁸²⁴. Offences that took place after 2011 are formally qualified as failure to prevent bribery, according to section 7 of the UKBA.

Chart 1: Number of bribery schemes per SPO (n = 26)

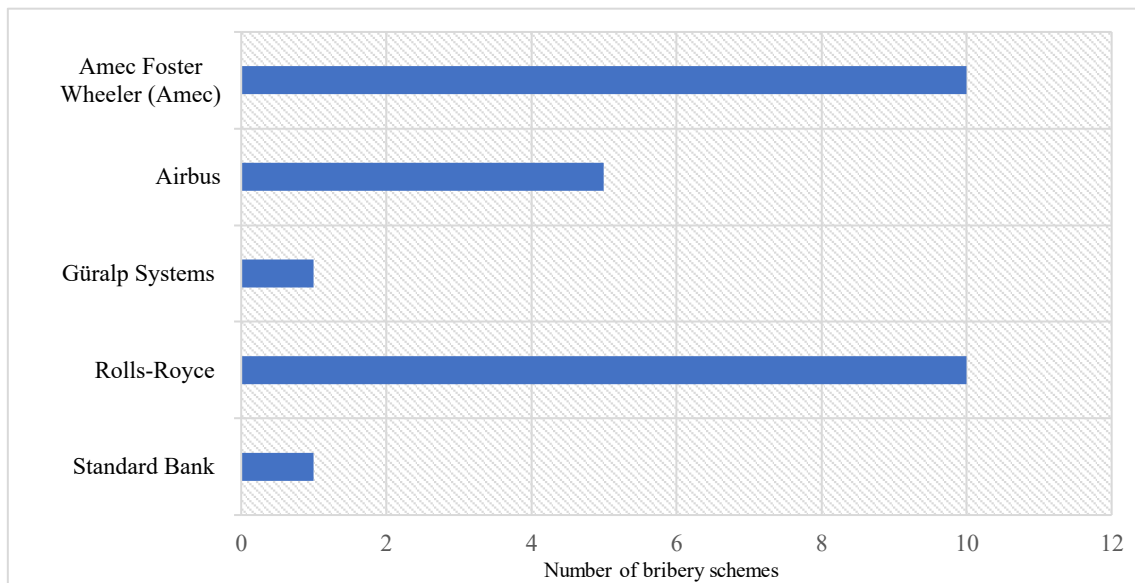


⁸²² OAG, 'Alstom Summary Penalty Order'; OAG, 'Odebrecht Summary Penalty Order'; OAG, 'KBA-Notasys Summary Penalty Order'; OAG, 'SICPA Summary Penalty Order'.

⁸²³ OAG, 'Gunvor Summary Penalty Order'; OAG, 'Nitrochem Summary Penalty Order'; OAG, 'Andrade Gutierrez Summary Penalty Order'; OAG, 'SBM-Offshore Summary Penalty Order'; OAG, 'Dredging International Services Summary Penalty Order'; OAG, 'ABB Summary Penalty Order'.

⁸²⁴ Criminal Law Act 1977 c. 45.

Chart 2: Number of bribery schemes per DPA decision (n = 27)



4.3.2. Data Access

The data access process varied considerably between Switzerland and the UK due to their respective transparency practices with regards to anti-bribery enforcement.

The present thesis is part of a larger research project titled *Revamping Anti-Bribery Law: Strategies and Consequences (RevACLaw)*⁸²⁵. The data access process for Switzerland was facilitated by the availability of several SPO decisions already gathered as part of this larger research. However, an extensive search was conducted to systematically identify all relevant SPOs between 2011 and 2023 due to the lack of official statistics in relation to NTR decisions⁸²⁶.

In this regard, it is worth mentioning that transparency regarding NTR decisions is not a prominent feature of the Swiss OAG approach towards anti-bribery⁸²⁷. In contrast to their British, French and US counterparts, the OAG withholds from openly and systematically listing and disclosing NTR

⁸²⁵ Cf. RevACLaw: <https://cordis.europa.eu/project/id/864498/de> (Accessed: 25.06.2025).

⁸²⁶ Hilti, 'Corporate Criminal Liability', 46.

⁸²⁷ For a critical review of Swiss transparency practices relative to the enforcement of the OECD ABC, see Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency', 20-4.; Hilti, 'Corporate Criminal Liability', 46; OECD-WGB, 'Phase 4 Report: Switzerland', 12. In contrast, Swiss prosecutors argue that current practices of publishing press releases announcing NTR decisions and permitting (controlled) consultations for journalists adequately uphold the publicity principle in criminal justice. See Blättler and Schnebli, 'La poursuite pénale efficace en Suisse', 170-73; Yves Bertossa, 'Les exigences de l'OCDE en matière de transparence et de répression de la corruption transnationale : De la théorie à la pratique', in *Negotiated Justice in Transnational Corruption - Between Transparency and Confidentiality*, eds. Nadja Capus and Franziska Hohl Zürcher (Helbing Lichtenhahn, 2024), 195-96.

decisions⁸²⁸. Additionally, NTR decisions are not publicly available, and their consultation is subject to considerable limitations⁸²⁹.

The completeness of the data was achieved through cross-referencing multiple publicly available sources of information related to anti-bribery enforcement activities in Switzerland. The sources of information included the OAG website⁸³⁰, Swiss case-law databases⁸³¹, Swiss-focused OECD reports relative to anti-bribery enforcement⁸³², and media reports announcing concluded anti-bribery investigations. Once the relevant cases and their case numbers were identified, formal access requests were sent to the OAG. The results of this process are represented in table 2⁸³³.

A communicative aspect of SPO decisions is their anonymised form. Anonymisation of criminal justice decisions is a common and established practice in Switzerland aimed at addressing the legitimate interests of personal data protection⁸³⁴. A divulged access to SPO texts is, however, possible upon request within a thirty-day period after their conclusion⁸³⁵. During this time, they can be consulted under restricted conditions, that is, within the OAG's offices and under a court clerk's supervision⁸³⁶. Additionally, copies of SPO decisions to interested parties, such as researchers, are distributed only in their anonymised form⁸³⁷. Consequently, several case details of SPO decisions included in this study were anonymised.

The name of the defendant companies is systematically anonymised in SPOs. However, uncovering which companies were concerned by a particular SPO proved to be a simple process. The information was extracted from OAG or non-OAG press releases. Systematic anonymisation is equally extended to the names of implicated persons and business units in the TCB scheme, whether corporate employees, intermediaries, subsidiaries, or foreign officials. Besides these elements, anonymisation practices are inconsistent throughout SPOs. To illustrate, in Nitrochem, Odebrecht, and KBA-Notasys SPOs, the country of the foreign public official is not subject to anonymisation⁸³⁸. Contrastingly, the remaining

⁸²⁸ Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency', 7.

⁸²⁹ See Capus and Hohl Zürcher, 'Revamping Anticorruption Criminal Law – The Making of (In-)Transparency', 8-9 for a description and discussion in this sense.

⁸³⁰ Office of the Attorney General of Switzerland: <https://www.bundesanwaltschaft.ch/mpc/fr/home.html> (Accessed: 25.06.2025).

⁸³¹ Two databases were consulted: Supreme Criminal Court of Switzerland case-law database: <https://bstger2.weblaw.ch/dashboard> (Accessed: 25.06.2025); Supreme Court of Switzerland: <https://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht.htm> (Accessed: 25.06.2025).

⁸³² Country monitoring of the OECD Anti-Bribery Convention, Switzerland: <https://www.oecd.org/daf/anti-bribery/switzerland-oecdanti-briberyconvention.htm> (Accessed: 25.06.2025).

⁸³³ Cf. section 4.3.1.

⁸³⁴ FC, 124 IV 234, para. 8.3.

⁸³⁵ Blättler and Schnebli, 'La poursuite pénale efficace en Suisse', 171–72.

⁸³⁶ Information provided by the OAG during access-related communications. See eg. Blättler and Schnebli, 'La poursuite pénale efficace en Suisse', 170.

⁸³⁷ Information provided by the OAG during access-related communications.

⁸³⁸ OAG, 'Nitrochem Summary Penalty Order', para. 1-18; OAG, 'Odebrecht Summary Penalty Order', s. II; OAG, 'KBA-Notasys Summary Penalty Order', s. III.

SPOs do not reveal this information. Similarly, the industry in which the defendant company is active is usually indicated, except for the ABB SPO.

DPA anonymisation practices differ significantly compared to those relative to SPOs. The legal framework requires criminal justice authorities to publicly communicate the conclusion of these NTRs⁸³⁹. Consequently, DPAs are subject to more considerable publicity and public communication strategies. Concluded DPAs are publicly available on the SFO's official website⁸⁴⁰ and were retrieved from there. It is important to note that the SFO has announced the conclusion of two TCB-related DPA cases in 2021⁸⁴¹. These two cases remain unpublished at the beginning of the analysis - October 2023 - due to publishing restrictions. Therefore, their inclusion in the present data sample was not possible.

In contrast to SPOs, anonymisation in DPAs is exceptional. The open justice principle is interpreted extensively and allows unrestricted access to criminal justice decisions⁸⁴². After a conviction, the public interest in transparency outweighs data and privacy rights in criminal matters⁸⁴³. DPAs equate to a settled criminal matter, regardless of the absence of conviction. In this sense, and as a rule, DPAs divulge private information about the defendant company, as well as more complete, non-anonymised accounts of the bribery scheme, in contrast to Swiss SPOs.

A certain degree of anonymisation is nevertheless present in DPAs despite the primacy of the publicity principle. Anonymisation impacts criminal offence segments and relates to the identities of corporate employees and other persons implicated in the bribery scheme. This ensures the anonymity of implicated individuals who might still be under investigation at the time of the conclusion of the DPA with the corporate offender⁸⁴⁴. However, corporate employee anonymisation is inconsistent in DPAs. Out of the five DPAs included in the present study, three proceeded to systematically anonymise implicated corporate employees⁸⁴⁵. In addition, these DPAs preclude the names of implicated persons or entities (foreign officials, intermediaries, shell companies) outside of the corporate structure. While the Standard Bank PLC DPA reveals the names of senior corporate employees implicated in the TCB

⁸³⁹ Cf. CCA sch. 17 s. 8 ss. 7.

⁸⁴⁰ Serious Fraud Office: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/> (Accessed: 25.06.2025).

⁸⁴¹ See SFO website, DPA section: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/> (Accessed: 25.06.2025).

⁸⁴² *Bloomberg LP v. ZXC*, case no. 2022 UKSC 5, UK Supreme Court (16 February 2022), para. 77.

⁸⁴³ *Ibid.*

⁸⁴⁴ Sabha MacManus and James Conroy, 'Negotiated Justice in Transnational Corruption – A UK Perspective on Transparency', in *Negotiated Justice in Transnational Corruption - Between Transparency and Confidentiality*, eds. Nadja Capus and Franziska Hohl Zürcher (Helbing Lichtenhahn, 2024), 58-9.

⁸⁴⁵ Rolls-Royce DPA; Airbus DPA; *Serious Fraud Office v. Amec Foster Wheeler Energy Limited* (Southwark Crown Court, 1 July 2021) (Amec DPA).

scheme, public officials and intermediaries are nevertheless anonymised⁸⁴⁶. In contrast to SPOs, defendant names and the countries of origin of the public official are disclosed elements.

4.4. Narrative Analysis of NTR Decisions

As our aim is to reveal both the substance of NTR narratives and their contextual embeddedness, a combination of content and context-oriented narrative analytical models was deemed appropriate. Additionally, the emphasis on narrative form provided a means to examine the various events, characters, and actions depicted within NTRs, thereby privileging a comprehensive narrative analysis of TCB prosecutions, offences, and offenders.

The narrative analysis of the collected NTR decisions consisted of a combination of three narrative analytical models, namely, structural, thematic, and performative narrative analysis⁸⁴⁷. In fact, narrative analysis refers to a family of analytical models that have in common the analysis of stories as the unit of analysis while offering distinct analytical focuses and lines of inquiry, which are resumed in table 4⁸⁴⁸. In this research, these analytical models enabled consideration of the form, content, and context of NTR-embedded narratives about TCB prosecutions, offences, and offenders.

⁸⁴⁶ Serious Fraud Office v. Standard Bank PLC, case no. U20150854, Southwark Crown Court (30 November 2015), Statement of Facts.

⁸⁴⁷ See generally Riessman, *Narrative Methods for the Human Sciences* discussing the application of these methods in social sciences. See also generally Sveinung Sandberg, 'Narrative Analysis in Criminology', *Journal of Criminal Justice Education* 33, no. 2 (2022): 212–29.

⁸⁴⁸ Cigdem Esin, 'Narrative Analysis Approaches', in *Qualitative Research Methods in Psychology: Combining Core Approaches*, eds. Nollaig Frost, 1st ed. (Open University Press Maidenhead, 2011), 97–98.

Table 4: Models of narrative analysis⁸⁴⁹

Models of narrative analysis	Focus of analysis	Inquiry-leading question
Structural	The story's structural components	What events, characters, and actions are included in the story?
Thematic	The story's content The themes around which stories are told	What are the recurring themes surrounding the description of events, characters, and actions?
Performative	The contextual features that shape the construction of narratives How is the meaning collaboratively created through interaction between storytellers and audiences	Who are the storytellers? Who is the intended audience, present or anticipated? For what purpose are events, characters, and actions described the way they are?

A practical start is considering the analytical steps to undertake when combining several narrative analytical models⁸⁵⁰. A three-tiered analytical process was employed with a different analytical focus in each step. First, NTRs were approached using the structural narrative analysis. This model is concerned with how the story is organised and traces the various narrative components of the story⁸⁵¹, while neglecting recurrent themes within or in between stories or emerging contextual elements⁸⁵². The narrative components pertain to plots, events, characters and their actions described in the story and are used to structure and convey its message⁸⁵³. This process enabled the identification of relevant structural components described in relation to TCB prosecutions, offences, and offenders, which became the micro-units of analysis in the subsequent analytical steps.

Once the different narrative components were identified, the second step consisted of employing a thematic analysis to elicit the content of the story. Thematic narrative analysis exclusively focuses on what is being said and excludes “how”, “to whom”, or “why” questions⁸⁵⁴. A typical question to ask the data is what the story tells us about a particular event or character⁸⁵⁵. The analysis centred on the previously identified narrative components, highlighting recurring themes and patterns between and

⁸⁴⁹ Adapted from Esin, ‘Narrative Analysis Approaches’.

⁸⁵⁰ *Id.*, 107.

⁸⁵¹ Riessman, *Narrative Methods for the Human Sciences*, 115.

⁸⁵² Sandberg, ‘Narrative Analysis in Criminology’, 219.

⁸⁵³ Kai Oppermann and Alexander Spencer, ‘Narrative Analysis’, in *Routledge Handbook of Foreign Policy Analysis Methods*, eds. Patrick A. Mello and Falk Ostermann (Routledge, 2022), 121.

⁸⁵⁴ Riessman, *Narrative Methods for the Human Sciences*, 81.

⁸⁵⁵ Esin, ‘Narrative Analysis Approaches’, 97–98; Riessman, *Narrative Methods for the Human Sciences*, 80.

across SPOs and DPAs. This process facilitated the identification of thematic similarities and differences between SPOs and DPAs.

For example, the investigation event in DPAs is thematically categorised as a partnership, as described in chapter 5, section 5.2. The same partnership theme is, however, absent from SPOs, as illustrated in chapter 5, section 5.1, where the predominant theme that emerged is investigatory control attributed to the prosecution authority.

The thematic narrative analysis encompassed character positioning. Positioning in narrative analysis concerns the various identities and roles attributed to the characters in the story⁸⁵⁶. The analysis focused on how company defendants and criminal justice authorities were positioned to an event or other characters in the story. This was done by careful analysis of the role attributed to these different characters in an event as well as their relation and affiliation to other groups⁸⁵⁷. This allowed for the development of thematic portraits of the different characters depicted in the NTR process.

A performative narrative approach guided the final analytical stage⁸⁵⁸. This method underscores the relationship between the context of storytelling and the themes identified in the previous step. Here, stories are viewed as purposeful performances enacted by storytellers in front of a specific audience⁸⁵⁹. The main questions that guide this analytical lens are: who are the storytellers and the audiences (present or anticipated), and why are the events and characters relayed the way they are⁸⁶⁰? This analytical model does not concern itself only with explicit references to the context. It also requires narrative linkage outside the narrative text⁸⁶¹, as it considers the interplay between narratives, their storytellers and audiences, and their mode of production⁸⁶².

4.5. Retracing SPO and DPA Narrative Structures

SPOs and DPAs narrate multiple events and actions related to the prosecution, the TCB offence, the sentencing, and the case resolution. Their structure is typified by episodic events organised within a beginning-middle-end framework. To better understand their narrative structure, it was essential first to identify the key narrative components of these decisions.

⁸⁵⁶ See generally Bronwyn Davies and Rom Harré, 'Positioning: The Discursive Production of Selves', *Journal for the Theory of Social Behaviour* 20, no. 1 (1990): 43–63.

⁸⁵⁷ Anna De Fina, 'Group Identity, Narrative and Self-Representations', in *Discourse and Identity*, eds. Anna De Fina, Deborah Schiffrin, and Michael Bamberg, Cambridge University Press, 2006, 351–52.

⁸⁵⁸ Sandberg, 'Narrative Analysis in Criminology', 220–22; Esin, 'Narrative Analysis Approaches', 109–12.

⁸⁵⁹ Sandberg, 'Narrative Analysis in Criminology', 221.

⁸⁶⁰ Riessman, *Narrative Methods for the Human Sciences*, 81, 151.

⁸⁶¹ Francesca Polletta *et al.*, 'The Sociology of Storytelling', *Annual Review of Sociology* 37, no. 1 (2011): 110–11; Sparkes and Smith, 'Narrative Constructionist Inquiry', 300.

⁸⁶² Sandberg, 'Narrative Analysis in Criminology', 221; Riessman, *Narrative Methods for the Human Sciences*, 151–52.

This section describes the narrative elements of SPOs and DPAs. It begins by examining the various sequences of events and actions depicted in these documents and their temporal order. In this study, event and action sequences are referred to as segments. A description of the story characters featured in TCB narratives is also included.

This analysis aims to pinpoint the beginnings, middles, and ends of the narratives, along with the different events and characters involved. It enabled a focused examination of specific events, story trajectories, and character developments, allowing for the identification of the narrative constructions of TCB prosecutions, offences, and offenders in accordance with the research questions.

4.5.1. Narrative Segments and Temporal Ordering

Structurally, SPOs and DPAs share similarities and comprise seven segments that recount past experiences of prosecuting TCB cases, as shown in figure 1. The temporal order of these segments resembles what the linguist Labov⁸⁶³ defines as a typical story trajectory. According to Labov, a fully formed narrative begins with an abstract and continues with an orientation, complication, resolution, evaluation, and coda⁸⁶⁴.

In our sample, the segments follow a similar trajectory, progressing from an abstract/orientation part to a complication and finally to a resolution and a coda, as demonstrated in figure 1. Additionally, the segments can be referential, evaluative, or both⁸⁶⁵. Referential segments pertain to the story's main events, actions, and characters. Evaluative segments provide information on the thoughts, feelings, and motivations underlying the key referential aspects⁸⁶⁶.

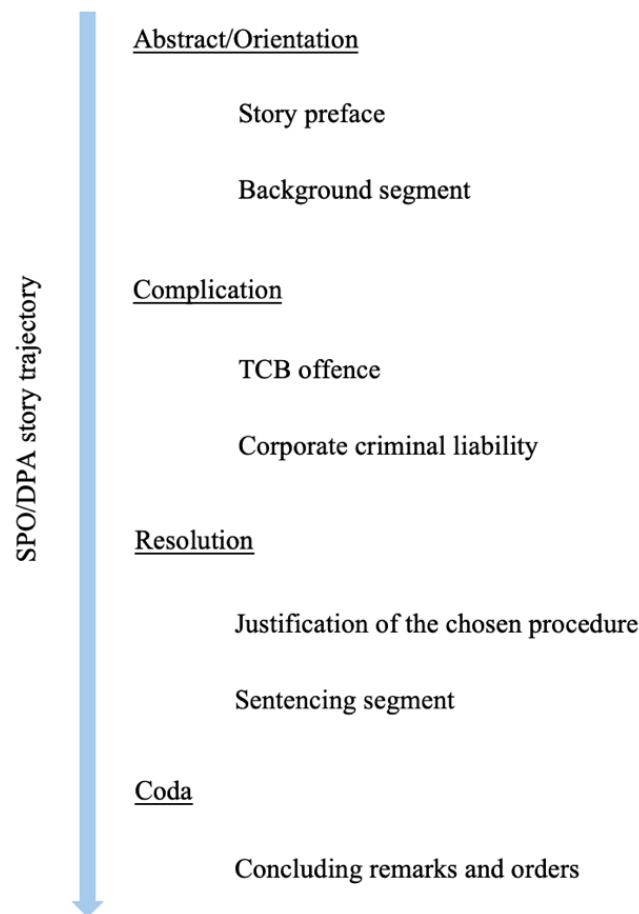
⁸⁶³ William Labov, *Language in the Inner City: Studies in the Black English Vernacular* (University of Pennsylvania Press, 1972), 363–70.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Id.*, 392.

⁸⁶⁶ *Ibid.*

Figure 1: Segments and their temporal order in SPOs and DPAs



SPO and DPA narratives thus encompass the same segments, that is, the same set of actions and events. Despite these similarities, significant differences exist in how these segments are emphasised or elaborated upon. Segment differences are due to the legally imposed narrative formats and necessities, evidenced in the following descriptions.

1. Story Preface

SPOs and DPAs begin with a preface that introduces the story of a criminal matter by listing case-specific details. This preface is presented as a cover page. It includes the document's title and issuance date, the names of the procedural parties, and the emblem of the prosecution or judicial authority (the OAG for SPOs and the Crown Court for DPAs). In SPOs, the legal preface also contains the criminal charges.

These segments serve a crucial communicative function by enabling the reader to situate the storytelling within the official criminal justice context, identify the main characters and their roles, and anticipate the conclusion.

2. Background segment

The storytelling in SPOs and DPAs continues with a background segment. These segments are referential by nature, contextualising the TCB case within the relevant procedural circumstances under which the present story should be appreciated. The information generally includes explanations of country-specific legal provisions and details of the investigation.

DPAs systematically outline the DPA legal framework by referencing Schedule 17 of the CCA. It situates the story within the context of DPA proceedings. This legal information is supplemented by descriptions of the case-specific criminal investigation into the company's criminal conduct. In contrast, four out of ten SPOs do not include a background segment. When present, these segments typically begin with the events that triggered the investigation into the company's missteps and proceed to retrace the criminal investigation chronologically.

3. TCB Offence

The segments detailing the criminal offence and those regarding corporate criminal liability represent the "complication" of the story, which represents the crisis that must be resolved⁸⁶⁷. In these segments, SPOs and DPAs recount the criminal conduct that prompted an NTR response.

Offence segments are primarily informative and describe the various bribery schemes implicating the defendant company. They focus on the various corporate actors (employees, executives, business units) and associated individuals (business consultants, subsidiaries, offshore companies, foreign bribery officials) involved in the scheme, their actions, and their relationships with each other. In this thesis, the terms "TCB offence" and "bribery scheme" are used interchangeably to refer to the illegal acts described in SPO and DPA narratives.

A single NTR typically includes several bribery schemes, as mentioned in section 4.3.1. Each bribery scheme is narrated separately, presented as a story within a story. These segments include an abstract, orientation, complication, and resolution.

⁸⁶⁷ Martin Cortazzi, 'Narrative Analysis', *Language Teaching* 27, no. 3 (1994): 159.

4. Corporate Criminal Liability

Corporate criminal liability evaluations complement TCB offence segments. Both NTRs operate under corporate criminal liability laws that address failures to prevent bribery⁸⁶⁸. Consequently, corporate criminal liability assessments follow a similar pattern in SPOs and DPAs. These segments transport the reader into company compliance units and the anti-bribery measures in place during the offence(s).

Corporate criminal liability segments are both referential and evaluative. They are presented as a historical narrative describing internal compliance structures and evaluating their adequacy. In SPOs, considerations of corporate criminal liability are narrated in a single segment. In DPAs, evaluations of corporate criminal liability are interspersed throughout the various documents and segments. The company's liability is considered in the interest of justice and sentencing segments. Furthermore, the Statement of Facts describes and evaluates the company's failed compliance structures as part of the offence-related narratives. The different concepts of corporate criminal liability present in these countries can explain these structural differences. Indeed, under the UKBA, the failure to prevent bribery is defined as a criminal offence⁸⁶⁹. Consequently, descriptions of the TCB offence encompass considerations of corporate criminal liability. This contrasts with the Swiss legal framework, which considers the failure to prevent a corporate criminal liability approach as a model of imputing the employee's behaviour to the corporate persona⁸⁷⁰. Therefore, the offence and the company's liability are two distinct elements of the TCB story, which are, consequently, separately evaluated.

5. Justification of the chosen approach

After the complication part, SPOs and DPAs narratives propose a resolution to the problem in the form of a conviction through an SPO and a non-prosecution in DPAs. Both NTRs justify the chosen decision, which constitutes the justification segment.

The justification segments are evaluative, as they speak to the driving forces that led to the resolution of the TCB case through an NTR mechanism from the storyteller's perspective.

SPO justification segments are characterised using fixed formulas⁸⁷¹ repeated from case to case. They consist of reciting the terms under which SPOs can be imposed and declaring that these terms are met in the present case without considerable effort to render the narrative concrete and case specific. In contrast, DPA justification segments are considerably extended, including case-specific considerations.

⁸⁶⁸ Cf. sections 2.4.

⁸⁶⁹ Cf. UKBA s. 7.

⁸⁷⁰ Cf. SCC Art. 102; SFC, 146 IV 68 (12 December 2019), para. 2.3. See also CoE, 'Liability of Legal Persons for Corruption Offences', 11-2, for a definition of the imputation liability concept.

⁸⁷¹ Blufarb, 'Law as Narrative und das Deutsche Recht', 35.

This difference in style is due to the legal requirements relative to motivating procedural choices in the two jurisdictions. According to the CCA, DPAs consider whether the proceeding is in the interest of justice⁸⁷². It requires the procedural parties to expose their motivations for deferring prosecution. This criterion translates into a lengthy narrative considering several aspects, including the seriousness of the conduct, a history of similar conduct, corporate cooperation, corporate compliance before, during, and after the criminal conduct, and the potential impact of prosecution on other innocent third parties.

Contrastingly, the conclusion of a criminal case through an SPO is contingent on the realisation of certain legally predefined conditions⁸⁷³; specifically: the facts of the case are sufficiently determined⁸⁷⁴, and the case can be resolved through a criminal fine⁸⁷⁵. Justifying the SPO approach is an exercise of repeating the legally predefined conditions and declaring that they are met in the present case.

6. Sentencing Segment

NTRs then proceed with the evaluative segment of relaying and discussing the legal consequences for the company. The sanctions segment brings the story to a resolution, together with the justification segment.

DPA sentences are comprised of both pecuniary and non-pecuniary consequences. The pecuniary consequences include disgorgement of profits, criminal fines, costs incurred by the prosecution, and eventually compensation terms to the identified victim state⁸⁷⁶. The non-pecuniary consequences revolve around the company's obligation to improve internal compliance structures, future cooperation with law enforcement, restrictions on sales, mergers, and company liquidations, and public statements related to the DPA.

The legal framework does not require a fixed set of DPA terms⁸⁷⁷. Nevertheless, the terms are repeated in each DPA as fixed formulas⁸⁷⁸. These accounts are then complemented by extended judgment narratives on the various mitigating and aggravating factors determining the criminal fine.

In contrast, SPOs impose only pecuniary consequences, including criminal fines, disgorgement of profits, and reimbursement of the prosecution's costs. The motivations for the decided criminal fines are recounted in terms of mitigating and aggravating factors. These narratives are individualised and

⁸⁷² Cf. CCA sch. 17 s. 7 ss. 1.

⁸⁷³ Cf. chapter 1.

⁸⁷⁴ Cf. SCCP Art. 352 al. 1.

⁸⁷⁵ Cf. SCCP Art. 352 al. 1 lit. a.

⁸⁷⁶ Imposed only in two DPAs in our sample: Standard Bank DPA and the Amec DPA.

⁸⁷⁷ Cf. CCA sch. 17 s. 5 ss. 3; DPA Code para. 7.8-7.9.

⁸⁷⁸ Cf. Blufarb, *Law as Narrative und das Deutsche Recht*, 35 for the concept of fixed formulas in legal storytelling.

case-specific, as the mitigating and aggravating factors are assessed depending on the peculiarities of the case.

7. Coda

The conclusion segment of SPOs and DPAs appears as a performative speech act, expressed to induce the execution of a specific action⁸⁷⁹. Both decisions are concluded with an adjudicative order.

These segments are declarative and, thus, referential in SPOs, as they do not include evaluative aspects. SPOs declare the company guilty and recite orders to execute the criminal fines and other pecuniary consequences. This type of concluding order is part of any judicial decision in the Swiss legal order and summarises the main takeaways of the decision.

In DPAs, they are both referential and evaluative. The judge's case-specific conclusions complement DPA orders. These segments allow judges to expose final remarks. Their content generally validates the decision to settle.

4.5.2. SPO and DPA Story Characters

The stories in the present sample mainly revolve around three main protagonists, defined as evolving characters: the prosecutor, the defendant company, and the judge. Evolving characters in a story tend to change and develop as the narrative unfolds⁸⁸⁰. Their behaviour or personality changes shape the story's ending⁸⁸¹. While SPO stories revolve uniquely around the prosecutor and the company, DPAs expand the circle to include the judge.

In contrast, other characters are static; they remain unchanged and lack complexity. They are usually constructed around a single idea or quality and have no existence outside of it⁸⁸². Static characters also inhabit SPO and DPA stories, especially in the TCB offence segment. Companies act through individuals, and TCB offences are usually facilitated by various “middlemen” establishing connections between the company and the foreign official⁸⁸³. NTR stories thus recount TCB offences through the actions of company employees or other associated persons, such as business consultants, agents, and other middlemen usually referred to as intermediaries. These characters are solely mentioned and cast onto the scene to relay what happened regarding the TCB conduct.

⁸⁷⁹ See Andrei Marmor, ‘Law as Authoritative Fiction’, *Cornell Law School*, 2020, 11–14 for performative acts in legal storytelling. 11-4.

⁸⁸⁰ Philip Meyer, *Storytelling for Lawyers* (Oxford University Press, 2014), 76–8.

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.*

⁸⁸³ Lord and Levi, ‘Organizing the Finances for and the Finances from Transnational Corporate Bribery’, 378.

Incidentally, several other static characters are present in SPO/DPA stories. These are foreign law enforcement agencies whose past or ongoing criminal procedures interlock in some way with the current story.

4.6. Summary

This chapter aimed to present the research strategy and design alongside the data and analytical techniques employed while also justifying the appropriateness of the chosen approaches for addressing the research questions. Section 4.1 outlined the ontological, epistemological, and methodological foundations of the thesis, which are informed by the narrative paradigm. It adopts the view that narratives play a constitutive role in shaping how social reality is understood. In this study, the narratives contained in SPO and DPA decisions are approached as situated knowledge claims that reveal how legal actors construct and communicate understandings of corporate wrongdoing and enforcement practices. Methodologically, this perspective prioritises interpretative, qualitative analysis, focusing on how narratives produce meaning, coherence, and credibility within their legal and institutional contexts. It further emphasises a context-sensitive and holistic approach to narrative analysis, examining the form, content, and context of storytelling while recognising narratives as socially embedded and co-constructed processes shaped by broader legal, political, and institutional frameworks.

Section 4.2 presents the comparative research design and provides rationalisations for comparing Swiss SPOs and UK DPAs. The rationale for adopting a comparative research approach is twofold. Firstly, it aims to explore how distinct national legal traditions and procedural practices shape narratives relative to TCB prosecutions. The lack of unified international standards for NTRs leads to significant variations between jurisdictions, influencing how TCB crimes, offenders, and criminal justice institutions are narratively represented, especially when comparing Switzerland's conviction-based SPOs and the UK's non-conviction-based DPAs. Secondly, employing a "most different systems" design, this research investigates how global anti-bribery trends, such as negotiated justice, are adapted and implemented within distinct local legal, cultural, and institutional contexts. Switzerland's inquisitorial and the UK's adversarial legal traditions offer contrasting frameworks, each characterised by differing conceptions of the criminal process, methods of legal reasoning, and cultural attitudes toward criminal law. The comparative approach thus provides deeper insight into the ways in which national contexts shape the narrative portrayal and practical application of NTRs.

Section 4.3 then describes the SPO and DPA decisions that form part of the empirical sample⁸⁸⁴. In total, the dataset includes 15 NTR decisions: 10 SPOs from Switzerland and 5 DPAs from the UK. The dataset covers a broad range of industries, implicating multiple companies within corporate groups for

⁸⁸⁴ See section 4.3.1.

the same bribery conduct, highlighting the complexities of the modern company. In addition, multiple bribery schemes per NTR are noted. The varying data access processes and difficulties between Switzerland and the UK were also highlighted⁸⁸⁵.

Section 4.4. discusses the analytical techniques employed. The analytical approach adopted in this research combines structural, thematic, and performative narrative analysis. Each analytical model addresses distinct aspects: the structural analysis focuses on narrative components (events, characters, actions) without considering thematic or contextual dimensions; thematic analysis identifies recurring themes within these components; and performative analysis considers the contextual factors influencing narrative construction, emphasising the relationship between storytellers, intended audiences, and narrative purposes.

Finally, section 4.5 presents the narrative structures of Swiss SPOs and UK DPAs, highlighting their systematic organisation into distinct segments within a structured narrative framework that resembles Labov's canonical narrative trajectory⁸⁸⁶. Both SPOs and DPAs are composed of seven main narrative segments: a story preface, background segment, complication (TCB offence and corporate criminal liability), resolution (justification of the procedure, sentencing), and coda (concluding remarks/orders). These segments guide readers through the narrative of prosecuting TCB offences, from triggering events to the resolution of the case through conviction (in SPOs) and deferred prosecution (in DPAs).

⁸⁸⁵ See section 4.3.2.

⁸⁸⁶ Labov, *Language in the Inner City: Studies in the Black English Vernacular*, 363–70.

5. Narrating Transnational Corporate Bribery Prosecutions

This chapter presents the main narratives and narrative devices used in the analysed sample of SPOs and DPAs in describing the act of prosecuting TCB cases, responding to the first research question⁸⁸⁷. In this context, prosecution refers to the set of institutional responses designed to resolve a specific TCB case. It refers to all the actions undertaken in investigating, prosecuting and sentencing TCB offences. For purposes of terminological clarity, it is important to note that DPAs result in deferred prosecutions. Decisions to defer prosecution are, nevertheless, prosecution acts subject to justification⁸⁸⁸. Accordingly, in the context of this study, the term prosecution encompasses equally law enforcement acts favouring deferred prosecution.

Prosecution work is portrayed differently in SPOs and DPAs - reflecting distinct procedural strategies and legal frameworks. A narrative of autonomous prosecutions is generally present in SPOs as shown in section 5.1. In contrast, section 5.2 describes the partnership narrative characterising DPA accounts. The differing prosecution narratives are achieved through a set of narrative devices, including the positioning of the prosecutors and the company in relation to investigating and resolving the TCB case.

This chapter, together with chapters 6 and 7, includes excerpts from SPO and DPA decisions for the purpose of illustrating the findings of the analysis. Given that SPO decisions are not publicly accessible documents⁸⁸⁹, the excerpts derived from them have been anonymised. For referencing purposes, each SPO decision within the analysed sample has been assigned a random case number in order to ensure consistency while further preserving anonymity. This anonymisation was undertaken to prevent the identification of specific cases, thereby respecting legal and ethical obligations associated with the use of non-public materials. The same anonymisation process was not applied to DPA excerpts, as these are publicly available documents⁸⁹⁰.

5.1. SPO: Narratives of Autonomous Prosecutions

SPO decisions portray the criminal proceeding as an autonomous prosecution, where procedural decision-making powers are exclusively attributed to the OAG as a public authority. The resulting narratives signal to audiences the dominance of criminal justice authorities in deciding the case's outcome despite the agreed-upon nature of SPOs⁸⁹¹. The OAG's control over the prosecution is

⁸⁸⁷ Cf. chapter 1, section 1.3.

⁸⁸⁸ Cf. CCA sch. 17 s.7.

⁸⁸⁹ See chapter 4, section 4.3.2 for how SPO decisions were acquired and an explanation of transparency issues regarding the transnational corporate bribery cases prosecuted by the OAG.

⁸⁹⁰ See chapter 4, section 4.3.2 for data access relative to DPA decisions.

⁸⁹¹ For a discussion on the negotiated nature of SPOs, see chapter 2, section 2.3.3.

established by narrating SPOs as monologic accounts⁸⁹², asserting role asymmetry⁸⁹³, and omission of company investigative acts⁸⁹⁴. The following sections further elaborate on these narrative characteristics.

5.1.1. SPOs as Monologic Accounts

SPO stories are represented as monologic accounts recounted from the unique perspective of the OAG. The exclusive storytelling control in favour of the OAG is apparent at the SPO story's beginning and end. The story's preface displays the official OAG logo in the upper right corner of every SPO. Likewise, the account is closed with the signature of the main prosecutor in charge of the case.

The language used in SPOs is impersonal, despite the clear identification of the prosecutor in the case who, by appending their signature, declares authorship of the narrative. Acts attributed to the OAG are narrated in the third person, as shown in excerpt 1. Moreover, evaluative accounts express the OAG's official legal position on the facts of the case and the offender's culpability. Nevertheless, these segments avoid using personal pronouns as demonstrated in excerpt 2.

Excerpt 1

By order dated 9 September 2019, the Office of the Attorney General of Switzerland opened a criminal investigation against the two former employees and carried out numerous acts of collecting evidence.

[...]. Accordingly, the Office of the Attorney General opened a criminal investigation by order dated 6 November 2020 against F. [sister company of the defendant] due to the company's criminal liability (SCC Art. 102 para. 2) in connection with the bribery of foreign public officials (SCC Art. 322^{septies}). In the course of these proceedings, the Office of the Attorney General of Switzerland edited and analysed a large number of documents at the F.

SPO 689, paras. 5 and 6

Excerpt 2

In the course of the aforementioned proceedings, it was suspected that the F. had not taken all necessary and reasonable organisational measures to prevent bribery of foreign public officials. [...]

It is clear that A. [defendant company] did not implement the instructions of B. [parent company of defendant] with regard to the anti-corruption dispositive and that its organisation had significant deficiencies in this regard. A. did not take any measures to prevent the bribery of external public officials, neither in the areas of risk management, (self-)binding internal/external directives, compliance including training, whistleblowing and sanctions, internal controls including an internal audit unit, communication by the executive body or third-party management. Taking organisational

⁸⁹² Cf. section 5.1.1.

⁸⁹³ Cf. section 5.1.2.

⁸⁹⁴ Cf. section 5.1.3.

precautions to prevent the corruption of external public officials would have been necessary and reasonable to prevent the offence in question. Accordingly, A. is guilty of the offence under SCC Art. 102 para. 2 in conjunction with Art. 322^{septies}.

SPO 689, paras. 5 and 46

The impersonal narrative style identified in SPOs prosecution accounts is a common feature of legal decisions stemming from predominantly inquisitorial criminal justice systems⁸⁹⁵. It expresses the storyteller's neutrality and places the identified lead prosecutor as part of a collective⁸⁹⁶ – the OAG. Avoiding appropriated narratives reinforces the idea that the legal decision is an act of a neutral public institution, unbiased from its personnel's views⁸⁹⁷. This, in turn, gives the impression that SPOs conform to the general principles of the Swiss criminal procedure. Independently of its trial or out-of-court form, the Swiss criminal procedure is imagined as a neutral inquiry conducted by state officials and aimed at discovering the truth⁸⁹⁸. The use of impersonal language thus casts the OAG in its intended role as a neutral truth-seeker and reinforces its legitimacy as the sole storyteller of the TCB account.

5.1.2. Asserting Role Asymmetry

SPO narratives of prosecution underscore the asymmetrical roles of the OAG and the defendant company in TCB case-making. The depicted dynamics between these two actors are reminiscent of the distinction between active and passive characters in storytelling⁸⁹⁹. Active characters drive the story forward⁹⁰⁰. By contrast, passive characters undergo the activity and do things not out of their own volition but because the narrator requires them to do so⁹⁰¹.

In the background segments of SPOs, the OAG is depicted in a proactive role and at the forefront of the investigative process, whereas the defendant company is shown in a reactive one, following the OAG's lead. Descriptions of TCB investigation are characterised by the substantial involvement of the OAG, whose role consists of authoritatively devising investigative orders and measures. The following

⁸⁹⁵ Ruth Blufarb, *Geschichten Im Recht: Übertragbarkeit von 'Law as Narrative' Auf Die Deutsche Rechtsordnung* (Nomos, 2017), 363; Hein Kötz, 'Rhetorik Und Jurisprudenz Im Deutschen Recht Und Im Common Law', *Festschrift Für Peter Schlechtriem Zum 70. Geburtstag*, 2003, 85.

⁸⁹⁶ Blufarb, *Geschichten Im Recht*, 363; Kötz, 'Rhetorik Und Jurisprudenz Im Deutschen Recht Und Im Common Law', 82.

⁸⁹⁷ Blufarb, *Geschichten Im Recht*, 363; Kötz, 'Rhetorik Und Jurisprudenz Im Deutschen Recht Und Im Common Law', 82.

⁸⁹⁸ SCCP Art. 4 (principle of the neutrality of criminal prosecutions) in relation to Art. 6 (principle of substantive truth). These principles apply to all forms of criminal proceedings provided by the SCCP, including SPOs. See chapter 2, section 2.3.2.

⁸⁹⁹ Caroline Lipovsky, 'Storytelling in Legal Settings: A Case Study from a Crown Prosecutor's Opening Statement', *Australian Review of Applied Linguistics* 40, no. 1 (1 December 2017): 83; Theo Van Leeuwen, 'The Representation of Social Actors', in *Texts and Practices: Readings in Critical Discourse Analysis*, eds. Caldas-Coulthard Carmen Rosa and Coulthard Malcom (Routledge, 1995), 43-4.

⁹⁰⁰ Van Leeuwen, 'The Representation of Social Actors', 43-4.

⁹⁰¹ *Ibid.*

excerpts elucidate the proactive-reactive positioning of the OAG and the defendant within background segments:

Excerpt 3

On 30 December 2015, the Office of the Attorney General of Switzerland (hereinafter: OAG) opened a criminal investigation against Unknown for suspicion of aggravated money laundering (Art. 305^{bis} ch. 1 and 2 SCC).

[...]

On 30 March 2016, Mr F. [defence lawyer] informed the OAG that he was defending the interests of company A. [defendant company] in the present proceedings.

On 30 June 2017, [second defence lawyers] were also appointed to defend the company's interests. They specified that Mr F. would continue to act as lead counsel.

[...]

On 22 July 2019, the OAG ordered the separation of the proceedings against Unknown, aimed at investigating the complex of facts linked to G. [implicated person] from the remaining proceedings against company A. (referenced as [no. of procedure]).

By letter dated 23 August 2019 addressed to company A., the OAG noted that the simplified procedure within the meaning of Art. 358 et seq. of the SCC was no longer necessary, as the present proceedings would be closed by a criminal order.

SPO 586, paras. 1-4, 8-9

Excerpt 4

Analysis of the evidence gathered in the proceedings [no. of a parallel criminal case] and the hearings conducted in these proceedings, and subsequently in the [aforementioned] simplified procedure, made it possible to identify the involvement of Swiss companies belonging to the E. group. in the setting up and execution of corrupt payments [...].

On 17 November 2020, the Federal Judicial Police (hereinafter FJP), acting on a warrant issued by the MPC, searched the premises of the accused companies situated in [anonymised headquarters of companies].

By letters dated 26 and 30 November 2020, [defence lawyers] indicated that they were representing the interests of A. B. and C. [defendant companies] in the present proceedings.

[...]

By order of 12 November 2021, the OAG sequestered three of the five binders handed over to the OAG by the [Compulsory Measures Court] in view of their relevance to the present proceedings, while the other two binders were to be returned to the defendant companies.

In a notice of impending closure dated 12 November 2021, the OAG informed A., B., and C. that it intended to close the investigation shortly with a criminal prosecution in respect of the suspicion of

disorganisation in connection with acts of active bribery of foreign public officials in [anonymised countries of foreign officials]. The accused companies were given a deadline of 17 November 2021 to submit any submissions of evidence they might wish to make, together with the information required for the possible application of Articles 429 et seq. of the SCCP.

In a letter from their defence counsel dated 17 November 2021, A., B., and C. indicated that they did not intend to submit any evidence submissions and were waiving their right to claim compensation under SCCP Art. 429 para. 1.

SPO 678, paras. 4, 7-8, 13-15

Both excerpts exemplify OAG's performative acts and affirm its authoritative claims over the proceeding. The OAG is showcased as a proactive story character, imbued with agency and capable of changing and shaping the story's trajectory. It opens the investigation based on its conclusions, decides on separating related procedures, orders the execution of a search warrant, seizes propriety, and gives notice of its decision to switch from simplified proceedings to SPO proceedings. In comparison, the defendant company appears later in the criminal proceeding after the initial OAG investigations. It reacts to the OAG's procedural actions by retaining defence counsel, responding to prosecutorial requests, and agreeing with the prosecutors' decisions. Thus, the OAG, identified as the sole storyteller of the SPO account, asserts authoritative control over the investigative decision-making process while positioning the defendant company in a subordinate role.

In SPO 487 and SPO 689, the defendant company's proactive stance in self-disclosing suspicions of criminal conduct within the remits of their business operations is revealed. The beginnings of the background segments within these SPOs diverge from the general narrative character of the passive defendant and portray a proactive one who initiates an investigation by informing the OAG of identified criminal conduct and transmitting documents in support of their claims:

Excerpt 5

In a submission dated 19.11.2015, A. [defendant company] reported itself to the Office of the Attorney General of Switzerland for a possible violation of SCC Art. 102 para. 2 in conjunction with Art. 322^{septies}.

The subject of the voluntary declaration was mainly a matter concerning the [country of foreign official] market.

On 4 April 2016, A. supplemented its self-disclosure with further concrete suspicious facts regarding possible acts of bribery by foreign public officials in other markets.

Both voluntary declarations were based on two comprehensive internal investigation reports by a renowned German law firm that were handed over to the Office of the Attorney General.

Based on this information, the Office of the Attorney General of Switzerland opened an investigation on 15 December 2015 pursuant to SCCP Art. 309 para. 1 let. a (cf. [citation]) against

A. on suspicion of a criminal offence pursuant to SCC Art. 102 para. 2 in conjunction with Art. 322^{septies}.

SPO 487, s. II, paras. 1-5

Excerpt 6

By submission dated 27 May 2019, F. [sister company of defendant] and other subsidiaries of B. [parent company of defendant] filed a comprehensively documented criminal complaint with the office of the Attorney General against two former employees for bribery of foreign public officials (SCC Art. 322^{septies}) and dishonest business management (SCC Art. 158 SCC).

The subject of the complaint was the awarding of several contracts to B. in the years 2013 to 2017 by the state-controlled, energy company C. [...] in connection with the construction of the coal-fired power plant "D." These contracts awards are to be based on bribes payments to E. [...], [anonymised information] of C., from December 2016.

By order dated 9 September 2019, the Office of the Attorney General of Switzerland opened a criminal investigation against the two former employees and carried out numerous collections of evidence.

SPO 689, paras. 3-5

Excerpt 6, for instance, demonstrates how the OAG follows the defendant's lead by opening an investigation against the two former employees implicated in the TCB scheme. Consistent with the role asymmetry theme, however, the OAG reclaims its leading position in the investigation as the narrative progresses:

Excerpt 7

[...] The Office of the Attorney General of Switzerland subsequently carried out account searches at numerous Swiss banking institutions, comprehensive transaction analyses and background investigations into the persons and companies involved. The Office of the Attorney General of Switzerland concentrated on the period from 2005 to 2012. The result of these investigations was, on the one hand, a consolidation of the suspicious circumstances reported by A. [defendant company] concerning the various markets. On the other hand, there were considerable suspicious facts concerning other countries.

The Office of the Attorney General of Switzerland edited numerous documents at A., such as organisation charts, minutes of internal compliance committees, compliance directives, information on all agents working for A., including the corresponding agent contracts, account details, internal investigation reports and all business e-mail correspondence of potentially relevant employees. A. complied with the requests for disclosure in due time and provided the documents in electronic form and prepared for analysis.

[...]

In November 2016, the Office of the Attorney General of Switzerland expanded the focus of the investigation to include individual natural persons. To this end, it opened separate investigations from the one against A., among others for bribery of foreign public officials under Art. 322^{septies} SCC, unfaithful management of a business under Art. 158 SCC, and possibly embezzlement under Art. 138 SCC.

SPO 487, s. II, paras. 5-6, 9

The same narrative strategies are evident in the SPO 698. The OAG reclaims the lead position in the prosecution after disclosing the self-reporting decisions of the defendant:

Excerpt 8

In the course of the aforementioned proceedings, it was suspected that the F. [sister company of defendant] had not taken all necessary and reasonable organisational measures to prevent bribery of foreign public officials. Accordingly, the Office of the Attorney General opened a criminal investigation by order dated 6 November 2020 [no. of proceeding] against F. due to the criminal liability of the company (Art. 102 para. 2 SCC) in connection with the bribery of foreign public officials (Art. 322^{septies} SCC). In the course of these proceedings, the Office of the Attorney General of Switzerland edited a vast number of documents at the F. and analysed them.

From the documents that were analysed, it was finally suspected that a further subsidiary of B. [parent company of defendant], A. [defendant company] [...] did not take all necessary and reasonable organisational precautions to prevent the bribery of foreign public officials, whereby the said bribery of foreign public officials was made possible. The Office of the Attorney General, therefore, extended the proceedings (no. of criminal proceeding) to A. by order dated 13 October 2022.

SPO 689, paras. 6-7

While these SPOs emphasise the company's proactive role at the beginning of the background segment, the authority of the OAG over the SPO proceeding is reaffirmed by the end of the same segment. Excerpts 7 and 8 recount how the OAG reappropriates the lead over the criminal proceeding after the defendant company's initial self-disclosure. It conducts its independent investigation, decides on extending the scope of the investigation, and opens new proceedings by reclaiming control and authoritative power over the inquiry. In this regard, the OAG retains the central decision-making powers to lead and determine the case's outcome independently of the company's collaborative stance.

The proactive-reactive dynamic is further strengthened by the defendant's acquiescence to OAG's decisions regarding the case's outcome. This relationship is apparent in the sentencing segments and, to a lesser extent, in the background segments. The following excerpts acclaim the defendant company's non-confrontational reaction to case-specific outcomes decided by the OAG:

Excerpt 9

It [defendant company] has consented to the payment of compensation claims that exceed its current capacity as determined by expert opinion.

SPO 487, s. V, para. 3.2

Excerpt 10

[...] A. [defendant company] informed the OAG that it consented to the documents produced in the simplified proceedings being included in the ordinary proceedings, without any restrictions.

It reiterated its request for the granting of payment facilities in connection with the compensation claim and indicated that it was prepared to send the OAG a declaration of waiver of the statute of limitations.

[...] it is important to note that company A. has acknowledged the facts of which it is accused [...]. Company A. also agreed to irrevocably waive all claims to an amount of USD 17 million in favour of the Swiss Confederation in spring 2018.

SPO 586, paras. 11, 33

Excerpt 11

[...] the fact that the USD 1.5 million payment was a one-off act and that the company confessed to committing the offence in question had a mitigating effect.

SPO 476, para. 23

These segments illustrate how the company complies unreservedly with the OAG's demands. The company confesses to the facts of the case (excerpts 10 and 11), consents to the reproduction of documents in a subsequent procedure (excerpt 10) and waives claims to compensation amounts as determined by the OAG (excerpts 9 and 10). The OAG regards these actions as cooperation from the defendant during the proceedings, which serves as a mitigating factor in sentencing, as shown in excerpt 11. From this perspective, the company's collaborative behaviour in SPOs is manifested as a non-antagonistic response to the OAG's decisions. When its cooperative behaviour is highlighted, the defendant company appears as a passive, agreeable partner aiding the prosecutor's case by effectively renouncing to invoke its due process rights.

5.1.3. Omissions of Company Investigative Acts

The previous two narrative practices are understood as explicit claims to authority over the SPO proceeding by the OAG. Indeed, SPOs unambiguously attribute procedural control to the OAG by presenting monologic accounts (chapter 4.1.1) and demonstrating the agency's governance over case outcomes (chapter 4.1.2).

OAG's control over the proceeding is also affixed by omitting descriptions of the company's investigative acts. The resistance towards integrating the defendant company's self-investigative activities as part of the SPO account is evidenced in the content and the syntactic characteristics of narratives. Specifically, while the OAG's arguments in favour of sentence mitigation highlight cooperative behaviour, the nature of that cooperation is not mentioned.

To illustrate, several SPO excerpts are reproduced:

Excerpt 12

[...] in particular, the admission of the misconduct as well as cooperative conduct shown can have a mitigating effect on the penalty. This is the case here.

A. [defendant company] did not cooperate in any way for months after the criminal investigation was opened and announced. Only the seizure of the servers and server data in Switzerland and thus the access to very decisive evidence, not only against A. as a company but also against numerous of its executives, induced the companies to cooperate. Despite this late concession with the application for a simplified procedure and the willingness to cooperate shown within the framework of the simplified procedure, this change in strategy can be rewarded with a reduction in the penalty of 10% of the reported operational penalty in each case [...].

SPO 465, s. IV, para. 2

Excerpt 13

[The defendant company] did its utmost to help establish [the facts of the case].

SPO 586, para. 33

Excerpt 14

It is also possible to mitigate the sentence based on the offender's confession or good cooperation with the police or judicial authorities, particularly if this cooperation has elucidated facts that would otherwise have remained obscure.

In the present case, such cooperation took place gradually in the summer of 2018. This should be taken into account but in a balanced way.

SPO 575, s. IV, para. 2

These segments cast the defendant company as a cooperative one in assisting with the elucidation of the facts. The ways in which the defendant company effectively cooperated with criminal justice authorities are omitted from SPO stories, despite these declarations. In fact, none of the investigatory measures described in the background segment of the same SPOs are explicitly attributed to the defendant company. As seen in the previous section, only the company's compliant and reactive actions during investigations are revealed.

In contrast, the investigative actions of the OAG are personalised and described in the active voice:

Excerpt 15

By decisions of 20 March and 25 April 2018, the OAG lifted the sequestration on the securities deposited in the account opened in K.'s [subsidiary of the defendant company] name with J.

On 25 April 2018, the OAG authorised the payment of the balance of available assets on open banking relationships [...]

By warrant of 27 September 2016, the OAG ordered the contents of safe deposit box no. 3. linked to relationship no. 1. opened in the name of I. with H. to be searched and provisionally secured.

SPO 586, paras. 16-17, 19

Other investigative acts are attributable to the OAG based on the contextual information provided:

Excerpt 16

[...] an A. [defendant company] employee [...] was arrested in Geneva on 17 February 2016. At the same time, various mobile phones, computers, and data carriers of this employee were forensically seized and later analysed.

Based on the seized electronic data, the statements of the arrested employee and further investigation results, it became apparent that A. had systematically directed bribes via a system of black accounts to influence the awarding of infrastructure projects to A. companies.

SPO 465, s. III, paras. 5, 7

Personalisation, combined with arguments for mitigation, suggests a deliberate obstruction of the investigative cooperation provided by the defendant company. Omitting to attribute certain investigative measures to the company and the use of active voice sentences conveys an involved stance only on the part of the OAG. This narrative approach assigns responsibility for actions to an identifiable entity. It elevates the OAG's role to that of an engaged, active agent in the proceedings, as opposed to a passive recipient of actions.

5.2. DPAs: Narrative of Prosecutions as a Partnership

In stark contrast to SPO narratives, DPAs represent the prosecution as a partnership in that the establishment of the facts of the case, sentencing, and decisions to defer prosecutions are presented as a collaborative process in the common interest of the main DPA characters: the company, the prosecutor, and the judge. The partnership narrative is achieved through three narrative strategies:

presenting DPAs as concerted accounts⁹⁰², narrating investigations as state-reviewed private actions⁹⁰³, and asserting a common interest in non-prosecution⁹⁰⁴.

5.2.1. DPAs as Concerted Accounts

DPA accounts are presented as a jointly crafted story co-authored by the judge, the SFO and the defendant company, reflecting the contract-like nature of the DPA process⁹⁰⁵. Regarding their representational aspects, UK DPA narratives consist of three distinct documents: the Statement of Facts, the DPA Agreement, and the Crown Court Judgement as stated in section 4.3. The Statement of Facts and the Agreement explicitly identify their authors as the SFO and the defendant company. For instance, the Statement of Facts in the Güralp Systems DPA begins by stating the agreed-upon nature of the ensuing criminal charges:

Excerpt 17

This Statement of Facts has been prepared pursuant to Paragraph 5(1) of Schedule 17 to the Crime and Courts Act 2013. It is agreed between the parties. It relates to the alleged commission by Güralp Systems Limited ("GSL") of offences of conspiracy to make corrupt payments (Count 1) and failing to prevent bribery by employees (Count 2), which are set out in the draft indictment.

Güralp Systems DPA, Statement of Facts, para. 1

Similarly, the Agreements are presented as contract-like documents signed jointly by a representative of the SFO and the company. In addition, these documents identify their authors in their introductory remark:

Excerpt 18

Rolls-Royce Plc and Rolls-Royce Energy Systems Inc. (together "Rolls-Royce") by its undersigned representatives pursuant to authority granted by its Board of Directors, and the Director of the Serious Fraud Office ("the SFO") enter into this Deferred Prosecution Agreement (the "Agreement"). This Agreement comes into force on the day when the Court makes a declaration pursuant to Schedule 17, section 8(1) and (3) of the Crime and Courts Act 2013.

The terms and conditions of this Agreement are as follows: [...]

Rolls-Royce DPA, Agreement, para. 1

Conversely, the Judgment is presented as the only part of the DPA narrative with a unique storyteller - the Crown Court judge. The judgment's preface reveals the judge's name. More importantly, it is

⁹⁰² Cf. section 5.2.1.

⁹⁰³ Cf. section 5.2.2.

⁹⁰⁴ Cf. section 5.2.3

⁹⁰⁵ See also Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 1-3.

written from a first-person perspective and expressions such as “my reasons” and “in my view” are widespread. Narrative appropriation is evident from the very beginning of the judgement:

Excerpt 19

On 28 January 2020 I heard an application in private in which I was asked to make a declaration in preliminary approval of a deferred prosecution agreement (a DPA) reached between the Serious Fraud Office (SFO) and Airbus SE (Airbus). At that hearing, I made a declaration that it was likely to be in the interests of justice for such agreement to be made and that its proposed terms were fair, reasonable, and proportionate. Today, the 31 January 2020, I made a final declaration and Order to that effect at a hearing held in public.⁹⁰⁶

Airbus DPA, Jugement, para. 1

Narrative appropriation in DPA judgements reflects the historically oral nature of pronouncing judicial opinions, which eventually evolved into written form⁹⁰⁷ and aligns with common-law legal principles and traditions. The doctrine of *stare decisis* confines UK legal practice to the statements of previous judicial decisions⁹⁰⁸. By framing the court's conclusions as a personal narrative, a certain level of flexibility is preserved in the application of the law, considering the coercive nature of legal precedent⁹⁰⁹.

DPA judgements are ultimately a compilation of the narratives of others. Although the judgement narratives of DPAs are conveyed in the first person, they are co-authored by multiple storytellers. They integrate and build upon aspects previously agreed upon by the SFO and the defendant company. The judgement often repeats, summarises, or refers to these agreements and arguments concerning the facts of the case, sentencing, or reasons for favouring non-prosecution. These elements are then supplemented by the judge's opinion or adopted as their own. In this manner, the judge's narratives become intertwined with those jointly formulated by the SFO and the defendant company, making them active storytellers of the judgement. For instance, part of the interests of justice narratives in the Airbus DPA judgement involves the appropriation of previously stated defence counsel arguments:

Excerpt 20

On the issue of the potential disproportionate consequences of a conviction, on behalf of Airbus, it has been said that a criminal conviction would have a number of materially adverse consequences. [...] Further, [Airbus defence counsel] identified that it would be likely that a conviction would result in a mandatory debarment from tendering for public sector contracts in the Netherlands, India, Turkey and the UAE amongst other jurisdictions; and that discretionary debarment in this

⁹⁰⁶ Underline added by the author to illustrate the use of the first-person perspective.

⁹⁰⁷ Peter M. Tiersma, 'The Textualization of Precedent', *Notre Dame Law Review* 82 (2006): 1212.

⁹⁰⁸ Lorenz Kaehler, 'First-Person Perspectives in Legal Decisions', in *Law and Language*, eds. Michael Freeman and Fiona Smith (Oxford University Press, 2013), 545.

⁹⁰⁹ *Ibid.*

jurisdiction, would, in any event, increase the risk of discretionary debarment in many other jurisdictions.

[...] Airbus has undertaken an analysis of the value of contracts which it might be precluded from tendering for if debarred, the effects of which could last up to fifteen years. On a worst case scenario, the estimated future revenue at risk globally across the Commercial, Defence and Space and Helicopter divisions could exceed €200 billion, which could decrease the value of production of Airbus in the United States, the UK, France, Germany, and Spain by over €200 billion.

Airbus DPA, Judgement, paras. 84-85

Furthermore, the agreed-upon nature of DPAs restricts the judge's storytelling abilities. According to the DPA legal framework, the judge's role is primarily that of validating or disqualifying the negotiated version of events and resolutions⁹¹⁰. Within this narrowly defined role, opportunities to develop judicial arguments are limited. This NTR characteristic is explicitly addressed in the Amec DPA's sentencing segment:

Excerpt 21

The first point which I wish to make is that my decision on this question is not a decision about how a sentencing judge would or should follow this guideline. I am confident that no sentencing judge would approach it in the way in which the SFO has done. For example, the fact that a company has no previous convictions is not a matter which is particularly relevant to sentence when the offending is as protracted and widespread as this. It just means they have been getting away with it for years, and underlines the poor conduct in 2007-2009 when the company failed to report its discoveries of apparent criminality. In a similar vein, I doubt if there would be separate discounts for the "twice removed" factor and the "co- operation" factor. Both factors would be taken into account as relevant guideline factors reducing seriousness but the court would be careful to avoid double counting since they are closely connected. [...]

The method set out in the spreadsheet, therefore, does not replicate the thought process of a sentencing judge, but it does offer a helpful yardstick against which to measure the total fine of £46m, in round figures, for the offending for which this DPA must include a financial penalty which is "broadly comparable" to that which would be imposed by way of fine on a guilty plea. I take the view that this means that I do not myself set about sentencing AFWEL and only approve a DPA which provides for payment of the sum I arrive at. [...]

Amec DPA, Judgement, paras. 49-50

In this segment, the Crown Court judge distances himself from the sentencing approach employed, highlighting that the judicial perspective is limited by the negotiated nature of the DPA.

⁹¹⁰ Cf. CCA sch. 17 s. 7, 8.

5.2.2. Narratives of State-Reviewed Private Investigations

Another aspect of the partnership narrative involves portraying the investigation as a state-reviewed private inquiry by establishing a complementary relationship between the company and the SFO in probing the bribery conduct⁹¹¹. In these narratives, the company is presented as a proactive investigator of its own criminal behaviour. In contrast, the SFO takes on a supportive role in the investigation as it complements the company's efforts by scrutinising its investigative work and confirming the accuracy of its claims.

DPAs usually contain detailed lists of the ways in which the company provided evidence for their criminal conduct. The company initiates internal investigations, voluntarily provides information to the SFO, and discloses subsequently identified criminal behaviour. Illustrating this is the Airbus DPA:

Excerpt 22

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 DPA, Judgement, para. 74

The previous excerpt continues by listing the diverse investigative tasks undertaken by the company, including identifying and analysing the content of employees' e-mails, requesting documents from foreign subsidiaries, conducting interviews with employees, and making reports to the SFO relative to its findings.

The company's investigative efforts are further described as "extraordinary"⁹¹², "extensive"⁹¹³, "exemplary"⁹¹⁴, "genuine"⁹¹⁵, and "significant"⁹¹⁶. In the Standard Bank DPA judgement, the overwhelming reliance on privately conducted investigations is emphasised by the following statement: "... Standard Bank conducted a detailed internal investigation that had been sanctioned by the SFO ...; the Statement of Facts in the present DPA proceeding is substantially reliant upon the evidence voluntarily disclosed by Standard Bank."⁹¹⁷ With these evaluative narratives, DPAs strengthen the characterisation of the defendant company as a proactive investigator.

⁹¹¹ See also Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 6-7.

⁹¹² Rolls-Royce DPA, para. 19.

⁹¹³ Rolls-Royce DPA, paras. 17, 20; Airbus DPA, Statement of Facts, para. 42; Amec DPA, Statement of Facts, para. 16; Güralp DPA, Statement of Facts, para. 13.

⁹¹⁴ Airbus DPA, para. 73.

⁹¹⁵ Rolls-Royce DPA, Statement of Facts, para. 11.1.

⁹¹⁶ Standard Bank DPA, Statement of Facts, para. 4.

⁹¹⁷ Standard Bank DPA, para. 30.

Company-led investigations are followed by descriptions of the SFO's investigative measures, demonstrating the bilateral effort in uncovering the company's criminality. Narratives of SFO investigations are, however, often portrayed as complementary and present a more succinct and less nuanced account relative to those of the company. In addition, the SFO's role in the investigation is described mostly by demonstrating efforts to review, control, request additional information, and redirect the initial company investigations. This SFO narrative portrait is best illustrated by the following excerpts informing the DPA public of the investigation following suspicions of bribery within the Airbus corporate complex:

Excerpt 23

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.

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.

Airbus SE, Statement of Facts, paras. 40-41

Excerpt 24

It is equally important to note that as the Statement of Facts records, the SFO interrogated and validated the Airbus narrative as well as conducting its own investigation as it was mindful of the need to identify the full extent of the offending. Steps taken included reviewing, including by digital review potentially relevant documents; conducting interviews in the UK; attending and asking questions at interviews in France; issuing notices under section 2 of the Criminal Justice Act 1987 for the provision of bank accounts in the United Kingdom and material held by third parties; sending Mutual Legal Assistance and intelligence requests to overseas jurisdictions and agencies for banking and company information and obtaining copies of documents seized by overseas agencies in connected investigations. Further, the SFO has, so far as possible, independently sourced information to challenge and confirm the information provided to it, and instituted an independent procedure to interrogate and validate Airbus documents to test the veracity and completeness of the provision of those documents.

Airbus DPA, Judgement, paras. 37

Both excerpts emphasise the SFO's efforts to maintain investigative independence despite relying on Airbus's self-disclosed narrative. The recurrence of "interrogated and validated the Airbus narrative" could be analysed as a discursive strategy to counteract scepticism about the deference of official criminal investigations to the defendant companies themselves within NTR frameworks⁹¹⁸.

⁹¹⁸ For critique in this sense, see Capus and Nunnari, 'Les faits établis par des accords étrangers et des rapports internes-une base valide pour une décision pénale suisse ?', 197-98; Hock, 'Policing Corporate Bribery', 963.

The framing of the SFO's investigative actions - "confirmed," "challenged," "interrogated," "validated", and "reviewed" - suggests a predominantly reactive posture rather than a fully proactive investigative approach. The SFO is depicted as responding to Airbus's self-disclosed investigation, assessing and verifying information provided by the company rather than independently uncovering misconduct⁹¹⁹.

DPA's relay an opposite dynamic between the company and the SFO compared to that present in SPOs⁹²⁰. Efforts to justify the DPA decision based on the company's active cooperation during the investigation tend to portray the SFO in a supporting role within background segments, verifying the veracity of the company's investigative conclusions. In contrast, the defendant company acquires a proactive and central role in investigating the criminal conduct, as it initiates and drives the fact-finding process, determines the scope of disclosure, and presents its narrative to the authorities, thereby shaping the contours of the prosecution's case.

5.2.3. Non-Prosecution as a Common Interest

The partnership narrative is further strengthened by narrating non-prosecution as a common interest. These narratives are formed within the justification segment and enabled by the legal framework requiring prosecutors and judges to evaluate the public interest in deferring prosecutions⁹²¹. As advanced by Campbell, also confirmed by the present findings, DPA justification strategies are grounded on discourses that intertwine the private interests of the company and the public interests⁹²². Within this framework, the judges usually identify economic prosperity and efficiency in criminal justice as public interests, which are then connected with the company's private interests in avoiding prosecution. The convergence suggests that the public benefits from the company's non-prosecution, as it fosters domestic and international economic growth on the one hand and efficient justice on the other.

For example, in the Rolls-Royce case, the DPA story delves into a substantiated discussion about the negative consequences of a potential debarment on Rolls-Royce as a company and on the ripple effects for the civil and defence aerospace industry of which it is identified to be a "world leader"⁹²³. This DPA considers how a potential debarment may hinder the UK military defence industry because the defendant is a consequential supplier. The argument is supplemented with concerns for sustaining competitive markets: "These repercussions for Rolls-Royce risk additional repercussions to third party

⁹¹⁹ See eg. Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 6-7.

⁹²⁰ See section 5.1.2.

⁹²¹ Cf. CCA sch. 17 s. 8.

⁹²² Campbell, 'Trying Corporations: Why Not Prosecute?', 276.

⁹²³ Rolls-Royce DPA, para. 52.

interests, including: [...] iii) impairment of competition in highly concentrated markets, where there are limited alternative sources of supply and significant barriers to entry ...”⁹²⁴.

Likewise, non-prosecution is narrated as a means to safeguard the financial interests of third parties. The company's shareholders and employees are considered innocents who would lose their employment, pensions, and stock values if the company's business is interrupted with a conviction⁹²⁵.

In furtherance, the Airbus DPA merges the private interests of the company with broader public interests by linking Airbus' “internal health”⁹²⁶ to developments in the aviation industry and economic stability of multiple countries:

Excerpt 25

On a worst case scenario, the estimated future revenue at risk globally across the Commercial, Defence and Space and Helicopter divisions could exceed €200 billion, which could decrease the value of production of Airbus in the United States, the UK, France, Germany, and Spain by over €200 billion.

“[Risks to debarment] would inevitably affect Airbus' thousands of employees in the United Kingdom, its share price, and thus pensioners and the thousands of companies and jobs which rely on Airbus, as part of its supply chain. The collateral effects spread more widely, however. A Deloitte report, commissioned by Airbus, has estimated for example that if Airbus was debarred from public procurement for five years, the ongoing effects over fifteen years, could put many thousands of jobs at Airbus at risk. Across that timeframe, and absent debarment, many thousands of jobs could be sustained, in the UK, the United States, Germany, France and Spain. indirect impact on the economies of these countries could be substantial: Deloitte estimates it could lower the Gross Domestic Product in each of those countries by over €100 billion. In addition, there could be adverse consequences for the reduction in competition in future public tenders, leading to additional public spending of many billions of euros...

Airbus DPA, Judgement, paras. 85-86

The Airbus DPA excerpt illustrates the imaginative and selective nature of the “non-prosecution as a common interest” narrative. These narratives transport the reader to one or more potential negative outcomes of criminal convictions to bolster the argument against prosecution. By highlighting the possible adverse effect of debarment, the DPA constructs a hypothetical apocalyptic scenario where the economic prosperity of several countries is negatively impacted. Through narrative imagination, the Airbus DPA prioritises public interest in maintaining prosperous economies and frames traditional criminal justice responses as a threat to that prosperity. These findings resonate with Barkan's observations, describing how the State and corporate entities are increasingly positioned in a non-

⁹²⁴ Rolls-Royce DPA, para. 56.

⁹²⁵ Rolls-Royce DPA, paras. 55 and 56.

⁹²⁶ Airbus DPA, para. 86.

antagonistic relationship⁹²⁷. Rather, they are positioned in a “doubling” relationship where the company and the State depend on one another, each providing the other with the conditions of existence⁹²⁸. From this perspective, Barkan argues that the notion of the modern capitalist company as a private for-profit organisation is disappearing in favour of the notion of the company as an extension of public matters⁹²⁹.

Industry-wide ripple effects are equally evoked in the Güralp Systems DPA, a relatively small company. The argument is developed by considering the peculiar expertise of the defendant. Analogously to the previous excerpt, DPA arguments against prosecution are provided with imaginative narratives identifying the potential deleterious effect of a conviction on the industry:

Excerpt 26

It is also of some significance that GSL is a company offering an unusual expertise. Were it to cease trading, there would be some deleterious effect on agencies around the world which require the seismological expertise available via GSL.

Güralp Systems DPA, Judgement, para. 35

Imaginative narratives express a protective attitude towards different industries and innocent third parties. Conversely, the protective attitude is extended to the company as part of that industry. The various industries represented in the present sample are consistently narrated as benefiting from the company’s survival and prosperity.

This framework identifies economic prosperity as a collective value, positioning financial stability and corporate success as key societal interests. Within this context, criminal justice officials - the Crown Court judge and the SFO - are portrayed not merely as enforcers of legal rules but as guardians of economic stability and industry advancement. Their role extends beyond sanctioning corporate misconduct to ensuring that proper legal interventions that do not unduly disrupt the financial viability of major firms are adopted.

DPAs equally recognise the wider public interest in an efficient and effective criminal justice through non-prosecution. DPAs posit that incentivising self-reporting and self-investigation with the prospect of avoiding conviction saves considerable criminal justice resources. Here, once again, wider public interests are deemed protected by avoiding prosecution. In this respect, the Rolls-Royce DPA Judgement states:

⁹²⁷ Joshua Barkan, *Corporate Sovereignty* (University of Minnesota Press, 2013), 1-2; Joshua Barkan, ‘Corporate Power and Neoliberalism’, in *The Sage Handbook of Neoliberalism*, eds. Damien Cahill *et al.* (Sage, 2018), 452-56 (446-56).

⁹²⁸ Barkan, *Corporate Sovereignty*, 6.

⁹²⁹ *Id.*, 43.

Excerpt 27

Although the SFO is ready and able to prosecute large corporates like Rolls-Royce, where necessary, its resources (both financial and in terms of manpower) are not unlimited so that when an agreement such as this can be negotiated, the public interest requires consideration to be given to the cases that will not be investigated if very substantial resources (sufficient to prepare the case for a hearing) are diverted to it.

Rolls-Royce DPA, Judgement, para. 58

Furthermore, non-conviction serves the “wider public interest of detecting crime” as cited in the Amec DPA⁹³⁰:

Excerpt 28

The DPA is likely to have a beneficial effect on the behaviour of organisations within the jurisdiction of the SFO in that they will be encouraged to report wrongdoing within their organisations when they discover it, and when they find evidence of it on acquiring another entity. A culture of self-reporting of such conduct is of very substantial benefit to the interests of justice in that it should bring criminal behaviour to light which might otherwise go entirely undiscovered, and may also make the investigation of such behaviour much easier, and the conviction of the guilty more likely, see the overriding objective in CrimPR [Criminal Procedural Rules] 1.1. This is an important matter both in the interests of the effectiveness of the police, SFO and Crown Prosecution Service whose resources will be better targeted, and also in the wider public interest of detecting crime.

Amec DPA, Judgement, para. 35

In the same repertoire as before, traditional criminal justice responses are portrayed negatively by invoking their limitations in rendering criminal justice efficiently. Consequently, non-prosecution is presented as a collective advantage serving not only the defendant’s interest in interrupted business but also the interests of the criminal justice system in allocating and using its limited resources optimally.

5.3. Chapter Summary and Discussion

This chapter has addressed the first research question, namely, how are narratives about the prosecution of TCB offences constructed in SPO and DPA decisions. It has also provided partial insights into the fourth research question pertaining to the similarities and differences between these two NTR decisions⁹³¹. Achieving this involved analysing how these accounts portray the investigation, prosecution, and sentencing of TCB offences. Syntax choices and the described events, actions and actors in NTR prosecution stories point to important narrative variations between SPOs and DPAs.

⁹³⁰ Amec DPA, para. 35.

⁹³¹ Cf. section 1.3.

Table 5 summarises the main narrative elements identified within SPO and DPA prosecution accounts, highlighting how each legal instrument constructs a distinct representation of TCB prosecutions.

Table 5: Main narrative elements identified in SPO and DPA prosecution accounts

Narrative element	SPO	DPA
Dominant theme	Autonomous prosecutions	Prosecution as a partnership
Character positioning	Companies as reactive characters	Companies as active characters
	Prosecutors as active characters	Prosecutors as reactive characters
Focalisation	Procedural and investigative acts by the OAG	Voluntary disclosures and self-investigative measures by the company, potential negative consequences of criminal convictions
Omissions	Company investigative acts	Investigative acts by the SFO

The dominant narrative theme diverges markedly between the two instruments: while SPOs depict autonomous prosecutions led unilaterally by the OAG, DPAs construct a narrative of prosecution as a partnership, wherein responsibility and initiative are shared between the company and the SFO. This divergence is further reinforced through character positioning. In SPO narratives, prosecutors are consistently framed as proactive agents driving the investigation and resolution, whereas companies are positioned as reactive participants who comply with prosecution directives. Conversely, DPA narratives invert this dynamic: companies are depicted as proactive actors undertaking internal investigations and self-disclosing offences, while the role of the SFO is comparatively reactive, validating and formalising the company's efforts.

In addition, SPO and DPA decisions focus on differing sets of information, selectively emphasising certain events and evidentiary elements, while marginalising others. The concept of focalisation in narrative analysis refers to the way narrative information is filtered or limited according to the perspective, knowledge, or experiential scope of the narrator, characters, or other entities within the story⁹³². SPO prosecution stories are constructed around procedural and investigative acts undertaken

⁹³² Burkhard Niederhoff, 'Focalization', in *Handbook of Narratology*, eds. Peter Hühn, Christoph M.J. Pier, and Wolf Schmid, 2nd ed. (De Gruyter, 2014), 197; Marjet Berendsen, 'The Teller and the Observer: Narration and Focalization in Narrative Texts', *Style* 18, no. 2 (1984): 140.

by the OAG, while DPA narratives centre on the company's collaboration with the investigation and the potential negative consequences of criminal convictions.

The narratives diverge equally in what omitted from the story. SPOs exclude descriptions of the company's investigative contributions. DPAs, by contrast, marginalise the investigative role of the SFO.

The narratives identified in this chapter reflect the specific institutional logic underpinning SPOs and DPAs, that is, the formal legal principles and norms, practices and justice objectives guiding these mechanisms⁹³³. As procedures rooted in and adhering to an inquisitorial-based procedural system, SPOs strongly emphasise the prosecution authority's control over the investigative and adjudicative process. This framework fosters a monologic narrative with a unique storyteller – the OAG - which presents a definitive account of the TCB case and positions itself as the lead and proactive agent of criminal prosecution and investigation. Within this framework, SPO narratives give the impression of the prosecution as a neutral, authoritative arbiter of legal and factual truth, in alignment with the foundational principles of Swiss criminal prosecutions. Indeed, this image aligns with the encoded guiding principles of all criminal investigations in Switzerland, including abbreviated out-of-court proceedings such as SPOs, which prescribe state-led criminal investigations for the purpose of establishing official narratives of the past⁹³⁴.

Conversely, DPAs, expressly designed as an exception to the dominant adversarial-based procedural system in the UK⁹³⁵, integrate public-private cooperation into their procedural logic. The DPA framework allows for a dialogic process between prosecutors and defendants, where companies actively participate in shaping the narrative of wrongdoing, accountability, and remediation in support of the SFO's prosecution work⁹³⁶. The partnership narrative characterising DPA prosecutions reflects this institutional background.

These conclusions, however, warrant contextualisation, particularly given the performative character of NTR decisions. Drawing on Goffman's impression management theory, Manning describes the communicative acts of public authorities as a form of social interaction, a performance, where public organisations intentionally highlight or downplay certain aspects of their organisation, work or specific actions⁹³⁷. This strategic communication is closely related to legitimacy: public authorities seek to legitimise their role as crime-control institutions by framing their activities in ways that align with

⁹³³ For similar conclusions in the context of international criminal trial proceedings, see Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 435.

⁹³⁴ For a discussion on Swiss criminal procedure principles, see chapter 4, section 4.2.

⁹³⁵ MoJ, 'Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations', 10-1. Cf. chapter 2, section 2.4.2.

⁹³⁶ For a discussion on the guiding principles of DPAs, see chapter 2, section 2.4.3.

⁹³⁷ Peter K. Manning, *Organizational Communication* (Aldine De Gruyter, 1992), 5–6. See also Erving Goffman, *The Presentation of Self in Everyday Life* (University of Edinburgh, 1956), 10–46.

prevailing public expectations⁹³⁸. Within the context of NTRs, anti-bribery enforcement authorities are confronted with a legitimacy deficit when settling TCB offences with negotiated and lenient procedures⁹³⁹. These enforcement strategies, induced by the difficulties of prosecuting international corporate crimes, contradict the usually punitive stance to crime conveyed through criminalisation initiatives that legitimate criminal law enforcement authority⁹⁴⁰.

Acknowledging the performative aspect of enforcement communications, Hutter notes that common procedural principles and legal frameworks may carry little weight in enforcement activities⁹⁴¹. These practices are typically underpinned by informality as prosecutors benefit from considerable discretion in enforcing their mandate⁹⁴². Nonetheless, conventional procedural principles and legal frameworks maintain their relevance when law enforcers engage with external entities such as the public⁹⁴³. These pre-established norms provide a framework for the evaluation of the validity or invalidity of enforcement actions⁹⁴⁴. As suggested by Grunewald procedural legal frameworks imply a specific “narrative blueprint”, a predetermined structure, dictating the “what” and “how” of criminal justice stories, as well as who their storytellers are⁹⁴⁵. In a similar vein, the legal frameworks of SPOs and DPAs create specific societal expectations for how TCB prosecutions should present themselves, e.g., what roles and actions the parties should take.

From this perspective, the inquisitorial undertones in SPO prosecution narratives can be understood as communication strategies that appeal to public expectations and collective imaginations of criminal prosecutions in Switzerland rather than providing insights into the realities of OAG’s enforcement practices. While reliance on internal investigations is a common aspect of TCB prosecutions⁹⁴⁶, the investigative acts of defendant companies are only rarely emphasised. Rather, SPO prosecutions are presented as autonomous acts, underscoring the independence of the OAG, including in investigation matters. In this context, the expression of inquisitorial ideals in SPO narratives may be viewed as a legitimisation tactic employed by the OAG in attempts to normalise summary proceedings for TCB cases. Indeed, conforming to these ideals emphasises the “ordinariness” of TCB prosecutions despite the extraordinary context of using SPOs for corporate offences.

⁹³⁸ Manning, *Organizational Communication*, 10. See also Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 2; Yeung, ‘Presentational Management and the Pursuit of Regulatory Legitimacy’, 274–75; Hawkins, *Law as Last Resort*, 209.

⁹³⁹ Capus and Bozinova, ‘Impression Management in Corporate Corruption Settlements’, 2.

⁹⁴⁰ *Ibid.*

⁹⁴¹ Bridget Hutter, *The Reasonable Arm of the Law?: The Law Enforcement Procedures of Environmental Health Officers* (Oxford: Clarendon Press, 1988), 9.

⁹⁴² *Ibid.* See also Capus and Brodersen, ‘Negotiating without the Victim State’, 2.

⁹⁴³ Hutter, *The Reasonable Arm of the Law?*, 9.

⁹⁴⁴ *Ibid.*

⁹⁴⁵ Ralph Grunewald, ‘The Narrative of Innocence, or, Lost Stories’, *Law & Literature* 25, no. 3 (2013): 371.

⁹⁴⁶ As discussed by the current literature on TCB enforcement practices: cf. chapter 2, section 2.2.2.

Similarly, the legal provisions of DPAs provide for a specific narrative blueprint, giving rise to stories of prosecution as a partnership. In contrast to SPOs, however, DPA prosecutions hinge on demonstrating the extraordinariness of the process, warranting deferral instead of a full prosecution. This is narratively represented in multiple ways. Consistent with the legal DPA validation requirements, the judicial authority is reimagined from a passive adjudicator to an ally, rationalising the SFO's decision not to prosecute⁹⁴⁷. Likewise, the typical narrative contest prevalent in adversarial trials is replaced by unique stories crafted and agreed upon by both sides⁹⁴⁸. To further reinforce the sentiment of corporate cooperation - a cornerstone of the DPA framework⁹⁴⁹ - the SFO's investigative acts are downplayed or omitted, while the defendant's efforts are highlighted. Additionally, the public interest in criminal justice is reframed in economic terms, with DPA decisions grounded in the need to safeguard national and international economic stability, which is framed as dependent on avoiding corporate convictions.

Divergences between SPOs and DPAs are equally observed in terms of how the cooperation between prosecutors and companies is storied. As articulated at the onset of this thesis⁹⁵⁰, NTR mechanisms are characterised by their propensity to foster public-private cooperation in case-making, which, in turn, facilitates TCB prosecutions. This cooperative approach is evident in both SPOs and DPAs, albeit in contrastingly different ways. In fact, according to comparative socio-legal scholarship, when legal practices, such as NTRs, cross borders and integrate into different legal systems, they are transformed to some extent and adjusted to national circumstances⁹⁵¹. Consistent with this literature, the results demonstrate that public-private cooperation in case-making is defined differently depending on the specific TCB enforcement context of Switzerland and the UK.

The analysis of the relationship and the interactions between prosecutors and defendants storied in SPOs revealed a rather empowered prosecution position and a rather disarmed defendant that waves its due process rights to support the prosecutor's case. The company's passiveness, non-antagonistic behaviour and willingness to forfeit rights are portrayed as cooperative stances subject to sentence mitigation. Cooperation in SPOs is thus framed in the defendant's non-assertiveness and non-confrontational approach rather than a proactive attitude that would complement or even replace the prosecutor's role in the proceeding. This narrative emerges in the Swiss context, where the legal obligation to investigate all possible avenues can significantly burden and extend the prosecutor's case, an obligation whose

⁹⁴⁷ For a similar conclusion, see Lord, 'Prosecution Deferred, Prosecution Exempt', 856-64.

⁹⁴⁸ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 3.

⁹⁴⁹ See chapter 2, section 2.4.3.

⁹⁵⁰ chapter 1, section 1.1.

⁹⁵¹ Dario Melossi, 'Neoliberalism's "Elective Affinities": Penalty, Political Economy and International Relations', in *Travels of the Criminal Question: Cultural Embeddedness and Diffusion*, eds. Dario Melossi, Richard Sparks, and Maximo Sozzo (Hart Publishing, 2011), 11; Langer, 'From Legal Transplants to Legal Translations', 3-7; David Nelken, 'Towards a Sociology of Legal Adaptation', in *Adapting Legal Cultures*, eds. Johannes Feest and David Nelken, vol. 4 (Hart Publishing, 2001), 25-28.

incomplete fulfilment may also serve as grounds for challenge by the defence⁹⁵². Invoking due process rights, such as the right to oppose the seizure of records or items by the sealing of evidence, may equally hinder the procedure⁹⁵³. These factors were indeed identified as obstacles in prosecuting TCB offences by Swiss authorities, as discussed in chapter 2, section 2.3.2. Within this context, cooperation is thus identified in the company's passiveness and complacent behaviour, remaining uncritical of the prosecutor's actions despite potential avenues to do so.

Contrastingly, cooperation in DPAs is foregrounded in the company's proactiveness during the prosecution. Initiatives from the defendants in self-reporting, investigating the scope of the criminal conduct and bettering their compliance structures and policies are referred to as cooperative stances. Similarly to SPO narratives, where cooperation is framed around overcoming key prosecution challenges, the cooperation narratives in DPAs emerge from the specific enforcement context. Detection obstacles relative to TCB offences and resource and time-consuming procedures were indeed considered major hurdles in the UK anti-bribery enforcement context⁹⁵⁴. Accordingly, cooperation is characterised by the company's active involvement in revealing the extent of the misconduct, utilising its resources in the process, thereby enhancing the efficiency of TCB prosecutions.

Despite differences in defining public-private cooperation, both NTRs reconceptualise certain aspects of the criminal process. Replacing adversarialism with partnership is particularly significant in the UK context, where the criminal process has traditionally been structured around a sharp opposition between prosecution and defence. The adoption of DPAs marks a departure from this model, introducing a cooperative dynamic in which corporate offenders are incentivised to collaborate with prosecutors, thereby reshaping the roles of procedural actors and their relationships. SPOs, in turn, redefine power distributions between the parties and empower the already powerful prosecutor by rewarding defendant companies that forego their due process rights. The analysis of prosecution narratives thus highlights how the adoption of NTRs is not only adapted to national institutional and enforcement contexts but also, the ways in which it provoked changes in the traditional repartition of criminal justice roles within one system.

⁹⁵² Blättler and Schnebli, 'La poursuite pénale efficace en Suisse', 162-63. See also chapter 2, section 2.3.2 discussing Swiss enforcement challenges in relation to TCB crimes.

⁹⁵³ *Ibid.* For the right to seal evidence, cf. SCC Art. 248. See also, chapter 2, section 2.3.2 discussing Swiss enforcement challenges in relation to TCB crimes.

⁹⁵⁴ See chapter 2, section 2.4.2 and 2.4.3.

6. Narrating Transnational Corporate Bribery Offences

As with every criminal proceeding, SPOs and DPAs fulfil the task of reconstructing past events. The stories included in offence segments are neutral and rather distant accounts of past actions, whose purpose is to present the criminal charges and supporting evidence against the defendant. To grasp offence narratives and the different aspects presented in each type of NTR decision, it was deemed necessary to provide an overview of the nature and structure of the bribery schemes included in the sample. This chapter thus begins by providing an overview of the various acts, events and networks of foreign bribery conspirators described in both SPO and DPA TCB offence segments⁹⁵⁵. A detailed analysis of all NTR decisions included in this study reveals that TCB offences involve multiple stages and various actors who conspire to negotiate, execute, and conceal the bribery agreement. The subsequent sections explore how DPAs and SPOs highlight different stages and aspects of bribery acts and networks, thereby constructing distinct narratives of TCB offences⁹⁵⁶.

6.1. Overview of Offence Segments in SPOs and DPAs

Structurally, the SPO and DPA offence narratives segments share similarities, as they adopt a typical Labovian story structure, as mentioned in chapter 4, section 4.5.1. These segments usually begin with an abstract summarising the main findings of the investigation. The orientation directs the reader towards a specific business interest or venture of the company in the country of the public official. The story then pursues to describe how the bribery scheme occurred, which constitutes the complication. The account is then concluded by providing the resolution, that is, the execution of the bribery agreement.

Criminological literature on the nature and scope of TCB offences suggests that these crimes are “organised”, comprising a multi-staged activity spanning a significant length of time⁹⁵⁷. It involves the negotiation, transfer and concealment of bribery through the use or misuse of organisational structures by multiple actors, both internal and external to the company⁹⁵⁸.

⁹⁵⁵ Cf. section 6.1.

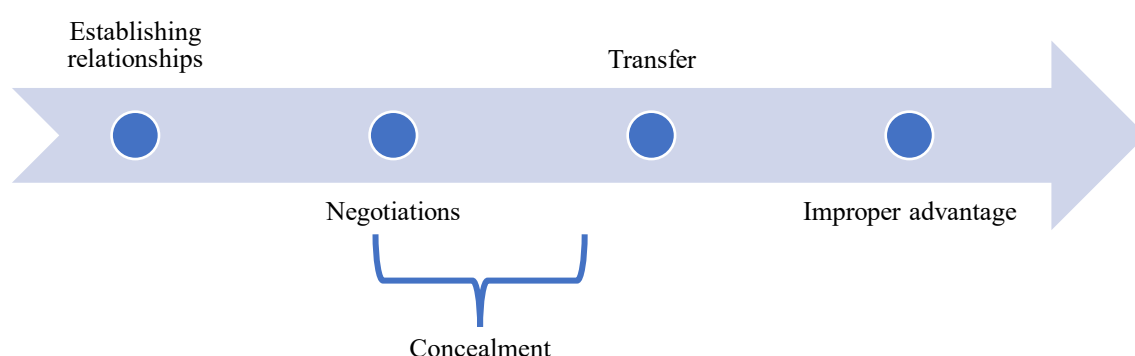
⁹⁵⁶ Cf. section 6.2 and 6.3.

⁹⁵⁷ Tomáš Diviák and Nicholas Lord, ‘Tainted Ties: The Structure and Dynamics of Corruption Networks Extracted from Deferred Prosecution Agreements’, *EPJ Data Science* 11, no. 1 (2022), 2; Chan *et al.*, ‘Understanding Transnational Bribery: A Corporate Crime Framework’, 223; Hock, ‘Policing Corporate Bribery’, 8; Nicholas Lord, Liz J. Campbell, and Karin Van Wingerde, ‘Other People’s Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-Collar, Corporate and Organized Crimes’, *The British Journal of Criminology* 59, no. 5 (2019), 1217–219; Lord and Levi, ‘Organizing the Finances for and the Finances from Transnational Corporate Bribery’, 382.

⁹⁵⁸ Fiona Chan *et al.*, ‘Unraveling the Patterns of Complexity in Transnational Corporate Bribery’, *International Criminal Justice Review* 34, no. 4 (2024): 392; Diviák and Lord, ‘Tainted Ties’, 3; Lord, Campbell, and Van Wingerde, ‘Other People’s Dirty Money’, 1217–218.

Consistent with this literature, the general overview of the different events and actors described in SPOs and DPAs reveals the organised nature of these crimes. Specifically, TCB offences are portrayed as a multi-staged activity, performed by various accomplices playing different roles in the different stages of the crime⁹⁵⁹. Figure 2 schematically represents the different stages of a typical TCB offence, as inferred from the descriptions of the criminal charges in both SPOs and DPAs.

Figure 2: Stages of TCB offences



The first stage involves establishing a relationship between the company (specifically, employees of the company) and the foreign officials or intermediaries⁹⁶⁰ representing their interests. It consists in finding and nurturing business contacts that can aid the company in acquiring the targeted contract or service in a foreign country. Establishing business relationships with intermediaries is a common and legitimate activity for MNCs seeking to expand their business within foreign countries⁹⁶¹. Within a bribery scheme, however, the intermediary acts on behalf of the briber (the company) or the bribee (the foreign

⁹⁵⁹ Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', 223; Diviák and Lord, 'Tainted Ties', 2; Blake E. Ashforth and Vikas Anand, 'The Normalization of Corruption in Organizations', *Research in Organizational Behavior* 25 (2003), 4.

⁹⁶⁰ Also referred to as consultants, agents or "middlemen". See Lord and Levi, 'Organizing the Finances for and the Finances from Transnational Corporate Bribery', 378; Vincenzo Dell'Osso, 'Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions', in *Preventing Corporate Corruption*, eds. Stefano Manacorda, Francesco Centonze, and Gabrio Forti (Cham: Springer International Publishing, 2014), 217; OECD, 'Typologies on the Role of Intermediaries in International Business Transactions' (OECD Publishing, 9 October 2009), 5.

⁹⁶¹ Dell'Osso, 'Empirical Features of International Bribery Practice', 230-34.; OECD, 'Typologies on the Role of Intermediaries in International Business Transactions', 5.

official) as an instrument in perpetrating the bribery scheme⁹⁶². In the present sample, almost all bribery schemes confounded involved an intermediary (n = 52).

The second stage revolves around negotiating the *quid pro quo* (corrupt) agreement between the company and the foreign official or intermediaries acting on their behalf. In this stage, the main foreign bribery protagonists agree on the nature of the bribe and ensure its delivery, usually through the intervention of the intermediary. In agreement with the literature on the subject, the bribe usually consists of money⁹⁶³. Exceptionally, however, some bribes involved providing services, offering to cover vacation expenses or employment opportunities for members of the foreign official's family. The negotiation of the corrupt agreement is followed by the transferring of the advantage to the foreign official, which consists of the third stage. This is usually accomplished with the aid of the intermediary, assuring the transfer from the company to the foreign official.

Concealing the bribery agreement is a central component of TCB crimes as actors strive to avoid detection both from internal company controls and public control agencies⁹⁶⁴. Within our sample, the authors usually proceed to disguise the bribe as an intermediary commission fee or as fees related to fictitious services. The final beneficiary of the bribe is equally concealed by using shell companies and offshore banks and accounts to transfer the bribery payment, rendering it difficult to detect the final beneficiary of bribery funds⁹⁶⁵. The different concealment efforts become apparent both at the negotiation and transfer stages of foreign bribery schemes. Concealment efforts form part of the negotiations between intermediaries and company employees, where the use of coded messages, establishing fictitious contracts or avoiding paper trails of their discussions can be spelt out as common tactics in the present sample. Additionally, bribery transfers are usually done to offshore accounts and businesses, accompanied by false accounting, hiding the true reasons behind the transferred funds, their origin, their destination or both.

Finally, the fourth stage concerns the improper advantage performed by the foreign official in favour of the company. This usually concerns the attribution of a public tender to the defendant company⁹⁶⁶. Most TCB offences described are explicitly portrayed or inferred to be completed schemes. In exchange for a benefit, usually a bribe payment, the foreign official has already executed his/her promise to the

⁹⁶² Dell'Osso, 'Empirical Features of International Bribery Practice', 231-32.; OECD, 'Bribery in Public Procurement: Methods, Actors and Counter-Measures' (OECD Publishing, 2007), 38.

⁹⁶³ Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', 226 f.; Dell'Osso, 'Empirical Features of International Bribery Practice', 208.

⁹⁶⁴ Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', 235-36.; Lord and Levi, 'Organizing the Finances for and the Finances from Transnational Corporate Bribery', 374; Dell'Osso, 'Empirical Features of International Bribery Practice', 230-34.

⁹⁶⁵ Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', 235-36.; Lord and Levi, 'Organizing the Finances for and the Finances from Transnational Corporate Bribery', 379.

⁹⁶⁶ For an analysis of bribery in public procurement, see generally OECD, 'Bribery in Public Procurement: Methods, Actors and Counter-Measures'.

company at the time of the NTR decision. It is worth reiterating that in both countries, TCB offences criminalise actions to offer, promise or give an undue advantage with the intent to bribe⁹⁶⁷. Whether or not the foreign public official actually performs the requested act is legally irrelevant; the offence of bribery can be established solely on the basis of the offer, promise, or provision of the undue advantage⁹⁶⁸.

In addition to their multi-staged nature, TCB are crimes thriving on networks of people and entities⁹⁶⁹ (shell and offshore companies, banking institutions). These offences are inherently relational and interactional forms of offending, creating consequential social networks that may span over several years⁹⁷⁰. The very definition of bribery implies at least two willing and consenting actors⁹⁷¹. However, as highlighted by SPO and DPA narratives, organising, executing, and concealing TCB offences are collective acts requiring the cooperation of multiple individuals and entities. Within this framework, a further distinction between internal and external actors in relation to the defendant company can be made. Internal actors are the defendant company's (its subsidiary's or sister company's) various employees with different levels of decision-making power (company executives, managers, employees). The intermediaries, the foreign officials, the different financial intermediaries, and shell and offshore companies are considered external actors.

SPOs and DPAs delve into the multi-staged and networked nature of TCB offences. However, they do so in rather different ways. Sections 6.2 and 6.3 address these divergences.

6.2. SPOs: Bribery as Financial Flows

In the Swiss context, SPO offence narratives are generally succinct and omit significant details on the bribery scheme. In 4 of the 10 SPO cases analysed⁹⁷², the pragmatical approach to the facts of the case is exemplified by reiterating the factual narratives foregrounded in parallel national or foreign proceedings. Illustrative of this is the SPO 678, where the commission of a foreign bribery offence is substantiated by listing the various agreements concluded between the company or its employees in foreign and national prosecutions based on assumptions of bribery. The factual elements consist of providing information about previous NTR agreements concluded between the defendant's parent company or its employees in foreign countries or in Switzerland for the same underlying offence of

⁹⁶⁷ SCC Art. 322^{septies} for Switzerland and UKBA s. 6 for the UK. Cf. chapter 2, sections 2.3.1 and 2.4.1.

⁹⁶⁸ Cf. chapter 2, sections 2.3.1 and 2.4.1.

⁹⁶⁹ Chan *et al.*, 'Understanding Transnational Bribery: A Corporate Crime Framework', 223.

⁹⁷⁰ *Ibid.* See also, Diviák and Lord, 'Tainted Ties', 2.

⁹⁷¹ Diviák and Lord, 'Tainted Ties', 2.

⁹⁷² The four cases of interest here are: Nitrochem, Gunvor, SBM-Offshore and SICPA SPO.

foreign bribery. The factual elements of the bribery scheme are thus replaced by the reiteration of parallel criminal proceedings as evidence foregrounding the charges of foreign bribery.

Revisiting the different stages of TCB schemes described in the previous section, SPO narratives generally depict the third and fourth stages of TCB offences: transfer and the performance of an improper advantage⁹⁷³. The first stage of establishing connections in foreign countries and the second stage of negotiating the bribery agreement are largely absent from SPO narratives.

SPO accounts predominantly narrate TCB offences as a series of financial flows, as the various movements of bribery payments are retraced. The main events and actions depicted are the money transfers from defendant companies to external business partners or entities, which are then retransferred to foreign officials. TCB offence segments usually conclude by disclosing the foreign official's undue advantage in favour of the company. In this regard, SPOs employ a typical "follow the money trail" approach in reconstructing TCB offences⁹⁷⁴.

The following excerpts illustrate how SPO narratives consist of a series of financial flows originating from the defendant company:

Excerpt 29

The corrupt payments identified in these proceedings were made from bank accounts controlled by A. [defendant company] and its affiliates, in Switzerland and abroad, via the bank accounts of intermediaries in Switzerland or abroad, including M., N. and O. and/or directly to bank accounts controlled in Switzerland by (former) executives or managers of B. [state-owned oil company] in particular E. and Q.

SPO 586, para. 28

Excerpt 30

II. Payment systems established in the name of A. [defendant company]

[...]

In particular, the above payments were made as follows:

A. paid into the Swiss bank accounts of the companies G., J., and K. [offshore companies].

M. [CFO of defendant company] and N. [director legal counsel of defendant company], acting on behalf of A., gave payment orders to be debited from the bank accounts of G., J., and K., in favour of public officials [anonymised country of origin of public official] or

⁹⁷³ Cf. figure 2, section, 6.1.

⁹⁷⁴ For a discussion on the "follow the money approach" in investigating corporate crimes, see Nicholas Lord, Karin van Wingerde and Liz Campbell, 'Organising the Monies of Corporate Financial Crimes via Organisational Structures: Ostensible Legitimacy, Effective Anonymity, and Third-Party Facilitation', *Administrative Sciences* 8, no. 2 (2018): 1-2.

companies whose beneficial owners were public officials [anonymised country of origin of public official] or which were responsible for routing payments to final recipients who could not be ruled out as being PEPs [publicly exposed people] or public officials [anonymised country of origin of public official].

SPO 564, para. 10

Excerpt 31

Part of the amounts credited to M. [shell company belonging to intermediary] was then transferred to [anonymised country]. In reality, these payments corresponded to offsetting transactions, i.e. transfers of funds to bank accounts in [anonymised country] followed by offsetting in cash delivered in person by an agent on the territory of [anonymised country] with no risk of traceability of the financial flow.

SPO 575, s. II, para. 1.2

Excerpt 32

[...] A. [defendant company] paid CHF 2 million in June and July 2010 into an account of K. [intermediary] at a bank outside Switzerland. In October and December 2011, A. then transferred CHF 3.8 million to an account of K. at a bank outside Switzerland.

SPO 487, s. III, para. 3.3

The core of SPO TCB offence stories describes the systems put in place to execute and conceal bribery payments, as exemplified by these excerpts. They retrace the sequence of convoluted transactions, specifically, a money laundering technique known as “layering”⁹⁷⁵, used to preclude the origin and the beneficiary of the bribery funds (excerpts 29-32). Instances of direct banking relations with foreign officials or companies controlled by them are equally present (excerpts 29 and 30).

SPOs thereby mobilise evidence of various banking relations and activities between the defendant company, intermediaries and foreign officials. Bank account beneficiaries, permanent or one-time payment orders, and transaction analysis are the main pieces of evidence presented in support of the criminal charges. For example, SPO 586 identifies and lists the numerous banking relationships controlled by or linked to the defendant’s company group at several Swiss banks⁹⁷⁶. Furthermore, SPO 465 refers to a transaction analysis in identifying the amount of bribery payments and the transfers carried out by the defendant to various offshore companies⁹⁷⁷.

⁹⁷⁵ Chan *et al.*, ‘Unraveling the Patterns of Complexity in Transnational Corporate Bribery’, 395-96; Fabian Teichmann, ‘Recent Trends in Money Laundering’, *Crime, Law and Social Change* 73 (2020): 239.

⁹⁷⁶ Andrade Gutierrez SPO, para. 13.

⁹⁷⁷ Odebrecht SPO, s. II, para. 4.2.2.

The story of the TCB offence culminates with the payment reaching the foreign official. While not a systematic narrative practice, SPOs generally detail the identity of the foreign official and their role in attributing the business contract to the defendant company, as illustrated by SPO 454:

Excerpt 33

The three identified recipients of the payments originating from A. [defendant company] and forwarded by D. [intermediary] are executive members of C. [state-owned company] which is owned by the state and ensures the energy supply of the country [...]

A. was a member of the management of the state-owned C. at the time and was decisively involved in its decision-making process regarding the awarding of the project. In this context, it was obviously only a matter of influencing decision-makers of C. by means of bribes to award the contract to A. [...]

SPO 454, para. 12.8

Emphasising the identity of the foreign official and their role in attributing the contract to the defendant allows the storyteller to infer the existence of a *quid pro quo* agreement, thereby demonstrating the intentionality behind the act. In fact, the company-intermediary-official financial triad does not adequately support the foreign bribery charges from a legal perspective. The Swiss legal framework requires proof of corrupt intent, e.g. the agreement between the briber and the bribee to substantiate a criminal charge of bribery of foreign officials, which might prove difficult without insights into how these relationships were planned and negotiated⁹⁷⁸. To compensate, prosecutors infer the corrupt agreement from circumstantial proof, the most common being the identity and function of the foreign official (although high commission fees to the consultant are equally mobilised):

Excerpt 34

The two civil servants held relevant positions during the award of Contract No [anonymised contract number] of [anonymised country]. Consequently, they were directly or indirectly involved in the tendering procedure. Because of the possible role of these officials in the tender procedure, A. should have ensured that no payment was promised or made that could constitute compensation for official acts contrary to its obligations. [...]

SPO 699, para. 3.7

In further efforts to substantiate the foreign bribery charge, SPO narratives demonstrate that, despite various concealment efforts, the investigation succeeded in uncovering the financial relationship between the defendant and the foreign official, as illustrated by the following:

⁹⁷⁸ SFC, 7B_78/2022 (30 October 2013), para. 6.2.3; Ursula Cassani, 'La corruption de fonctionnaire: Répression pénale d'un pacte', in *Pacte, convention, contrat: Mélanges en l'honneur du Professeur Bruno Schmidlin*, eds. Alfred Dufour and Bénédict Winiger (Helbing Lichtenhahn, 1998), 214-15.

Excerpt 35

It emerges from the investigations that C. [employee of defendant company] and the advisor organised the transfer of cash of at least CHF 640,000.00 and USD 302,736.00 to the official of Q [state-owned company]. The funds originally came from A. [defendant company]. It also emerges that funds in Switzerland were paid in cash to the public official or his relatives. The amounts were paid out as follows:

- between October 2008 and March 2009, USD 302,736.00,
- at least CHF 20,000.00 on 15 or 16 February 2010, CHF 70,000.00 on 5, 6 or 7 March 2011,
- CHF 550,000.00 shortly before or on 17 October 2011.

SPO 699, paras. 5.6-5.7

Excerpt 36

In this case, the investigations carried out by the OAG, in particular the analysis of the banking documentation summarised in the [financial analysis] report, made it possible to identify transfers totalling USD 19'078'499 and EUR 2'159'850, linked to corrupt payments in Switzerland by company A. [defendant company] and its affiliated entities, including USD 17,579,474 and EUR 2'159'850 to (former) executives or managers of B. [state-owned oil company] between 2007 and 2012.

SPO 586, para. 28

Excerpt 37

The amounts were then transferred to another agent, who then continuously withdrew cash amounts and personally handed them over to the employee of the central bank [foreign official], mostly in Switzerland but also partly in Morocco.

SPO 487, s. III, para. 2.2

When available, SPO TCB offence segments mention the exact amounts paid (excerpts 34-35), as well as the dates, places, and modes of handover to foreign officials (excerpts 34-36). SPO narratives then close the narrative of the criminal behaviour by briefly disclosing how the defendant company benefited from the payment:

Excerpt 38

The aforementioned executives of the state-owned [company] C., who benefited from the payments made, obviously influenced the awarding of contracts in favour of Ab. and Ah. [subsidiaries of defendant company] by virtue of their position at C. in the projects Ea. and Eb. respectively, but also prevented their employer from suing A. [parent company of defendant] for damages for improper or delayed performance in return for a corresponding payment.

SPO 454, paras. 12.6-12.7

Excerpt 39

These corrupt payments were considered for the award of various contracts by the state-owned company B. to company A. [defendant company] and even to other companies in the same group.

SPO 586, para. 28

Section 6.1 discussed how TCB offences are networked phenomena requiring the intervention of multiple actors that can be both internal and external to the defendant company. By narrating TCB offences as a series of financial flows, SPOs adopt an outward perspective on the networked nature of these offences, emphasising the involvement of bribery accomplices external to the company. The main protagonist is generally the defendant company itself, cast into the role of the perpetrator, engaging directly in the criminal behaviour. The company undergoes a process of personification⁹⁷⁹, acting as an intentional actor in organising, executing, and dissimulating foreign bribery. TCB offence segments then recount the relationships created and sustained between the protagonist and various actors external to the company, including intermediaries, shell companies and offshore or onshore banking institutions through which the transfers are made and concealed. As stated earlier, the financial relationship between the company and the foreign official or between the intermediary and the foreign official constitutes an integral part of SPO offence narratives.

Consequently, SPOs present bribery networks as a collective formed by multiple accomplices independent from one another, forming financial connections to pursue a mutual goal. For example, by retracing the financial flows, SPO 487 describes the relationships between the defendant company and two intermediaries. Delving into the details of the TCB offence, the network is extended to include the foreign official by providing an overview of subsequent acts outside of the company's control:

⁹⁷⁹ For a definition of personification in literary studies, see Aletta G. Dorst, 'Personification in Discourse: Linguistic Forms, Conceptual Structures and Communicative Functions', *Language and Literature* 20, no. 2 (2011): 116.

Excerpt 40

In July 2008, A. [defendant company] concluded an Agency Agreement with a company named J. [...]. Based on this agreement, an amount of CHF 2.1 million was transferred to an account in Switzerland in favour of the company on 23 September 2009. The beneficial owner of this account was a director of the [country of foreign official] Central Bank. Further payments were made to accounts outside Switzerland.

In June 2010, A. then concluded another Agency Agreement with a company called K. [...]. Based on this agreement, A. paid CHF 2 million in June and July 2010 into an account of K. at a bank outside Switzerland. In October and December 2011, A. then transferred CHF 3.8 million to an account of K. at a bank outside Switzerland. It was proven that the owner of K. was a relative of a senior executive of the [country of foreign official] Central Bank.

SPO 487, s. III, paras. 3.2 and 3.3.

Similarly, the SPO 575 TCB scheme is narrated in terms of corrupt ties between multiple entities and individuals representing the interests of the defendant company and the foreign official, respectively. They depict the concealment efforts by recreating ties between the defendant, the intermediary, and shell companies created to disguise the origin and destination of the payment:

Excerpt 41

[...] on 25 June 2008, G. [shell-company created by defendant company] signed a Memorandum of Understanding (MOU) with H., a company owned by a man named I. who acted as E.'s [the son of the foreign official] frontman. The said contract was signed by C. [defendant company employee] and I. It provided for the remuneration of the agent, i.e. H. by the payment of a commission following the signature of a petroleum contract, the amount of which was to be determined by agreement between the parties and according to the profitability of the transaction.

Despite the wording of the contractual obligations of the agent, which were never carried out, the aforementioned MOU was drawn up as a legal cover to justify the corrupt payment channel. At a meeting with C., E. clearly introduced the person who was to collect the bribes on his behalf, i.e. I., through the company H.

Shortly after 20 March 2009, following C.'s validation of the invoice issued, B. [defendant company] made a payment of USD 200,000 in favour of the company H. on behalf of E. The use of the company G. as a co-contractor alongside H. prevented B. from being exposed [...].

SPO 575, s. II, para. 1.1

In contrast, the internal company dynamics that led to the execution and concealment of the TCB scheme play a marginal role. The ways in which company employees collaborated with one another in performing the TCB offence are generally omitted from SPO accounts. SPO 678, for example, reveals internal concealment methods only as a company-wide practice:

Excerpt 42

The corruption system thus set up was based on the use of intermediaries, acting through offshore companies to which A. [defendant company 1] paid "commissions", under cover of fictitious contracts concluded between the said offshore companies and the accused companies. In this context, the use of payment orders entitled "rush payment request", bearing in particular the letterhead of B. [defendant company 2] was common practice within E. [group of companies]. Most often, these documents, discovered by the OAG in the course of its investigation, deliberately did not mention the name of the beneficiary in order to "limit knowledge of the facts to a restricted circle of people within the company", as indicated by D. [former employee of defendant company and witness].

SPO 678, para. 57

Excerpt 41 provides information on the concealment methods undertaken within the defendant company. However, the specific dynamics between employees or business units in organising and executing the TCB scheme remain undisclosed.

6.3. DPAs: Bribery as Corrupt Agreements

In comparison to SPO narratives, DPA depictions of the bribery offence are relatively detailed, substantiated by different evidentiary claims and emphasise the internal dynamics of organising the bribery agreement within the company.

DPA narratives generally represent TCB offences as corrupt agreements. In fact, the core of the TCB offence story in DPAs revolves around the first two phases of the typical TCB scheme, as illustrated in figure 2⁹⁸⁰. The first stage concerns initiating a relationship with foreign officials or intermediaries. The second one involves negotiating the *quid pro quo* agreement between the company and the foreign official or the intermediary. Most of the bribery schemes depicted in DPAs involve the use of intermediaries. In this sense, offence stories generally involve interactions between company employees and intermediaries. Accordingly, the main events and actions described revolve around forming and executing corrupt agreements in written or oral form between company employees and intermediaries (business agents or consultants), presumed to facilitate contacts with foreign officials.

DPA TCB offence segments describe intermediary recruitment, commission negotiations, and company-wide organisational behaviours in favour of maintaining and executing corrupt intermediary agreements. For example, the Airbus TCB scheme in Taiwan revolves around the conclusion of consultancy agreements with intermediaries:

⁹⁸⁰ Cf. section 6.1.

Excerpt 43

On 15 March 2013 Airbus signed a consultant agreement with the Company of Intermediary 3 (remuneration being a percentage of NAF, with 50% of the remuneration payable within 15 days of signature) with retroactive effect from 1 September 2012, so as to cover the period of the 25 October 2012 Amendment (sale of additional A321neo aircraft).

Under an assignment of receivables agreement dated 24 January 2013, the remaining compensation due under the Company of Intermediary 2's consultant agreement (US\$4,485,500) was assigned to the Company of Intermediary 3.

The Company of Intermediary 3 invoiced Airbus on 16 July 2012, 25 February 2013 and 16 May 2013. These invoices indicate that Airbus paid the Company of Intermediary 3 a total of US\$11,902,500. A percentage of the total commercial contract value of each TNA purchase appears to have been destined for "Van Gogh" [foreign official].

Airbus DPA, Statement of Facts, paras. 121-123

The account is substantiated by reproducing the e-mail conversations between company employees and the intermediary, retracing the negotiation of commissions, part of which is destined for foreign officials. Equally, an excerpt of the minutes of a meeting in which the actual beneficiary of the intermediary's commissions is revealed:

Excerpt 44

[...] on 5 December 2011 an email was sent from Intermediary 2 to Airbus employee 1 [senior], entitled 'Van Gogh', which read:

“Recently I sent a request for laeee [sic] prints of Van Gogh to [Airbus employee 9 [senior]]. What is the status of the response?”

On 8 April 2012, Intermediary 2 emailed Airbus employee 1 [senior] regarding a meeting with Airbus employee 1 [senior] during which they discussed “a 70/30 split”:

[...]

At our last meeting and discussions on Van Gogh's paintings, I left with a new understanding of the 70/30 split. Originally, I thought only the first invoice required the 70/30 split. I want to confirm here that the complete list of invoices requires the 70/30 split.

[...]

In an interview during Airbus' due diligence review process, on 29 October 2015 Airbus employee 1 [senior] is recorded in an interview note as saying:

The Company of Intermediary 3 would serve as what he described as a "portage," and that Intermediary 3 would pass on the majority of the compensation that it received from Airbus Group to the TNA Parent Executive 3 minus a commission. [...]

Airbus DPA, Statement of Facts, para. 114-115 and 124

As excerpts 42 and 43 demonstrate, bribery payments are usually disguised as commissions to intermediaries. Against this background, DPAs showcase the processes of negotiating commissions to substantiate the foreign bribery criminal charge. Similarly, in describing Rolls-Royce's TCB offence relative to its business ventures in Thailand, DPA narratives focus on the conclusion of an intermediary agreement. The various back-and-forth negotiations between the intermediary and company employees are chronologically ordered. The account mentions various side letters to the intermediary contract, uncovering the nature and modalities of the agreement.

Excerpt 45

In March 1992, when a second order by Thai was first anticipated by RR [Rolls-Royce], an RR employee agreed with Intermediary 3 a “success fee” of 135 million Thai Baht (then approximately US \$5.29 million), should Thai order further B777s with T800 engines. This was formalised via a Side Letter to Intermediary 3's agreement.

The order did not proceed at that time. Two years later, on 20 May 1994, RR paid US \$500,000 to Intermediary 3, despite the deal not yet being concluded. In April 1995, with the order still not finalised, a further Side Letter was sent by RR to Intermediary 3. This increased the 1992 offer to a payment of US \$1 million per aircraft (six aircraft were envisaged). There were also changes proposed to Intermediary 3's percentage commission.

The Side Letter specified that the US \$500,000 payment was an advance on Intermediary 3's percentage commission. Intermediary 3 wrote to RR later in April 1995 to explain that this was incorrect: "the expense of RR only for lobbying [a senior officer of Thai]. It is not an advance money at all."

In July 1995 a further Side Letter was drawn up confirming that the US \$500,000 payment would be treated as ex gratia and would not be deducted from Intermediary 3's commission.

Rolls-Royce DPA, Statement of Facts, paras. 73-76

The Rolls-Royce Thailand TCB scheme demonstrates the internal company process in organising and validating the corrupt agreement. The following excerpt from the same TCB criminal charge highlights the implication of several senior employees and the use of normal company communication channels in pursuing the corrupt deal:

Excerpt 46

In November 1996 an internal RR [Rolls-Royce] memo noted that the same employee of Thai had asked an RR senior employee to "release" US \$1 million of the US \$5 million which remained to be paid to Intermediary 3. The memo recommended that payment be made now: "so that Thai can use it to 'manage the political process.' "

Three RR senior employees agreed to this. The second advance of US \$1 million was again paid to Intermediary 3.

In January 1997 an internal memo sent to two RR senior employees noted that the order by Thai awaited ratification by the Government of Thailand and that:

"Part of the concession package associated with this contract involves the payment of US\$7.14M contingent upon Government approval of the purchase. These funds would be passed through our Commercial Adviser who would take responsibility for the 'in-country' distribution."

The purpose of the memo was to advise of press reports which had suggested that the Thai Government might prefer leased aircraft to a purchase and that RR were therefore exposed to a risk of having paid out US \$2 million without having secured the order, albeit repayment of those monies had been guaranteed by the two intermediaries.

In February 1997 a meeting of RR's CRSC was held at which were present three RR senior employees who had been involved in agreeing the second advance of US \$1 million. [...].

Rolls-Royce DPA, Statement of Facts, paras. 88-92

TCB offence segments regularly exemplify the organisational behaviour of company employees in negotiating and executing the corrupt agreement. In contrast to the outward perspective in SPOs, DPAs reconstruct the internal dynamics of bribery acts by revealing inter-company communications and relationships in pursuit of a corrupt agreement. Although the intermediary, as an external actor to the

company⁹⁸¹, is an important protagonist in offence segments, they are usually driven by company employees, who, acting on behalf of their employer, develop relationships and negotiate deals with these intermediaries. While occupying the role of central protagonists in the offence segments, company employees nevertheless appear as static characters, depicted through a single defining trait, typically their involvement in the bribery act, and are devoid of any narrative depth or development beyond that function⁹⁸². This stands in stark opposition to SPO narratives that personify the company and position it as the main perpetrator of the bribery. Indeed, a level of corporate depersonification is inferred within DPA accounts as the focus shifts to company employees and organisational structures and dynamics. In this regard, the company is presented as a simple organisational structure comprised of compliance and contract approval processes, as well as individuals acting on behalf of the company's business interests.

In addition to conversations between intermediaries and company employees, the actions detailed often involve the drafting and amending of intermediary contracts by company employees, their validation by compliance units or senior staff and the ways in which internal controls are circumvented. DPAs thus recreate the internal workings of TCB by highlighting how deals are initiated, negotiated, and validated by various business units or adjusted to meet internal compliance requirements. This inward perspective is reinforced with company emails, memos, and employee witness statements as key evidence presented.

Revealing the internal dynamics between company employees is a consistent feature of DPA TCB offence segments. For example, the Amec DPA relays how the initial intermediary contacts, the negotiation of the agreement and its validation are arranged by multiple employees belonging to different business units:

Excerpt 47

On 28 October 2011, IA6 [intermediary] contacted FWE39 [Amec employee 1] by email offering his services on the bid for the UFN- IV Contract. [...] FWE39 passed this email on to FWE40 [Amec employee 2], with a message stating “this person was introduced to me by a mutual friend. I obviously have no idea of his legitimacy. Would you be interested in speaking with him?” FWE40 in turn passed IA6's details to FWE38 [Amec employee 3].

FWE38 initially firmly rejected the notion that FWEL should engage with IA6 [...]

Despite these reservations, on 7 November 2011, FWE38 emailed IA6, stating that he had been informed that IA6 would like to explore the possibility of assisting FWEL “in a current sales opportunity”. [...]

⁹⁸¹ Cf. section 6.1. for a distinction between internal and external actors of a bribery scheme.

⁹⁸² Cf. chapter 4, section 4.5.2 for a distinction between evolving and static characters in storytelling.

FWE38 met with IA6 in Geneva on 30 November 2011. On 1 December 2011, IA6 then emailed FWE39 about the meeting, relaying "...we spoke about the project and about compliance, etc... From our side we have a structure that permits well identified services and eventually man hours to be supplied: this can be a solution". It is inferred that IA6 was proposing to circumvent FWEL's compliance procedures by inventing fictitious services and that he made this proposal known to FWE39. [...]

Amec DPA, Statement of Facts, para. 227-230

Excerpts 48

The engagement of CA5 [intermediary 1] and CA6 [intermediary 2] in relation to the Paradip FEED Contract was arranged by FW's Global & Sales Marketing team, in particular the senior executives FWE33 [Amec employee 1] and FWE32 [Amec employee 2], with the approval of senior employees and directors of FWEL, in particular FWE11 [Amec employee 3], FWE34 [Amec employee 4], FWE35 [Amec employee 5] and FWE20 [Amec employee 6].

Amec DPA, Statement of Facts, para. 192

Excerpt 49

Subsequently, on 22 April 2007, FWE16 [Amec employee 1] emailed FWE17 [Amec employee 2] asking for sign-off on FWE14 [Amec employee 3]'s proposed payment, and there were discussions between FWE9 [Amec employee 4] and the "Manager" (followed by internal discussions) about the exact amount of money to be paid to satisfy the requested bribe – taking into account money already paid for a previous visa application that had been unsuccessful. On 23 April 2007, FWE14 confirmed the amount:

"a cheque for 268,000 [SAR] has been issued to FWE9, in his name, for him to obtain cash to complete the transaction this morning. The balance, 132,000, will be paid after we have received the refund / return of the 50% YANSAB application which the 'Riyadh Agent' has been instructed to return – by the Ministry man! We are assured that the block visa will be cleared within one week".

Amec DPA, Statement of Facts, para. 117

Excerpt 50

There is evidence from which it can properly be inferred that directors and senior employees within FWEL knew that the money paid to CA3 [intermediary] under the CUF Consultancy Agreement had been intended for officials in Petronas in order to influence the award of that contract. In an email exchange dated 1 October 2003 between FWE2 [Amec employee 1] and FWE25 [Amec employee 2] (copying FWE5 [Amec employee 3], FWE7 [Amec employee 4], FWE11 [Amec employee 5]), in which FWE25 [Amec employee 2] said that he had "Asked [IA3] to clear the problem of the backlog as it was causing business winning problems and also other issues... agreements, other payments due, etc as we were unable to move on any of these without his positive action".

Amec DPA, Statement of Facts, para. 149

As illustrated, DPAs demonstrate the internal organisational dynamics of TCB, as multiple employees perform different tasks related to the corrupt agreement. While a certain set of employees establish relationships (excerpt 47) and draft contracts with intermediaries (excerpt 48), others make efforts to conceal their true nature (excerpt 47). Yet another group of employees is responsible for validating and executing the payments relative to the corrupt agreement (excerpts 49 and 50).

The concealment efforts depicted here are those undertaken by company employees with respect to internal compliance structures, in contrast to the outward perspective put forward by SPO narratives. DPA narratives delve into the internal organisation preceding the transfer of bribery payments:

Excerpt 51

A due diligence report on Intermediary 8 / Intermediary 8 Company C by an independent risk consultancy, dated 17 February 2011, was produced in accordance with RR's new policy [...]. This revealed Intermediary 8's connection to the former Indonesian President. It was recommended that RR visit Intermediary 8 in Indonesia.

On 22 February 2011 an RR [Rolls-Royce] Legal and Compliance employee was warned that if Intermediary 8's services were not retained, the TCA deal might fall through.

On 2 March 2011 the RR Legal and Compliance employee above, a Compliance colleague and an RR employee attended a meeting in Indonesia at which Intermediary 8 denied making payments to senior Garuda employees. Following the meeting Intermediary 8 was reclassified as 'Low Risk' and on 18 March 2011 was granted a new CAA.

Rolls-Royce DPA, Statement of Facts, paras. 262-264

Excerpt 52

[Güralp employee 1], in his capacity as Finance Director, continued to authorise GSL's finance department to make payments to [intermediary] after he had devised the ABC policy in 2012 and whilst he was caretaker Managing Director at GSL from November 2013.

In May 2012, [Güralp employee 2] and [Güralp employee 1] agreed the form of words to be used by [intermediary] when raising invoices for the advice fees to GSL. The wording was vague: "Invoice for technical consultancy on parametric information and product development". [Güralp employee 1] reply to [Güralp employee 2] proposed form of words is consistent with them having deliberately chosen vague wording for [intermediary] invoices: "Perfect!! No one will ever understand any of that!" [Intermediary] subsequently used that wording when submitting all of his invoices to GSL between 30 May 2012 and 20 April 2015.

Güralp Systems DPA, Statement of Facts, para. 52-53

Excerpt 53

This email demonstrates a deliberate effort by at least one director and senior employees at FWEL to keep payments to agents hidden in certain documentation. The evidence suggests that the costs of the engagement of agents were to be communicated by GSM, but that the agreements with the

agents were to be kept out of sight of the bidding/projects team and the monies paid to agents were to be described as “additional services”, disguising their true nature.

Amec DPA, Statement of Facts, para. 151

Excerpt 54

187. RR [Rolls-Royce] employees were sensitive about such discussions appearing on email. Following another similar message, an RR employee emailed:

“I told [the RR employee in Russia] on Monday I do not want to see any of this stuff appearing in an email in future. If he does it again, I’ll bring him back to London so we can give him a face-to-face scrubbing.”

Rolls-Royce DPA, Statement of Facts, para. 187

Excerpt 55

Airbus employees [...] agreed to deliberately circumvent the proper compliance process by falsely representing that the work in respect of the First Campaign had been done by this company, who could in turn then make the money available to Intermediary 5 and others. Intermediary 8 had no previous links or experience of working in Ghana for any Airbus entity.

Airbus DPA, Statement of Facts, para. 191

The inward perspective allows the reader to glimpse into corporate employees’ organisational patterns and habits when organising bribery, rationalisation methods and organisational values supporting rule-breaking behaviour, as illustrated by these excerpts. Excerpt 51 illustrates how business needs take precedence over compliance concerns, as employees ignore potential bribery risks for the benefit of pursuing the business deal. Excerpts 52, 53 and 54 highlight how company employees engaged in deliberate efforts to obscure payments to intermediaries using coded messages or by keeping key information from team-members. These examples show how employees create internal silos to hinder the discovery and comprehension of their actions, both by internal control systems and external law enforcement or regulatory authorities. Excerpt 55 exemplifies cases where employees actively work around compliance protocols by falsifying records to justify payments.

Contrary to SPO narratives, the transfer of the bribery payment to the foreign official and its status as such is less relevant in DPA narratives. Emphasis is put on elements that would evidence the intentionality or neglect of company employees implicated in the corrupt agreement while omitting to showcase whether the foreign official has received the bribe. Accordingly, terms such as “it is inferred” or “it is agreed” often accompany DPA conclusions regarding the beneficiary of the bribery payment. For example, in the Rolls-Royce case, the abstract of the first TCB scheme states that “there is an inference that Intermediary 1 / Intermediary 1 Company A acted as an agent of the office of the President of Indonesia and that this money was a reward for Intermediary 1 showing favour to [Rolls-Royce] in

respect of a contract for Trent 700 engines”⁹⁸³. Similarly, the Amec DPA states in relation to the bribery charge in Malaysia:

Excerpt 56

125. Whilst there is no direct evidence identifying who precisely these officials within Petronas were or the size or method of such payments, there is evidence from which it can be properly inferred that, nevertheless, payments had been or were being made to one or more of those officials for this purpose. It can also be inferred that the officials to whom payment was intended to be made were likely to be in a position to assist with or influence the award of the two relevant contracts.

Amec DPA, Statement of Facts, para. 125

The criminal charges are, nevertheless, generally substantiated by emphasising the knowledge and will of company employees as to the illegal or problematic nature of the consultancy agreement, as demonstrated by excerpt 56.

6.4. Chapter Summary and Discussion

The chapter addressed the second and fourth research questions by providing insights into how SPOs and DPAs narrate TCB offences. The narrative analysis of offence segments has allowed us to understand how knowledge about bribery is constructed within and transmitted through NTR mechanisms. SPOs and DPAs share the same structural characteristics but differ thematically. On the one hand, both NTRs recount the bribery schemes through a recognisable narrative structure, beginning with an abstract and continuing with an orientation, a complication and a resolution. On the other hand, a mix of narrative devices and choices, including personification and depersonification of the corporate offender, the strategic mobilisation of specific types of evidence while omitting others, and an emphasis on internal or external bribery ties, contribute to two distinct narrative representations of the foreign bribery offence within SPOs and DPAs. These findings indicate that legal narratives pertaining to the facts of the case extend beyond mere factual reporting; they employ distinct narrative strategies that articulate specific dimensions of the crime. SPOs emphasise the financial flows between co-offenders and adopt an outward focus on the networked nature of TCB offences. In contrast, DPAs highlight the agreements between co-offenders and orient their audience towards the internal company dynamics involved in organising the bribery scheme.

As summarised in table 6, SPOs depict bribery as a set of financial flows and place the defendant company as the main perpetrator of the bribery scheme. They construct the offence narrative by referring to banking records, transaction trails and other financial documents, showcasing the financial

⁹⁸³ Rolls-Royce DPA, Statement of Facts, para. 30.

flows between defendants, intermediaries and foreign officials. In doing so, SPOs emphasise the transfer of the funds from the defendant company to the foreign official, equally describing the improper advantage granted by the foreign official. In contrast, the first and the second stage of the bribery conduct - establishing relationships with the intermediaries, respectively, the foreign officials and negotiating the corrupt agreement - are omitted. Conversely, DPAs depict bribery as a corrupt agreement and place company employees as the main protagonists in offence narratives, depersonifying the defendant company in the process. The focus is on evidence located within the remits of the defendant company itself, as the bribery scheme is reconstructed using internal employee e-mails and conversations, as well as excerpts from negotiations and contracts with the intermediaries. As such, DPAs emphasise the first and second stages of the TCB offences, while omitting information about the transfer of the funds from defendants to foreign officials and the nature and scope of the improper advantage.

Table 6: Main narrative elements identified in SPO and DPA offence accounts

	SPO	DPA
Dominant theme	Bribery as financial flows	Bribery as corrupt agreements
Character positioning	Defendant company as the main protagonist; personification of the company	Company employees as main protagonists; depersonification of the company
Focalisation	Banking records; transaction trails; financial documents	Company internal e-mail; employee conversations; intermediary contracts
Narrative omissions	Transfer and execution of the improper advantage	Establishing relationships with intermediaries and/or foreign officials; negotiation of the bribery contract

The results of this research support the existing literature on factual narratives in the criminal process, illustrating how evidence and investigative strategies shape the crime stories relayed by criminal proceedings⁹⁸⁴. More specifically, it is possible to observe a reciprocal relationship between narrative

⁹⁸⁴ See generally, Brookman *et al.*, ‘Crafting Credible Homicide Narratives’, 340-66; Grunewald, ‘Forces Beyond Linear Reasoning’, 189-218; Gunilla Byrman and Joacim Lindh, ‘Narratives on Assault in Investigation, Trial and Judgment – Analysis of the Argumentation in the Judicial Process’, in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen, Espen Ingebrigtsen, and Werner Gephart (Klostermann, 2021), 219–52; Susana Costa and Filipe Santos, ‘The social life of forensic evidence and the epistemic sub-cultures in an inquisitorial justice system: Analysis of Saltão case’, *Science and Justice* 59, no. 5 (2019): 471-79.

and evidence⁹⁸⁵. The evidentiary material gains significance when contextualised within a narrative framework, yet the construction of these narratives is, in turn, shaped by the evidence introduced. Pieces of evidence, such as banking transactions in SPOs and e-mail correspondence in DPAs, carry no inherent meaning outside of the stories in which they are embedded. The illegality of the financial flows presented between intermediaries and companies can only be understood as such within the broader story of executing the bribery scheme. Similarly, e-mails and contracts in DPAs are contextualised within a broader narrative of negotiating corrupt agreements rather than being treated as discrete pieces of evidence. Absent this narrative framework, such documents could be perceived as standard business communications. In furtherance, the facts of the case are not simply deduced from the evidence but rely on a process of narrative imagination, allowing storytellers to supplement missing details in the presented evidence⁹⁸⁶. In SPOs, this is illustrated by way of inferring a corrupt agreement between the company and the foreign official based on his/her identity and position, providing support for claims of a corrupt agreement. DPA narratives, correspondingly, regularly conclude by presuming that the sum agreed between company employees and intermediaries reached the foreign official. Conversely, the narratives of TCB offences are constructed on the basis of the evidence presented. Bribery schemes present themselves as financial flows within the SPO framework, which mobilises banking relations and financial analysis as primary evidence in support of the criminal charge. This is contrasted by the narrative of corrupt agreements in DPAs revolving around communications between company employees and intermediaries, as well as between the employees themselves.

The different narrative portrayals of TCB offences cannot be separated from the specific investigative strategies deployed by the anti-bribery efforts of the OAG on the one hand and the SFO on the other. Thematic differences reveal the investigative habits and practices developed by law enforcers in combating new forms of criminality. The financial flows narrative suggests that SPO TCB investigations rely on information outside of the defendant company's purview. The main evidence mobilised (e.g. banking information and transactions, financial documentation and analysis) consists of financial intelligence obtained from banking institutions, typically gathered and analysed by reporting authorities within the AML frameworks of countries. Employing AML reporting frameworks to detect foreign bribery offences is a common enforcement strategy of the OAG⁹⁸⁷. In 2017, it was reported that 60% of foreign bribery proceedings in Switzerland were initiated based on reports provided by the national AML financial intelligence unit, MROS⁹⁸⁸. SPO's financial flows narrative, however, suggests that AML structures are not only used to detect TCB suspicions but also to gather systems to gather financial intelligence in support of the criminal charges and to reconstruct the bribery network.

⁹⁸⁵ Brookman *et al.*, 'Crafting Credible Homicide Narratives', 361; Grunewald, 'Forces Beyond Linear Reasoning', 198-200.

⁹⁸⁶ Grunewald, 'Forces Beyond Linear Reasoning', 198-200; Byrman and Lindh, 'Narratives on Assault in Investigation', 249-50.

⁹⁸⁷ OECD-WGB, 'Phase 4 Report: Switzerland', 14-5.

⁹⁸⁸ OECD, 'The Detection of Foreign Bribery', 84.

Therefore, AML reporting structures appear to be of continuous relevance throughout TCB investigations.

The emphasis on internal company dynamics and on evidence internal to the company (e.g. employee communications, company emails, memos and company accounting) in DPAs suggest that offence narratives result from a cooperative investigative framework. The private, company-driven and SFO-supervised investigation allows for DPA storytellers to reconstruct the facts of the case based on evidence retrieved from the company. In contrast, financial intelligence, usually situated outside of the company's reach is only rarely deployed. The use of the DPA cooperative framework as the main investigative strategy in TCB prosecutions was confirmed by the OECD-WGB country report⁹⁸⁹. Conversely, UK authorities declared little reliance on AML financial intelligence in the context of these types of investigations⁹⁹⁰.

The juxtaposition of SPO and DPA crime stories allowed us to exemplify which aspects of these multi-staged crimes are emphasised and which ones are omitted. SPOs focus on the last two stages of these crimes - transfers of funds and the performance of improper advantages - focusing on the exchanges of payments and services between the bribers. The concealment efforts portrayed are those undertaken via money laundering techniques and driven outside of the company's remit. In addition, these narratives reveal the external bribery networks. The role of intermediaries in concealing and executing bribery payments is emphasised, as is the function of the foreign official and its position of influence in awarding the contract. This outward perspective reveals little of the organisational aspects associated with TCB offences. Criminological research on corporate crimes has long acknowledged that these offences are generally supported by a corporate culture that privileges profit maximisation instead of ethical values directing the criminal behaviours of corporate employees⁹⁹¹. The exclusive focus on the illicit financial flows accompanying TCB limits insights of the organisational complexities relative to this criminal activity. By omitting the internal corporate processes involved in planning, negotiating, and concealing the bribery scheme, SPOs project the image of TCB as a purely financial crime instead of a systematic, structural problem within the company. With this understanding of TCB offences, little

⁹⁸⁹ OECD-WGB, 'Phase 4 Report: United Kingdom', 16-5.

⁹⁹⁰ *Id.*, 21.

⁹⁹¹ See generally Benjamin Van Rooij and Adam Fine, 'Toxic Corporate Culture: Assessing Organizational Processes of Deviancy', *Administrative Sciences* 8, no. 3 (2018): 1-38; Xiaoding Liu, 'Corruption Culture and Corporate Misconduct', *Journal of Financial Economics* 122, no. 2 (2016): 307-27; Mark S. Schwartz, 'How to Minimize Corruption in Business Organizations: Developing and Sustaining an Ethical Corporate Culture', in *Crime and Corruption in Organizations*, eds. Ronald J. Burke and Edward C. Tomlinson (Routledge, 2016), 273-96; Ivana Nacinovic Braje and Lovorka Galetic, 'Corruption and Corporate Culture: Exploring the Connection', in *An Enterprise Odyssey. International Conference Proceedings* (University of Zagreb, Faculty of Economics and Business, 2014), 1061.

attention may be given to crime-fighting strategies targeting organisational traits that facilitate foreign bribery⁹⁹².

DPAs, in contrast, mobilise evidence internal to the company, such as company accounting and compliance programs, emails and other forms of inter-employee communications. These evidentiary elements reflect the company's internal cultures, workings and disorganisations that lead to the bribery offence. This inward perspective allows the reader to glimpse into corporate employees' organisational patterns and habits when organising bribery, rationalisation methods and organisational values supporting rule-breaking behaviour. Lord and Broad assert that the inward perspective is a symbolic step forward, as it acknowledges what criminologists have long recognised - the organisational component of corporate crime⁹⁹³. The same authors suggest that the UKBA's failure to prevent offence⁹⁹⁴ orients investigative attention towards the organisational dysfunctionalities leading up to foreign bribery, as the failure is to be found in the company's structures and operations⁹⁹⁵. Focusing on organisational failure risks, however, dissociating failure to prevent offences from the substantive criminal behaviour of foreign bribery⁹⁹⁶. Effectively, the newly criminalised offence of failure to prevent involves qualitatively different behaviours than that of foreign bribery, as companies are held liable for failing to prevent bribery committed by their employees rather than for perpetrating these offences themselves⁹⁹⁷. Corporate crime is, thus, reframed as a failure of compliance, a negligent regulatory oversight, or a management deficiency rather than a deliberate act of illegality. From this perspective, the standard of failure to prevent offence implies a move away from the prosecution pursuit of the substantive criminal behaviour, which triggered the criminal responsibility in the first place⁹⁹⁸.

The results demonstrate that proving the identity of the foreign official, their status as such and whether the improper advantage is performed is often downplayed in DPAs. These elements of foreign bribery offences are frequently inferred or accepted by agreement rather than substantiated through direct evidence. The focus, instead, is on bypassing or disregarding internal compliance structures for agreements between company employees and intermediaries that are suspected of advancing business interests through corruption abroad. These considerations highlight how NTR decisions rely on incomplete or simplified foreign bribery narratives. Indeed, failing to describe the actual reception of the bribe by the foreign official and its role in promoting the company's business in DPAs may be construed as an incomplete TCB story. The observations outlined align with Ralph's concept of

⁹⁹² Wim Huisman, 'Blurred Lines: Collusions Between Legitimate and Illegitimate Organizations', in *The Handbook of White-Collar Crime*, eds. Melissa L. Rorie, 1st ed. (Wiley, 2020), 153–54; Paul Ponsaers, 'What Is so Organised about Financial-Economic Crime? The Belgian Case', *Crime Law and Social Change* 37 (2002): 199–200.

⁹⁹³ Lord and Broad, 'Corporate Failures to Prevent Serious and Organised Crimes', 37.

⁹⁹⁴ Cf. UKBA s. 7.

⁹⁹⁵ Lord and Broad, 'Corporate Failures to Prevent Serious and Organised Crimes', 37.

⁹⁹⁶ *Id.*, 39.

⁹⁹⁷ *Id.*, 48.

⁹⁹⁸ *Id.*, 39.

narrative erasing procedures concerning out-of-court legal proceedings⁹⁹⁹. The author considers how the negotiated nature of non-trial proceedings, such as settlements, leads to simplified factual accounts¹⁰⁰⁰. Out-of-court resolutions shape the narrative landscape of the justice system by hindering the contestation of narratives¹⁰⁰¹. Consequently, the potential appellate narratives and the evidentiary materials that enhance the richness of legal storytelling are prevented¹⁰⁰².

Perhaps the most evident manifestation of narrative simplification is expressed in certain SPO offence accounts, presenting the factual basis through summarised reiterations from previously settled criminal charges in national or foreign jurisdictions¹⁰⁰³. Elements relative to the bribery scheme, such as the identity and status of the foreign official, the *quid pro quo* agreement and the amount of the bribery payment - are omitted in the factual narratives. As a negotiated justice device, SPOs preclude judicial control and reduce process publicity, decreasing the necessity to elucidate the facts and bringing the full foreign bribery story to light¹⁰⁰⁴. These narrative-erasing patterns effectively allow rapid case dispositions, economising time spent on criminal investigations and factual disputes between the parties¹⁰⁰⁵. However, the broader consequences of these practices for public perceptions and understanding of TCB crimes are put into perspective under an expressive reading of the criminal law. As suggested by Buell, criminal justice discourses play a fundamental public role in clarifying the ambiguities surrounding corporate crime¹⁰⁰⁶. The lack of immediate victims and harms of corporate crimes, the multiplicity of actors involved, and their propensity to be disguised as legitimate business activities pose challenges for external audiences in assessing the validity of corporate crime allegations¹⁰⁰⁷. The features of privatisation of justice embodied by the negotiated nature of NTR decisions challenges these communicative advantages of criminal proceedings and precludes knowledge of TCB instances from the public gaze.

⁹⁹⁹ Ralph, 'Narrative-Erasing Procedure', 573–627. See Capus and Bozinova, 'Impression management in corporate corruption settlements', 2.

¹⁰⁰⁰ Ralph, 'Narrative-Erasing Procedure', 617.

¹⁰⁰¹ *Ibid.*

¹⁰⁰² *Ibid.*

¹⁰⁰³ See section 5.1.1.

¹⁰⁰⁴ Cf. chapter 2, section 2.3.3.

¹⁰⁰⁵ Cf. chapter 2, section 2.3.3.

¹⁰⁰⁶ Buell, 'The Blaming Function of Entity Criminal Liability', 521–22.

¹⁰⁰⁷ Thomas J. Roulet and Rasmus Pichler, 'Blame Game Theory: Scapegoating, Whistleblowing and Discursive Struggles Following Accusations of Organizational Misconduct', *Organization Theory* 1, no. 4 (2020): 2–4.

7. Narrating Corporate Offenders

This chapter presents the results of the analysis of how SPOs and DPAs characterise the defendant company. It is important to note that the previous chapters already revealed the multiple roles and identities that the corporate offender takes on throughout NTR accounts. The company is positioned in the role of a partner, reactive or proactive, in prosecution segments, as evidenced in chapter 5. In SPO prosecution segments, the corporate offender emerges as a passive but cooperative actor. In contrast, DPA narratives intentionally centre on the self-investigative roles taken by the defendant and build its character as a proactive partner. In furtherance, the company is either personified or depersonified in the narratives of offence segments presented in chapter 6. SPOs personify the corporate offender as the main protagonist of the bribery scheme and portray the company as an individual possessing agency and acting in a lively manner. Contrastingly, the depersonification of the defendant is evidenced in DPA offence narratives, as the focus shifts from the corporate persona to the individual employees implicated in the bribery scheme.

These characterisations implicitly emerge through NTR accounts, as depictions of actions undertaken by the company, prosecutors, or corporate employees contribute to constructing a particular portrait of the corporate persona. In both SPOs and DPAs, the audience also encounters explicit characterisations of the corporate offender, specifically in corporate criminal liability and sentencing segments. The analysis presented in this chapter focuses on these two segments in answering the third research question, which pertains to the narrative portrait of corporate offenders. Unlike the narratives of prosecutions and offenders, the narrative identities of corporate offenders do not differ from SPOs to DPAs. In both types of NTRs, these actors acquire the same identity, conforming to what the story segment aims to show. To ascribe corporate criminal liability for TCB offences, both NTRs portray the company as a failed self-regulator in corporate criminal liability segments. This narrative portrait is mainly constructed by evaluating its internal compliance structures as inadequate or insufficient, as demonstrated in section 7.1. The defendant company is then transformed from a failed self-regulator to a reformed corporate citizen in sentencing segments by showcasing present-day self-regulatory corporate measures, as discussed in section 7.2.

7.1. Narratives of a Failed Self-Regulator

NTR stories depict the defendant company as a failed self-regulator in corporate criminal liability segments. The defendant company is portrayed here as having failed to enforce its own self-imposed compliance structure. This portrait is constructed by discrediting the effectiveness of existing internal

compliance structures in terms of their robustness, quantity, applicability, and awareness amongst the employees.

Failed self-regulator narratives are narrow in scope. Their focus is on the specific aspects of internal compliance structures and systems assumed to have been ineffective in preventing case-specific TCB occurrences. A recurring example is the emphasis on compliance structures that regulate business relations with intermediaries, given that most cases in the present sample involve the use of such individuals or firms for the conclusion or execution of the bribery agreement¹⁰⁰⁸.

The Standard Bank DPA, for example, proceeds to a lengthy description of anti-bribery compliance structures and policies¹⁰⁰⁹. These mechanisms are then qualified as unclear, inadequate, or insufficiently reinforced. Additionally, DPA offender stories consider how employees were not adequately trained and advised on potential bribery risks by the company:

Excerpt 57

In summary:

- a. The applicability of the Introducers and Consultants policy was unclear on the face of the policy. Moreover, it was not reinforced effectively to the SB deal team [group of employees implicated in the bribery scheme] through communication and/or training
- b. SB [Standard Bank]'s Introducers and Consultants policy and/or SB's training did not provide sufficient specific guidance about relevant obligations/procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank Group entity engaged an introducer or a consultant
- c. The SB deal team relied on its sister company, ST, to flag any anti-bribery and corruption risks relating to EGMA [intermediary] through ST's own KYC ["Know Your Customer" compliance policy]
- d. As a consequence of their reliance on ST to flag any anti-bribery and corruption risks relating to EGMA (and the fact that ST did not identify such risks), the SB deal team did not identify the bribery and corruption risks relating to EGMA's involvement in this transaction

Standard Bank DPA, Statement of Facts, para. 199

DPAs equally invoke the company's business culture as a contributing factor to the inability of the defendant to self-regulate. In these narratives, the focus is exclusively on the defendant company's inner workings, compared to the centrality of the outward perspective in SPO TCB offence segments¹⁰¹⁰. For instance, the Amec DPA exemplifies how the company's business culture prevented an effective enforcement of existing compliance structures:

¹⁰⁰⁸ Cf. See chapter 4, section 4.3.1 discussing the characteristics of the bribery schemes included in the sample.

¹⁰⁰⁹ Standard Bank DPA, Statement of Facts, para. 191-197.

¹⁰¹⁰ Cf. chapter 6, section 6.2.

Excerpt 58

Despite the policies and procedures in place, in the course of its investigation, the SFO became aware of a practice within FWEL [Amec] of using Agents without informing FWEL's compliance department. This was described by a FWEL employee who was interviewed by the SFO about matters relating to compliance and culture at FWEL as a "try before you buy" culture.

The SFO's investigation identified multiple occasions on which the above policies and procedures were circumvented and breached, leading the SFO to conclude that there existed within FWEL a culture of disregard for compliance policies and procedures.

Amec DPA, Statement of Facts, paras. 33-34

Likewise, the Airbus DPA identifies the defendant's business culture as the reason behind failed self-regulation:

Excerpt 59

Common to all the counts is the fact that during the indictment period Airbus did have some bribery prevention policies and procedures in place. However, prior to September 2014 these policies and procedures were easily bypassed or breached and there was a corporate culture which permitted bribery by Airbus in countries throughout the world.

Airbus DPA, Judgement, para. 108

Similar discrediting narratives are found in SPOs. TCB offences in SPO 454 involved the intervention of intermediaries. The SPO thus refers to Alstom's internal guidelines for the selection and use of business consultants in constructing the failed self-regulator narrative. In this excerpt, the SPO infers causal links between unenforced compliance structures and TCB occurrences in narrating the criminal liability of the defendant:

Excerpt 60

A.'s [parent of defendant company] relevant internal guidelines for the selection and use of consultants were introduced in stages and continuously adapted and improved. According to these principles, the consultants should preferably be based in the country in which the project was to be realised or at least have a representative there. In addition, the consultant should have banking connections in the relevant project country. The consultant's services should also preferably be provided by an "established company with all normal office facilities and records". This should ensure that the services are provided by a legal entity with actual operational business activity, properly registered and equipped with appropriate infrastructure. Insofar as consultancy agreements or other consultancy contracts were concluded with mere domiciliary companies or a letterbox company, this was, therefore, inadmissible according to the relevant internal provisions of A.

SPO 454, para. 9

Other narrative strategies contributing to the failed self-regulator portrait pertain to how corporate criminal liability segments evaluate the seriousness of the company's wrongdoings. Both SPOs and

DPA's articulate the seriousness of the conduct around the company's failures and only seldom around the seriousness of the underlying conduct of foreign bribery. This is exemplified by the Deferred Prosecution Agreements concluded with Standard Bank and Rolls-Royce, in which section 7 offences under the UKBA are characterised as less serious than substantive bribery offences, even as the agreements concurrently affirm the inherent gravity of the latter:

Excerpt 61

[...] but it is right, at this stage, to recognise that although the predicate bribery offence was allegedly committed by two senior executives of Stanbic, and involved the intention to bribe a foreign public official, using public funds such as to make the intended bribe payment, such as could have compromised the integrity of a financial market, that is not the conduct in respect of which Standard Bank falls to be judged.

The criminality which Standard Bank potentially faces is the failure to prevent the intended bribery committed by senior officials of Stanbic (a sister company the management of which is unconnected to the Bank) arising out of the inadequacy of its own compliance procedures and its own failure to recognise the risks inherent in the proposal.

Standard Bank DPA, paras. 27-26.

Excerpt 62

In respect of the offences contrary to s. 7 of the Bribery Act 2010, (counts 8 to 12), it is common ground (and reflects my observations in *SFO v Standard Bank plc* at [46]), that failing to prevent bribery is less egregious than an offence of bribery or corruption not least because although it represents a serious failure of corporate governance, the operative minds of the company are not involved in the predicate offence.

Rolls-Royce DPA, para. 93.

The same narrative strategy is recognisable in SPO accounts that only seldom consider the severity of foreign bribery. In contrast, the seriousness of corporate disorganisation is regularly highlighted, further strengthening the failed self-regulator narrative. Indeed, SPOs emphasise the inappropriateness of conducting business in high-risk countries and industries without appropriate compliance structures. These narrative strategies are predominantly used in instances where defendant companies lacked internal compliance structures during the offending.

SPO 678 argues, for example, that failures of internal self-regulatory provisions acquire a more serious form when considering the company's industry and the countries in which business was conducted: "These failings seem all the more serious given that the intermediaries used by [parent company] were supposed to provide services in the oil and gas industry, which is particularly exposed to the risk of corruption, and in connection with projects involving companies belonging to countries notorious for

endemic corruption, such as [anonymised names of countries]. Such circumstances called for even tighter control and monitoring of the activities of these intermediaries [...]”¹⁰¹¹.

In a similar vein, the Rolls-Royce DPA emphasises the gravity of an absent culture of compliance when operating in high-corruption countries:

Excerpt 63

[...] the involvement by mid- ranking Rolls-Royce employees in predicate corrupt conduct and the failure on the part of Rolls-Royce to instill within the wider business a culture of compliance especially in jurisdictions all of which could objectively be seen as having a high corruption index perception (which should have been known to the Rolls-Royce personnel concerned).

Rolls-Royce DPA, Judgement, para. 102

Most of the defendant companies in both SPOs and DPAs were engaging in bribery for long periods of time, usually several years. This element is also used to reinforce the failed self-regulator narrative. SPO 699, for example, highlights how the defendant has operated its business activities without appropriate anti-bribery compliance structures during a significant period, used as an argument in favour of findings relative to corporate criminal liability¹⁰¹².

7.2. The Reformed Company: Transformative Narratives

The defendant company is re-characterised as the story progresses from corporate criminal liability segments to sentencing ones in SPOs, justifications and sentencing in DPAs. It acquires a new identity - that of a reformed, compliant, and overall better version of itself in comparison to its previous failings. In this sense, the defendant is the subject of transformative narratives, as NTRs emphasise the evolving internal dispositions of the defendant. Moreover, these narratives recount how the company has been positively impacted by the criminal justice intervention, emphasising the value of this event in facilitating the process of self-transformation.

Narrative transformations reflect the lenient approach taken in determining the penal consequences against the defendant and are storied to provide a justification for such decisions. In DPAs, transformative narratives foreground the non-prosecution and lenient sentencing approach. Likewise, SPOs mobilise transformative narratives in justifying mitigating factors relative to the criminal fine ultimately imposed.

¹⁰¹¹ SBM-Offshore SPO, para. 54.

¹⁰¹² SICPA SPO, para. 10.

DPA explicitly re-characterise the defendant as a reformed company. These accounts consistently highlight elements that justify the deferral of prosecution, emphasising internal compliance and personal changes within the defendant company. For example, the Airbus DPA explicitly frame the defendant as a transformed company, fundamentally distinct from the entity it was when the alleged offences took place:

Excerpt 64

I have already referred to the weaknesses in oversight within Airbus that existed in the years under consideration. However, starting in late 2014 Airbus implemented a number of measures. It is submitted that these have transformed Airbus into what is, for present purposes (in relation to issues of compliance, culture and the like) effectively a different company to the one that it was at the time the offences alleged in the indictment occurred. I am satisfied this is the case.

Airbus DPA, Judgement, para. 76

Narratives of a reformed company are facilitated in instances of corporate acquisitions and mergers or changes in the composition of the board of directors. Illustrative of this is the Standard Bank DPA, which declares the company as “a different entity from that which committed the offence”¹⁰¹³. This statement is supported by the fact that the majority shares of the defendant have been acquired by another company at the time of the DPA¹⁰¹⁴. In contrast, the Rolls-Royce DPA foregrounds a reformed company culture by referring to changes in the company’s board of directors:

Excerpt 65

The cultural change is evidenced by the steps which I have just described but I have pressed Rolls-Royce to disclose its present constitution and, in particular, the membership of its Board. Had any member of the today’s senior management who was implicated or been in a position where they should have been aware of the culture and practices which I have described and were clearly endemic at Rolls-Royce remained in his or her position, this, itself, would have been of real significance and could have affected my approach.

Rolls-Royce DPA, Judgement, para. 48

Similarly, the Amec DPA reveals that another company has acquired 60% of the defendant’s shares, while simultaneously declaring the latter as “a substantially different entity to the one that failed to prevent the bribery”¹⁰¹⁵.

Comparatively, narratives of a reformed defendant in SPOs are usually found in sentencing segments while providing justifications for mitigating the criminal fine. All SPOs include some form of sentence

¹⁰¹³ Standard Bank DPA, para. 34.

¹⁰¹⁴ *Ibid.*

¹⁰¹⁵ Standard Bank DPA, para. 34.

mitigation, which is expressly addressed. However, detailed descriptions of internal compliance changes motivating mitigation are inconsistent.

Transformative narratives in SPOs sometimes rely on the time passed between the offence and the sentencing, implying the company's changed character. This implication is sometimes inferred from the structural characteristics of the narrative. For example, the changed character of the defendant company in SPO 699 is derived from causal connections between the events of a narrative sequence:

Excerpt 66

It is further considered that:

- The present investigation has lasted over eight years (opened on 7 January 2015);
- A. [defendant company] accepted strict liability [...] and undertook to pay a fine (section 3.8.);
- A.'s ability to pay is also given special consideration in the context of the enforcement modalities (see section III.C);

In consideration of all the above factors, the fine is set at CHF 1 million, which corresponds to A.'s culpability.

SPO 699, paras. 10.3-11

In this segment, chronology and causality are interconnected. It is assumed that earlier events presented in the narrative sequence cause later ones. The fact that the investigation has lasted a long period of time (7 years) causes a mitigated sentence (of 1 million out of 5 million as a legal maximum¹⁰¹⁶). The elapsed time as a sentence mitigation presupposes that the company has evolved over the years and is now a different entity less deserving of strict punishment.

In both SPOs and DPAs, narratives of the reformed company are primarily built around the internal compliance structures, which are within the same repertoire as those in the failed self-regulator narrative. Changes in corporate compliance structures and personnel are often detailed and emphasised. Lengthy descriptions of the ways in which the company has implemented changes to mitigate bribery risks in the future complement the reformed company narrative in DPAs. In the Airbus DPA, the reforms described range from simple reviews of compliance structures and policies to changes in management personnel¹⁰¹⁷. The detailing of the actual measures undertaken provides proof of internal changes and thus reinforces the reformed company profile. Another example is the Standard Bank DPA, which exemplifies the reformed company by listing all the relevant measures undertaken after the offence:

¹⁰¹⁶ Cf. see Art. 102 al. 1 SCC for the maximum sentence possible in corporate criminal liability cases.

¹⁰¹⁷ Airbus DPA, paras. 78-80.

Excerpt 67

Weight is to be given to any corporate compliance programme in place at the time of the offence, at the time of reporting, and any improvement that has occurred (para. 2.8.2 (iii) of the DPA Code of Practice). In this regard, against this backdrop of Standard Bank's failings in its anti-money laundering and anti-corruption procedures, the SFO accept that the Bank has made significant enhancements to its compliance policies, procedures and processes since the risk and supervisory review conducted by the FCA in 2011.

In particular, [listing company-specific compliance improvements]

Standard Bank DPA, Judgement, paras. 32-33

This excerpt exemplifies how the company is portrayed as a willing actor in its own transformation. Additionally, the company is recognised as a good corporate citizen by showcasing its voluntary commitment to ethical and compliant business practices. In a similar fashion to DPAs, SPOs chronologically list the defendant's various compliance and ethics-oriented undertakings. SPO 699, for example, demonstrates company progressions towards ethical business initiatives and practices:

Excerpt 68

A. [defendant company] became a founding member of R. [anonymised website address], an independent non-profit organisation based in [anonymised country] (henceforth: R.). R. focuses on the prevention of corruption and cartel offences.

[...]

In 2021, A. ISO 37001 certified (certification of anti-bribery management systems).

Particularly in the markets [anonymised market] and [anonymised market] in which A.'s business activities were developing strongly and rapidly at the time, the associated risks in the countries should have been taken into greater account.

SPO 699, paras. 6.8, 6.11-6.12.

The same characterisation is found in SPO 487. The OAG highlights how the company has established an integrity fund to enhance anti-bribery compliance within the industry in which it operates. The company's initiative in favour of an integrity fund is portrayed as being inspired by the commencement of the SPO proceeding. These narratives effectively reshape the company's personality. They retrace the company's transition from an egocentric entity engaging in bribery to gain a competitive advantage, to an altruistic one that voluntarily supports industry-wide ethical business developments.

The SPO 487 example embodies a common narrative in both SPOs and DPAs that emphasises the transformative effect of law enforcement on the defendant. These narratives highlight how prosecution initiates the company's transition from its old irresponsible self to a new law-abiding corporate citizen. This corollary effect of prosecution is explicitly addressed in the Rolls-Royce DPA (excerpt 69) and the SPO 575 (excerpt 70) narrative:

Excerpt 69

[...] the effect of the DPA is to require the company concerned to become a flagship of good practice and an example to others demonstrating what can be done to ensure ethical good practice in the business world.

Rolls-Royce DPA, Judgement, para. 60

Excerpt 70

[...] it appears that, since the events at the heart of the present proceedings, B. [defendant company] has become aware of the seriousness of these events and has developed its anti-corruption organisation by gradually putting in place measures corresponding to the standards mentioned above, in particular a compliance programme and a code of conduct and ethics. Under the guidance of a compliance director, hired in 2012, a compliance department was set up and has steadily grown to include no fewer than 16 employees to date.

SPO 575, s. IV, para. 2

Narratives of law enforcement-induced reforms may be seen as conflicting with those depicting the company as pursuing compliance transformations on its own initiative. Nevertheless, both narratives convey the same message: that of a matured business that has regained control over its self-regulatory abilities.

7.3. Chapter Summary and Discussion

This chapter has examined how corporate offenders are portrayed in SPOs and DPAs, thereby addressing the third research questions and partially answering the fourth research question. Two narrative identities were identified: the company as a failed self-regulator and as a reformed corporate citizen, which emerge as the dominant narrative themes in offender narratives. Unlike the narratives of prosecutions and offences presented in chapters 5 and 6, the re-characterisation of defendant companies follows a similar pattern in both NTR decisions. Table 7 summarises the main narrative elements of the two narrative portraits identified.

Table 7: Main narrative elements of the narrative portraits of corporate offenders in SPOs and DPAs

Company narrative portraits in SPOs/DPAs		
Narrative element	Failed self-regulator	The reformed company
Defendant company character positioning	Explicitly positioned as deficient in compliance and internal control; blameworthiness linked to institutional failure	Explicitly repositioned as proactive and correctly self-regulated; regains regulatory control through reforms, compliance structures, and management restructuring
Focalisation	Compliance structures and policies; employee training and knowledgeability of internal compliance; compliance culture	New or revised compliance structures and policies; changes in personnel
Narrative omissions	Minimises the seriousness of the misconduct; omits detailed descriptions of corrupt acts or their consequences; presents failure as procedural rather than moral	Downplays the role of enforcement pressure or prosecution influence; frames reform as internally motivated and voluntary

In the failed self-regulator portrait, the company is explicitly characterised as a deficient organisational actor that has abdicated its internal compliance responsibilities. Here, the company is positioned as a compromised entity in terms of its self-regulatory capacities, with its blameworthiness for the criminal conduct rooted in institutional failure. In the reformed company portrait, the organisation is positioned as a proactive agent of transformation, having reacquired the capacity to self-regulate.

A common feature in both narrative characterisations is that they are articulated around the company's obligations and capabilities to self-regulate. The identity of the corporate offender is constructed mainly through a regulatory lens, emphasising its failure to enforce its existing compliance structures and policies or omitting to create such mechanisms. From the same perspective, the characterisation of the defendant as a reformed company emphasises the reacquired self-regulatory abilities by reinforcing internal anti-bribery compliance, changing management or the overall abilities to monitor and guide the activities of its employees. This construction is the result of a narrative focalisation that privileges information pertaining to the company's managerial abilities and compliance structures, thereby foregrounding self-regulation as a key marker of the corporate identity.

The two narrative portraits of the corporate offender are shaped not only by what is included but also by what is left unsaid. In the failed self-regulator narrative, a notable omission concerns the severity of the underlying criminal offence. While internal deficiencies and compliance failures are acknowledged,

the narratives often minimise or bypass considerations of the negative consequences of foreign bribery or its ethical implications. In the reformed company portrait, the role of enforcement actions or prosecution leverage in prompting reform is downplayed. The company's transformation is presented as internally driven, with limited reference to external accountability mechanisms, settlement bargaining, or ongoing oversight. These omissions reinforce the reformed company narrative by conveying the impression that the company's transformation was achieved through voluntary means and without external coercion.

The self-regulatory portrait of corporate offenders cannot be separated from the specific corporate criminal liability legal frameworks of Switzerland and the UK. These jurisdictions adopt formally divergent legal constructions: Switzerland applies an "organisational fault" model, whereby corporate liability arises from a failure to establish adequate internal controls, while the United Kingdom relies on a statutory offence of "failure to prevent bribery"¹⁰¹⁸. In the Swiss model, corporate liability functions as a liability model grounded in the organisation's structural deficiencies, and the burden remains on prosecutors to demonstrate the failure of organisational safeguards¹⁰¹⁹. Additionally, Swiss prosecutors must prove the alleged organisational functionalities¹⁰²⁰. By contrast, the UK model introduces a substantive offence and shifts the burden of proof, requiring companies to affirmatively demonstrate that they had "adequate procedures" in place to prevent bribery¹⁰²¹. Despite these differences in terms of burden of proof, both approaches converge in their underlying attribution of criminal culpability to the corporation. In each case, liability is premised on the normative expectation that corporations are autonomous, rational actors capable of internal governance and self-regulation. Such conceptions prioritise findings of corporate criminal liability in management failures, the absence of internal control processes, and general aspects of corporate culture, which are features created and implemented by the company itself¹⁰²². Concurrently, corporate actors acquire policing roles, traditionally reserved for State authorities, while criminal justice actors concede their interventionist role for that of a supervisor¹⁰²³. Indeed, this is reflected in the reformed company narrative, which is constructed around the compliance processes defined, delimited and executed by the company itself. These narratives suggest that companies benefit from a significant latitude in determining the meaning of effective anti-bribery

¹⁰¹⁸ Formally, criminal liability for foreign bribery offences is grounded on SCC Art. 102 corporate criminal liability in Switzerland, which is considered as a corporate criminal liability model. In contrast, the UK recognises a specific corporate offence of failure to prevent bribery at its UKBA s. 7. See Chapter 2 for a discussion on the particularities of corporate criminal liability in these countries.

¹⁰¹⁹ Cf. chapter 2, section 2.5 for a discussion of the differences between corporate criminal liability in Swiss and UK law.

¹⁰²⁰ *Ibid.*

¹⁰²¹ *Ibid.*

¹⁰²² Elliot and Lüth, 'Corporate Liability for Economic Crimes', 216; Pascal, 'Entreprise et corruption', 221-22

¹⁰²³ Katelouzou and Zumbansen, 'The Transnationalization of Corporate Governance', 58-9.

compliance¹⁰²⁴. In opposition, the OAG and the SFO, as criminal justice authorities, are positioned in a supervisory role, examining and evaluating the self-regulatory strategies undertaken by the company.

These narratives are in line with standards of enforced self-regulation that have been gaining prominence as the preferred model of responding to corporate crimes, both in national legal systems and in international legal instruments and their implementation recommendations¹⁰²⁵. Enforced self-regulation refers to a strategy of business crime control characterised by laws or enforcement practices imposing requirements for companies to establish and implement their own institutional regulations in line with regulatory or criminal laws¹⁰²⁶. A defining characteristic of enforced self-regulation is the internal compliance structures defined and implemented by the company itself, which are believed to prevent the occurrence of regulatory failures and illegal acts within their remit¹⁰²⁷. Within this context, the focus of law enforcement shifts from identifying violations of risk-reduction rules to evaluating the adequacy of the systems established for managing risk¹⁰²⁸. Indeed, as highlighted by the results, anti-bribery compliance structures and policies are the centre of focus in corporate criminal liability and sentencing narratives of both SPOs and DPAs. This approach supports the assignment of responsibility directly to those who generate the risk (i.e. the companies)¹⁰²⁹.

Within the context of anti-bribery law, Elliot and Lüth observe how the OECD, through its recommendations, has promoted self-regulatory corporate criminal liability standards within OECD-ABC member states¹⁰³⁰. These standards were, in turn, popularised by the US NTR approach, which attributes corporate liability to failures in managerial oversight, the lack of internal control mechanisms, and broader weaknesses in corporate culture¹⁰³¹. Not only is this form of corporate crime regulation expressed through NTR enforcement practices but is also increasingly becoming the preferred model for formal corporate criminal liability laws, as demonstrated by the Swiss “organisational failure” model and the UK’s “failure to prevent” offence.

Within a context where the law situates the culpability of the corporate offender in its ability to self-regulate, the corporate offender is no longer narratively represented as a criminal offender but a failed partner in effectively enforcing a public mandate - the control and regulation of criminality. Indeed, the absence of robust compliance mechanisms, rather than the underlying criminal act itself, becomes the

¹⁰²⁴ For similar results in the context of NTRs, see Hock and Dávid-Barrett, ‘The Compliance Game’, 11.

¹⁰²⁵ Elliot and Lüth, ‘Corporate Liability for Economic Crimes’, 217-18.

¹⁰²⁶ John Braithwaite, ‘Enforced Self-Regulation: A New Strategy for Corporate Crime Control’: 1467–470.

¹⁰²⁷ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, USA, 1992), 103.

¹⁰²⁸ Robyn Fairman and Charlotte Yapp, ‘Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’, *Law & Policy* 27, no. 4 (2005): 493.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ Elliot and Lüth, ‘Corporate Liability for Economic Crimes’, 215-16.

¹⁰³¹ *Ibid.*

primary indicator of culpability. The avoidance of identifying the corporate offender as a briber is most obviously reflected in the articulation of the severity of the crimes, which are oriented primarily around internal governance failings. These accounts only seldom consider the gravity of foreign bribery as an offence. Instead, NTR narratives problematise the scope and length of the dysfunctional organisations surrounding the bribery offence. As relayed in chapter 6, section 6.4, these developments effectively draw attention to the organisational component surrounding corporate crimes. However, they also deviate the focus away from the actual crime of foreign bribery. In the same vein, the narrative characterisations of the corporate offender operate to deflect the criminal label, recasting the company not as an intentional perpetrator of bribery, but as a structurally flawed organisation enmeshed in systemic dysfunctions.

The reluctance to label the company as a criminal is even more striking by the end of the SPO/DPA narrative account, as the defendant company is transformed from a failed self-regulator to a reformed company. As illustrated in section 7.2, the company is storied as a changed entity capable of self-regulating in the future and, therefore, deserving of leniency. Connecting these findings with the expressivist logic described in theoretical chapter 3 of this thesis, NTRs contradict the notion of the criminal process as a moral denunciation. Drawing on Garfinkel's conception of the criminal process as a "status degradation ceremony", legal expressivists imagine the criminal process as a discrediting ritual, whereby a denouncer who possesses the moral authority to represent a community (such as criminal justice authorities), publicly dissociates from a recognised wrongdoer¹⁰³². A successful degradation ceremony expels the wrongdoer from the moral community, redefining their identity and actions as threats to shared values¹⁰³³. Public denunciation reinforces this exclusion through the formal labelling of wrongdoers as social outcasts who cannot be trusted to follow societal norms¹⁰³⁴. The punishment that follows serves both as the price to be paid for violating moral values and the public's expression of condemnation from the state¹⁰³⁵. Whereas NTRs effectively engage in a transformation process, the outcome stands in stark opposition to traditional expressivist conceptualisations. Defendant companies are not redefined as societal outsiders but are rather reintegrated into society as reformed citizens, trusted to resume their self-regulating role.

NTRs thus represent platforms where contrasting corporate identities are constructed and conveyed to audiences. Starting from portraits of failed self-regulators, NTR accounts ultimately result in

¹⁰³² For the expressivist conception of criminal prosecutions, see generally Garfinkel, 'Conditions of Successful Degradation Ceremonies', 420-24. See also Hearty, "'Standing with Soldier F'", 114-15. Cf. chapter 3, section 3.2.

¹⁰³³ Garfinkel, 'Conditions of Successful Degradation Ceremonies', 421-22. See also George H. Mead, 'The Psychology of Punitive Justice', *American Journal of Sociology* 23, no. 5 (1918): 585-90.

¹⁰³⁴ Hearty, "'Standing with Soldier F'", 121; Garfinkel, 'Conditions of Successful Degradation Ceremonies', 423.

¹⁰³⁵ Shannon Fyfe, 'Negative Aesthetic Experiences of Prosecuting the Barely Alive', *International Criminal Law Review* 22, no. 1/2 (2022): 25; Richard C. Fuller, 'Morals and the Criminal Law', *Journal of Criminal Law and Criminology (1931-1951)* 32, no. 6 (1942): 625.

promotional platforms, attesting to the redeemed character of the corporate offender¹⁰³⁶. These publicity components are especially evident within the DPA context, where the narratives of reformed corporate citizens provide detailed and lengthy information about the company's internal transformations. The narrative portraits can be explained as strategies deployed in justifying the deferral of prosecution and, consequently, the non-conviction of a corporate wrongdoer. Presenting the reformed defendant as capable of effectively preventing future TCB offences provides leverage to the lenient treatment afforded. Indeed, it creates the image of a corporate entity undeserving of strict punishment.

¹⁰³⁶ For a discussion of trial procedures as promotional platforms, see Houge, 'Imageries of Self', 189–91.

8. Conclusion

This study was inspired by two developments. The first pertains to the global trend of responding to TCB crimes through negotiated resolutions. Under the guise of pragmatism in criminal justice, NTRs support a distinct procedural framework that challenges existing practices and principles in the field. Within this context, criminal justice is not a matter of unilaterally imposing punishment on rule-breaking actors, but rather a matter of concessions, collaboration, and lenient treatment. Inspired by the socio-legal literature on the communicative aspects of the criminal process, this development raised questions about how criminal justice is re-imagined within the particular NTR procedural framework.

The second development pertains to the fact that despite these foundational characteristics, NTRs take on different forms as they cross borders and are implanted in country-specific criminal justice contexts. Illustrative of this is the UK's version of DPA, which mirrors and, at the same time, reimagines its US counterpart by incorporating judicial oversight, a feature absent in the American framework. Similarly, the Swiss SPO integrates negotiations and concessions into the criminal process, reflecting the original US DPA model while nonetheless preserving criminal convictions as the ultimate outcome of proceedings. These observations suggest that, despite their global diffusion, NTR mechanisms are not culturally neutral enforcement tools; rather, they are adapted to fit pre-existing structures within specific criminal justice systems.

These developments oriented this study to uncover how crime and justice are conceived and communicated to broader audiences within the procedural frameworks of two NTRs: SPOs and DPAs. Specifically, this thesis delved into the NTR legal narratives surrounding prosecutions, offences, and offenders. The narrative focus was complemented by a comparative research design to investigate how negotiated justice is expressed within country-specific justice systems and anti-bribery enforcement frameworks. This comparative perspective allowed us to devote particular attention to the conditions of storytelling within and in relation to specific NTR legal frameworks.

This chapter recapitulates the main conclusions about the research questions in section 8.1 and presents one additional observation regarding the narrative coherence of SPO and DPA stories in the following section. Returning to the theoretical framework, the methodological approach and the findings, this chapter also considers the scholarly and practical contributions in section 8.3. The final section, 8.4, outlines the limitations of this thesis and provides suggestions for future research.

8.1. Summary of Findings

As pointed out by Scheppele storytelling is a deeply patterned activity. Research into storytelling in linguistics and literary studies¹⁰³⁷ has demonstrated that narratives follow a predictable structure despite enormous variations in stories' content, style, and tone¹⁰³⁸. For Scheppele, legal storytelling is no less patterned than other sorts of storytelling and is perhaps more structured because it is embedded in larger institutional frameworks that value regularity and routinise solutions to events¹⁰³⁹. Unlike rules of law, however, which are taught through legal education, legal storytelling is left to the practitioner to learn and develop¹⁰⁴⁰.

This research aimed to study the communicative aspects of newly established law enforcement mechanisms and proceeded to the analysis of how two divergent NTR frameworks and the legal actors operating within distinct legal cultures shape the legal storytelling surrounding TCB cases. The study formulated four research questions:

1. How are narratives about the prosecution of TCB offences constructed in SPO and DPA decisions?
2. How are TCB offences narrated within these documents?
3. How are corporate offenders narratively characterised within these documents?
4. What are the key similarities and differences between the narrative constructions found in SPOs and those in DPAs?

Drawing on the narrative paradigm, this thesis employed a methodology that focused on the form, content, and context of SPO and DPA stories about TCB cases. SPO and DPA decisions were understood as stories or purposeful accounts of past events that relay experiences of investigating, prosecuting and sentencing TCB offences and represented the empirical basis for this study. In total, 10 SPOs and 5 DPAs were included, encompassing all concluded TCB cases between January 2011 and December 2023 in Switzerland and the UK. Both SPOs and DPAs shared a similar narrative structure comprising seven key narrative segments that pertained to procedural and prosecution considerations, factual descriptions of TCB crimes, findings of corporate criminal liability, justification of SPO and DPA decisions, and sentencing remarks. A narrative analysis was employed to uncover how TCB prosecutions, offences, and offenders are conceived and understood within SPOs and DPAs. Specifically, the analysis consisted of a combination of three narrative analytical models, namely,

¹⁰³⁷ The analysis of storytelling patterns and structures in linguistics and literature studies was foregrounded by Vladimir Propp. See Vladimir Propp, *Monography of the Folktale*, eds. Louis Wagner, second edition (University of Texas Press, 1968), cited by Scheppele, 'Forward: Telling Stories', 2085.

¹⁰³⁸ Scheppele, 'Forward: Telling Stories', 2085.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*

structural, thematic, and performative narrative analysis. The relevant events, characters, and actions described in NTR decisions were first identified following a structural narrative analysis. A thematic narrative analysis was then applied, enabling the identification of recurring themes between and across NTR decisions. Character positioning constituted an integral part of this analytical step, as the main narrative characterisations of SPO and DPA actors were identified and highlighted. Finally, the performative narrative analysis enabled us to consider how NTR narratives connect to their context, specifically to the legal frameworks guiding NTR practices, the roles declared by their storytellers, their audiences, and their purposes. This process enabled the identification of divergences and convergences in the narratives surrounding TCB cases, reflecting the specific legal norms, institutional practices, enforcement contexts, and criminal justice assumptions that underlie anti-bribery prosecutions in Switzerland and the UK.

Specifically, chapter 5 identified and discussed the narratives surrounding TCB prosecutions. Within the context of this thesis, prosecution refers to all the actions undertaken in investigating, prosecuting and sentencing TCB offences. Reflecting the specific legal frameworks of SPOs and DPAs, prosecutions are narrated differently across these decisions. In SPOs, TCB prosecutions are narrated as an autonomous activity under the exclusive control of the OAG. The OAG's actions are portrayed as proactive and authoritative, while the defendant company assumes a passive, reactive role, responding to the prosecutor's directives. This narrative aligns with the inquisitorial tradition of the Swiss legal system, emphasising prosecution autonomy and investigative exclusivity in criminal proceedings. Conversely, DPAs portray prosecutions as a partnership, a joint endeavour between the defendant, the prosecutor (SFO) and the Crown Court judge. DPA prosecution narratives appear to be driven by the need to showcase the defendant's proactiveness in self-investigating. Here, the company is portrayed as a proactive agent, actively shaping the official narrative of the case and investigating its own criminal conduct. In comparison, the SFO appears in a supporting role rather than as the main protagonist in prosecution segments. Unlike SPOs, these narratives highlight an important gap between common adversarial principles, specifically the contest between opposing parties and the practices employed within the DPA process.

The findings demonstrate how public-private cooperation is understood, perceived, and defined within the differing SPO and DPA contexts. A particular form of company cooperation is evidenced in both NTRs. In SPOs, the inquisitorial habits and thought patterns that emphasise the criminal process as a state-centred activity construct a rather accommodating form of company cooperation. Cooperation is defined as supporting the OAG-driven prosecution by complying with its requests and forfeiting due process rights to facilitate prosecution work. In contrast, within DPAs, the proactive company behaviour is understood as cooperation, where the defendant assimilates roles usually conferred to public authorities. These findings empirically demonstrate how the notion of public-private cooperation is

contextually constructed, revealing the specific institutional conditions and country-specific concerns in relation to anti-bribery enforcement that shape its articulation within each national framework.

In chapter 6, the study considered how and what NTRs communicate about foreign bribery offences. The findings highlight the relationship between investigative strategies and crime narratives. The state-centred investigative approach mobilised in Switzerland produces narratives of bribery as financial flows that revolve around evidence of the transfer of bribery funds between the defendant company, the intermediary and the foreign official. In contrast, the cooperative investigative approach in DPAs, which hinges on the company's proactive self-investigative measures, narratively constructs bribery as corrupt agreements, highlighting bribery contract negotiations between company employees and intermediaries. Structurally, however, both SPOs and DPAs present TCB offences as a networked and multi-staged activity

Furthermore, the structural analysis of offence narratives revealed that the factual accounts in both types of NTR decisions contain vestiges of their negotiated nature. Agreement on resolving the case out of court and on the criminal charges in SPOs reduces the necessity to reiterate the facts of the case, thereby precluding the public from important details of the bribery scheme. Contrastingly, DPA narratives reveal much more detail about the bribery scheme, notably regarding the internal company dynamics and organisational deficiencies that facilitated the employees' criminal conduct. However, narrative simplification manifests as unfinished bribery stories in DPAs where the actual reception of the bribe by the foreign official, its function and role in favouring the company's business, becomes inferred, supposed and imagined instead of proven.

Chapter 7 delved specifically into the narrative characterisations of the corporate offender. In contrast to narratives of prosecutions and offences, SPOs and DPAs presented similar narrative characterisations of corporate offenders. The chapter illuminated how NTRs work to reconcile multiple corporate identities - the corporate offender as a failed self-regulator and a reformed corporate citizen. Conforming to crime control assumptions behind corporate criminal liability laws in Switzerland and the UK, corporate offenders are explicitly characterised as failed self-regulators instead of corporate criminals. Once the liability of the defendant has been established, SPOs and DPAs engage in transformative narratives that explicitly seek to reinvent corporate offenders from failed self-regulators to responsible corporate citizens. In relation to these findings, it is argued that NTRs establish a narrative environment in which companies are portrayed as ethical and rehumanised entities, as acceptable members of society, separate from the wrongdoings that occupy the rest of the NTR story.

8.2. Coherence in NTR Legal Narratives

This section offers a final reflection that cuts across the research questions and findings, focusing on the internal narrative coherence of SPOs and DPAs. Criminal justice decisions, along with its associated rituals, is characterised by a deterministic and authoritative linguistic style, which contributes to an impression of narrative coherence¹⁰⁴¹. Scholars of legal storytelling often regard narrative coherence as a key feature of the communicative function of legal language¹⁰⁴². As Den Boer suggests, coherence in legal texts represents the “‘ideal projection of successful communication’, that is: communication which is in principle not hindered by incomprehensibility or lack of consensus”¹⁰⁴³. Coherence thus enhances both the credibility of the legal narrator and the perceived legitimacy of their claims¹⁰⁴⁴.

A distinction is commonly made between external and internal coherence in legal narratives, as outlined in the theoretical chapter of this thesis¹⁰⁴⁵. While the findings previously presented and discussed include analysis of the external coherence of SPO and DPA narratives, that is, their alignment with the broader institutional, legal, and political contexts, this section turns to internal coherence. It discusses the extent to which each NTR story maintains internal consistency, unity, and logic within its narrative structure.

Internal coherence is a matter of unity and connection, creating a sense that what is communicated is complete and consistent both in its larger meaning and its components¹⁰⁴⁶. It denotes a logical relationship between the “whole” and its “parts”¹⁰⁴⁷. In the context of NTRs, narrative coherence may be understood as the internal consistency between the central decision, whether it is a conviction in the case of an SPO or a deferral of prosecution in a DPA, and the narrative strategies that accompany it. This coherence depends on how the story is structured: the selection of events, the portrayal of characters, and the omission of alternative explanations all serve to produce a narrative that appears unified and inevitable¹⁰⁴⁸. Consequently, internal coherence relies on narrative selectivity and organisation, such that the outcome appears as the only logical and necessary conclusion to the account presented¹⁰⁴⁹.

¹⁰⁴¹ Sherwin, ‘Law Frames’ 40–41.

¹⁰⁴² Cammiss, ‘Law as Narrative’, 27; Offit, ‘Storied Justice’, 59–60; Jackson, ‘Narrative Theories and Legal Discourse’, 27–31; Yovel, ‘Running Backs, Wolves, and Other Fatalities’, 129–31; McCormick, ‘Coherence in Legal Justification’, 235; Den Boer, ‘Legal Whispers’, 127–31.

¹⁰⁴³ Den Boer, ‘Legal Whispers’, 137.

¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ Cf. chapter 3, section 3.1.

¹⁰⁴⁶ Rideout, ‘A Twice-Told Tale’, 74–7.

¹⁰⁴⁷ *Ibid.*

¹⁰⁴⁸ Richard K. Sherwin, ‘Law Frames’, 41; Den Boer, ‘Legal Whispers’, 137.

¹⁰⁴⁹ Sherwin, ‘Law Frames’, 41; Den Boer, ‘Legal Whispers’, 137.

The comparative analysis of DPA and SPO narratives reveals divergent levels of narrative coherence, which in turn reflect distinct communicative goals tied to each country's anti-bribery enforcement style and institutional configuration.

In DPAs, unity exists between the different narrative features and the story's overarching message, that is, the decision to defer prosecution. This is apparent both by observing the chronological structure and the overall tone of the story. Chronologically, there is a discernible inbuilt anticipation to the final message of DPAs. These stories unfold by showcasing the cooperative relationship between prosecutors and defendants in uncovering the criminal conduct. A discernible emphasis on the proactiveness of the defendant company in investigating foreign bribery offences is rendered explicit, as those of the SFO appear secondary in comparison. This process is then connected to the offence segments that construct TCB offences around evidence provided from the company, showcasing employee dynamics and internal compliance processes, which appear as the logical continuation of the cooperative investigative process described before. By focusing on the actions of company employees, DPA stories effectively depersonify the corporate offender. The legal fiction of the corporate persona enjoying a distinctive entity separate from that of its employees is generally absent from DPA offence segments¹⁰⁵⁰. Instead, what is highlighted are the organisational corporate structures, such as compliance processes and procedures that are unknown, ignored or deliberately circumvented by the offending corporate employees. While this narrative choice reveals the internal company dynamics that lead to offences of foreign bribery, it simultaneously shifts the locus of blame. By abstracting misconduct into employee behaviour or procedural failures rather than corporate intent, DPAs render it difficult to ascribe responsibility to a singular corporate persona. The result is an offence account in which violations appear as breakdowns in systems rather than the deliberate actions of a corporate agent.

As the story progresses into considerations of corporate criminal liability, the company regains its agency. Within these segments, the corporate entity is represented as a distinct person that is capable of behaving in certain ways. Nevertheless, the culpability of the company defendant is described in terms of failure to prevent bribery, further emphasising the connection between the company's internal governance structures and the crime. DPA stories reach their culmination by highlighting the transition of the company from a failed self-regulator to a reformed corporate citizen capable of self-regulating again.

This chronological progression - from proactive cooperation to implicitly downplaying the role of the corporate persona in foreign bribery offences, through corporate liability for organisational failures, and finally to demonstrable remediation - reinforces the legitimacy of the ultimate decision to defer

¹⁰⁵⁰ For a discussion on corporate personification, see Ian Ashman and Diana Winstanley, 'For or against Corporate Identity? Personification and the Problem of Moral Agency', *Journal of Business Ethics* 76 (2007): 83–95.

prosecution. Each narrative segment builds on the last, showing that the company's self-initiated investigations, identification of procedural gaps, and implementation of compliance programs collectively produce a remediation trajectory that aligns with the deferral of the prosecution. In other words, by the time the narrative reaches its conclusion, it becomes manifestly clear that prosecution would not advance the public interest more effectively than deferring the prosecution for a continued but limited oversight of the company's reform efforts. Thus, the chronological ordering of events not only structures the story but also legitimises the deferral as a reasoned, principled choice, presenting it not as a concession or compromise, but as a rational resolution.

Moreover, the narrative tone of DPA stories aligns with the DPA's core purpose. From the outset, the language employed is conciliatory rather than accusatory, emphasising the cooperation between defendant companies and the SFO throughout the investigation, prosecution and sentencing. In evaluative segments of criminal liability, the narrative generally avoids moralisations, describing the misconduct in technical terms - "procedural failures", "control deficiencies" and "circumvention of compliance procedures". The conciliatory tone is further emphasised in framings of the public interest in deferring prosecution. Across justification segments, the language remains focused on shared objectives between criminal justice authorities representing the public interest and the defendant companies, such as economic stability and efficient justice. As the text moves toward its conclusion, the tone remains conciliatory as the mutually beneficial aspects of the DPA processes are highlighted. While DPA enforcement has catalysed positive change within the company, these reforms ensure future compliance with the law, benefiting the preventive goals of criminal justice. By maintaining a conciliatory register, the overall narrative tone bolsters the overarching message that the decision to defer prosecution is justified and conducive to the broader aims of criminal justice.

In contrast, SPO stories invite ambivalence in the eyes of onlookers, which is reflected in the incoherences between the different parts of the story and its overall message. SPOs often begin by presenting themselves as platforms for expressing anti-bribery criminal law's authoritative, vertical and blaming features. In recounting TCB prosecutions, SPOs deliberately emphasise the public prosecutor's unilateral decisions and investigative acts as the expression of the State's monopoly in criminal law matters. Narratives of TCB offences are framed as a direct extension of prior state-led investigations, structured primarily around financial intelligence data. This framing, read in conjunction with the investigative realities of anti-bribery enforcement in Switzerland, suggests that the OAG conducted the evidence-gathering process in a unilateral and self-contained manner, without relying on potential company self-investigative initiatives. In this structure, the company's role as a blameworthy agent in offence segments is more pronounced than in DPAs, with the corporate entity itself often portrayed as a central figure in the criminal act.

Prosecution and offence narratives are imbued with a typical crime control undertone when faced with rule-breaking entities conforming to the conviction-based framework of SPOs. This connotation is, however, disrupted by the end of the SPO account by a frail condemnatory undertone. In criminal law, convictions that embody the repressive and top-down imposition of power consistent with the traditional conceptions of criminal justice are closely linked to constructions of the criminal persona¹⁰⁵¹. Godzimirska and Orina observe how prosecutors portray the defendant as inherently different from law-abiding citizens; a strategy intertwined with the persistent need to legitimise and rationalise the punitive orientation in criminal justice¹⁰⁵². The image of the criminal persona makes top-down legal sanctions and convictions supported by the professional identity and role of the public prosecutor appear natural and justified¹⁰⁵³. In this sense, the coercive authority of criminal justice actors is sustained by the image of the criminal that these actors themselves propagate.

Contradictorily, however, the conviction-based framework of SPOs portrays a reformed corporate citizen instead of a criminal persona. In concluding the narrative account, SPO storytellers transform the defendant from a blameworthy corporate offender to a reformed corporate citizen, highlighting the voluntary self-regulatory measures implemented by defendants, ultimately justifying a mitigated sentence. SPO narratives thus successfully deflect the stigma of the criminal process in favour of the defendant. Simultaneously, they position the OAG as a lenient and accommodating authority, which markedly contrasts with the punitive orientation typically associated with dominant crime control strategies.

These narrative choices create a rift between the beginnings, middles and ends of SPO stories. They equally contradict the story's overall message - the corporate offender's conviction - consequently imbuing these accounts with ambiguities. These findings suggest that the OAG navigates a tension between projecting an authoritative image to the public, aligned with expectations of an inquisitorial style of law enforcement, and communicating a more lenient stance to present and future corporate offenders, one that reflects neoliberal ideals of market self-regulation. Thus, the Swiss NTR process in TCB cases reveals a complex dynamic in the enforcement of anti-corruption laws, marked by a tension between retributive policies and emerging efforts to incorporate more participatory and restorative elements of justice.

This research has shown that enforcement practices through NTRs in Switzerland and the UK are narrowed towards a convergent narrative of the corporate offender, regardless of the different objectives pursued by these enforcement mechanisms. Indeed, while presenting the defendant company as a

¹⁰⁵¹ Godzimirska and Orina, 'Scapegoats and Underdogs', 451–54; Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 426–28.

¹⁰⁵² Godzimirska and Orina, 'Scapegoats and Underdogs', 451–54.

¹⁰⁵³ *Ibid.*

reformed actor trusted to self-regulate in the future is expected in DPA frameworks, the same cannot be said for SPOs, which result in criminal convictions. These transformative narratives reflect the enforcement paradox generally discussed in relation to modern attempts at corporate crime control through criminal law¹⁰⁵⁴. NTRs emerge as part of state efforts to control corporate crime through criminal law. As discussed in chapter 2, the introduction of these mechanisms in Switzerland and the UK is justified by facilitating the application of criminal law to corporate offenders. Paradoxically, they are deployed to alleviate the inevitable consequences of criminal law¹⁰⁵⁵, such as the criminal stigma, an inherent effect of criminal prosecutions. As suggested by Van Erp, this paradoxical situation reflects the situation where states must signal the credibility of criminal law enforcement mechanisms while simultaneously avoiding the alienation of powerful corporate actors whose economic contributions are deemed essential¹⁰⁵⁶. As a result, enforcement narratives often shift from punitive rhetoric to cooperative messaging, thereby blurring the line between legal accountability for criminal acts and market-friendly governance. This dual imperative underscores the ambiguity at the heart of modern corporate crime control - an ambiguity that shapes not only enforcement strategies but also the communicative frameworks through which legal norms are constructed and conveyed.

8.3. Contributions of the Study

One contribution of this study is that it adds to the existing literature on the communicative and expressive dimensions of criminal proceedings¹⁰⁵⁷. By analysing narratives within Swiss SPOs and UK DPAs in cases of TCB, the thesis deepens our understanding of how law enforcement mechanisms serve not only instrumental but also communicative purposes. Specifically, this research illustrates how legal narratives convey messages about prosecutions, crimes and criminal liability to multiple audiences, including corporate actors, legal professionals, and the broader public.

Consequently, this study brings out-of-court proceedings to the literature on the communicative aspects of the criminal process. Multiple studies explore the communicative and narrative proprieties of trial proceedings, as their public nature and transparency make them appealing sites for examining the communicative dimensions of criminal justice¹⁰⁵⁸. However, out-of-court proceedings, such as NTRs,

¹⁰⁵⁴ See generally Mills, 'UK Corporate Bribery and Corruption: An Enforcement Paradox'; Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar Publishing, 2011). See also Campbell, 'Trying Corporations: Why Not Prosecute?', 276; Aleksandra Jordanoska and Nicholas Lord, 'Scripting the Mechanics of the Benchmark Manipulation Corporate Scandals: The "Guardian" Paradox', *European Journal of Criminology* 17, no. 1 (2020): 24–28.

¹⁰⁵⁵ Campbell, 'Trying Corporations: Why Not Prosecute?', 270.

¹⁰⁵⁶ Van Erp, 'Anti-Cartel Thrillers as a New Film Genre', 242–23.

¹⁰⁵⁷ Cf. chapter 3, section 3.2 for a discussion of the communicative aspects of criminal proceedings.

¹⁰⁵⁸ Hearty, "'Standing with Soldier F'", 109–28; Vasiliki Zoi Festa, 'Erasing the 'Victim' from the "Victim-Perpetrator" Expressivist Messages in the Ongwen Trial Judgment', *Journal of International Criminal Justice*, 2024, 1–21; Tim Meijers

plea agreements, mediations, and restorative justice practices, are rarely thematised in this field of research¹⁰⁵⁹. This relative neglect stems from their character as privatised and often opaque forms of justice, which operate outside the public gaze, thereby, not typically designed for broad societal engagement¹⁰⁶⁰. NTRs, in particular, are viewed as backstage criminal justice practices, as opposed to frontstage performances: the confrontation and negotiation of differing narratives concerning facts, evidence, and appropriate sanctions take place behind closed doors rather than in the public setting of the courtroom¹⁰⁶¹. By contrast, trial proceedings are inherently performative events. They involve a set of ritualised practices through which legal actors (judges, prosecutors, defence counsel, witnesses, etc.) enact codified roles within a formal space, often before an audience composed of the public, the jury, and the press¹⁰⁶². This theatrical structure is not incidental; it serves a symbolic and communicative function, affirming legal norms, publicly allocating blame, and legitimising the authority of the law through visible and deliberative processes¹⁰⁶³. The trial thus performs justice both procedurally and communicatively, allowing multiple narratives to be voiced, contested, and adjudicated in a forum that invites public reflection and judgment. Although NTRs bypass the ritualised public performance characteristic of trial proceedings, their communicative function remains intact. Instead of enacting justice through open confrontation and symbolic ceremony, NTRs convey meaning through formalised, written narratives embedded within legal documents. These texts operate as institutionalised accounts that frame the offence, delineate the role and responsibility of the corporate offender, and justify the prosecution response. In doing so, they represent the principal platforms through which the issues

and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', *Ethics & International Affairs* 30, no. 4 (2016): 429–47; Marlies Glasius, "'It Sends a Message': Liberian Opinion Leaders' Responses to the Trial of Charles Taylor', *Journal of International Criminal Justice* 13, no. 3 (2015): 419–47; Trevaskes, 'Propaganda Work in Chinese Courts', 5–21. For studies applying a narrative analysis in examining the communicative function of criminal trials, see Avram, 'Narrating Communist Repression in and Outside the Courtroom', 82–103; Godzimirska and Orina, 'Scapegoats and Underdogs', 443–63; Houge, 'Imageries of Self', 179–96; Baker, 'Using Narrative to Construct Accountability in Cases of Death after Police Contact', 60–75; Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 419–37; Elizabeth Mertz and Jonathan Yovel, 'Courtroom Narrative', in *Routledge Encyclopedia of Narrative Theory*, eds. David Herman, Manfred Jahn, and Marie-Laure Ryan (Routledge, 2005), 86–93.

¹⁰⁵⁹ For exceptions, see James Dignan *et al.*, 'Staging Restorative Justice Encounters against a Criminal Justice Backdrop: A Dramaturgical Analysis', *Criminology & Criminal Justice* 7, no. 1 (2007) for a discussion on the communicative aspects of restorative justice practices. For research on the communicative and narrative dimensions of NTR proceedings, see generally Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 1–11; Lord, 'Prosecution Deferred, Prosecution Exempt', 848–66.

¹⁰⁶⁰ Ralph, 'Narrative-Erasing Procedure', 624–27; Dignan *et al.*, 'Staging Restorative Justice Encounters against a Criminal Justice Backdrop': 18–24; David Garland, 'Durkheim's Sociology of Punishment and Punishment Today', in *Durkheim and Foucault: Perspectives on Education and Punishment*, eds. Mark S. Cladis (Durkheim Press Ltd, 1999), 34.

¹⁰⁶¹ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 3.

¹⁰⁶² Isabel Schoultz and Janne Flyghed, 'Performing Unbelonging in Court. Observations from a Transnational Corporate Bribery Trial—a Dramaturgical Approach', *Crime, Law and Social Change* 77, no. 3 (2022): 324–25; Kate Leader, 'The Trial's the Thing: Performance and Legitimacy in International Criminal Trials', *Theoretical Criminology* 24, no. 2 (2020): 243–48; Peter Anton Zoettl, 'Let Justice Be Done: A Performative View on Portuguese Criminal Trial Procedures', *Communication and Critical/Cultural Studies* 13, no. 4 (2016): 400–401.

¹⁰⁶³ See generally W. Lance Bennett, 'Storytelling in Criminal Trials: A Model of Social Judgment', *Quarterly Journal of Speech* 64, no. 1 (1978): 1–22; William Knapp, 'Symbolism in the Criminal Trial Ritual', *Bracton Law Journal* 10 (1977): 17–24; Garfinkel, 'Conditions of Successful Degradation Ceremonies', 420–24.

surrounding TCB crimes and enforcement are made intelligible¹⁰⁶⁴. As a result, they serve as key reference points for compliance officers, defence lawyers, regulators, and journalists who follow developments in corporate criminal liability for TCB offences. This underscores the importance of analysing NTRs as communicative acts that shape legal meaning and public understanding.

Related to the last contribution is the extension of narrative methods and analysis to the study of out-of-court proceedings. The question of how the procedural practices of trial procedures impact the stories of crimes, criminals, and penal authority has been extensively researched¹⁰⁶⁵. This is particularly true for adversarial-type trial proceedings, where the structured opposition between prosecution and defence generates a visible narrative contest, spanning factual reconstruction, the attribution of criminal liability, and the interpretation of legal norms, which has made such proceedings especially conducive to narrative analysis¹⁰⁶⁶. In contrast, few studies examine how criminal justice procedures that hinge on efficiency, negotiations and concessions impact the resulting criminal justice narratives¹⁰⁶⁷.

Another key contribution of this study lies in its engagement with socio-legal scholarship on legal transplants, particularly regarding the adoption and adaptation of NTRs in distinct jurisdictions. Through a comparative narrative analysis of SPOs and UK DPAs, this research highlights how core features of these mechanisms - the negotiation of penal issues, public-private cooperation in case-making, and the tendency toward leniency for corporate offenders - are contextually reinterpreted to fit the distinct enforcement styles and institutional contexts within recipient countries. Exemplifying this is how SPOs narrate public-private cooperation as the defendant's passive but acquiescent attitude that contrasts with the prosecutors proactive and leading role in prosecutions, in accordance with the traditional inquisitorial ideals of the Swiss criminal justice process. By contrast, DPAs highlight the cooperative dynamics between defendant companies and prosecutors, which stand in tension with the adversarial foundations of the UK criminal justice system. These findings suggest that transfers of legal

¹⁰⁶⁴ Capus and Bozinova, 'Impression Management in Corporate Corruption Settlements', 3; Lord, 'Prosecution Deferred, Prosecution Exempt', 856.

¹⁰⁶⁵ See generally Houge, 'Imageries of Self', 179–96; Houge, 'Re-Presentations of Defendant Perpetrators in Sexual War Violence Cases before International and Military Criminal Courts', 419–37; Krisda Chaemsaitong, 'Positioning Self and Others in the Courtroom: Person Markers in the Opening Statement', *Poznan Studies in Contemporary Linguistics* 51, no. 1 (2015): 1–25; Bennett and Feldman, *Reconstructing Reality in the Courtroom*; Smejkalová, 'Story-Telling in Judicial Discourse', 95–109; Joshua A. Newberg, 'The Narrative Construction of Antitrust', *Southern California Interdisciplinary Law Journal* 12 (2002): 181–216; Ewick and Silbey, 'Subversive Stories and Hegemonic Tales', 197–226.

¹⁰⁶⁶ Monika Fludernik and Frank L. Schäfer, 'Introduction', in *Erzählen und Recht/Narrative and Law* (Ergon Verlag, 2022), 15–16; Line Norman Hjorth, 'Underlying Narratives in Courtroom Exchanges', in *Narratives in the Criminal Process*, eds. Frode Helmich Pedersen, Espen Ingebrigtsen, and Werner Gephart (Klostermann, 2021), 141–42; Gewirtz, 'Narrative and Rhetoric in the Law', 2–3. While studies of adversarial-type procedures in Law as Narrative scholarship are predominant, narrative analysis of inquisitorial-type court proceedings are emerging. See generally Byrman and Lindh, 'Narratives on Assault in Investigation, Trial and Judgment', 219–52; Grunewald, 'The Narrative of Innocence, or, Lost Stories', 366–89; Smejkalová, 'Story-Telling in Judicial Discourse', 95–109.

¹⁰⁶⁷ For exceptions see Ralph, 'Narrative-Erasing Procedure', 573–627, discussing the impact of out-of-court legal proceedings on legal narratives.

constructs are rarely direct and complete but are partial and mediated through national cultures¹⁰⁶⁸. Consequently, this thesis contributes to a deeper understanding of how transferred enforcement mechanisms become meaningful and operational within recipient societies.

Finally, this research has highlighted the value of narrative methods for comparative criminal justice scholarship. A narrative approach acknowledges storytelling as an inherently contextual practice, reflecting cultural, institutional, and legal frameworks within which narratives are produced and disseminated¹⁰⁶⁹. While narrative methods have been integrated in studies comparing media representations of crime and criminal justice, their use remains relatively limited in comparative criminal justice research¹⁰⁷⁰. By examining narratives constructed in SPOs and DPAs, the research illustrated how narratives function as mediums through which local enforcement practices and institutional contexts are articulated and communicated. More specifically, narrative analysis enabled the exploration of how criminal justice narratives reflect the institutional values, investigative strategies, and ideological orientations of their storytellers. The narrative and comparative methodological approach also illuminated not only what was explicitly emphasised in these narratives but equally what remained unsaid or omitted. Indeed, juxtaposing the Swiss and UK narratives revealed contrasts and convergences in storytelling strategies, making visible the selective nature of legal narratives. This comparative perspective enabled a more nuanced oversight of how certain elements were emphasised, downplayed, or omitted in one jurisdictional narrative compared to the other.

8.4. Limitations and Suggested Future Research Directions

Although this thesis has made several significant contributions, it presents some limitations that can be explored as future avenues for research. The first limitation pertains to the fact that this research is a small-scale qualitative narrative study that focuses on the workings of NTR mechanisms in one inquisitorial procedural system, Switzerland, and one adversarial procedural system, the UK. This research is thus inherently context-dependent and excludes any extrapolation of the findings to the NTR practices in other countries. It nevertheless showed the value of comparative research in analysing how foreign legal constructs, such as NTRs, are integrated and translated into national justice systems.

¹⁰⁶⁸ John Muncie, 'Youth Justice: Globalisation and Multi-Modal Governance', in *Criminal Justice and Political Cultures: National and International Dimensions of Crime Control*, eds. Tim Newburn and Richard Sparks (Willan Publishing, 2012), 163.

¹⁰⁶⁹ Presser and Sandberg, 'Research Strategies for Narrative Criminology', 95–97; Presser and Sandberg, 'Introduction: What Is the Story?', 1; Esin, Fathi, and Squire, 'Narrative Analysis: The Constructionist Approach', 204–6; Sparkes and Smith, 'Narrative Constructionist Inquiry', 300.

¹⁰⁷⁰ Afroz Rafiee, Wilbert Spooren, and José Sanders, 'Framing Similar Issues Differently: A Comparative Analysis of Dutch and Iranian News Texts', *Journal of Multicultural Discourses* 16, no. 4 (2021): 334–49; Carlo Berti, 'Rotten Apples or Rotten System? Media Framing of Political Corruption in New Zealand and Italy', *Journalism Studies* 20, no. 11 (2019): 1580–597. See Sergi, "Three Tales/Two Threats", 221–46 as an example of a comparative criminal justice study integrating narrative methods.

Langer points out that the process of diffusion of legal constructs across borders has transformed inquisitorial-based legal systems, leading to the emergence of significant procedural differences among jurisdictions that were once characterised by a deeply shared commitment to the official investigation model¹⁰⁷¹. While these jurisdictions historically maintained a relatively homogeneous legal culture, recent adaptations illustrate a fragmentation of this traditional unity, as jurisdictions increasingly diverge in how they conceptualise and structure criminal procedure¹⁰⁷². In light of this, a comparative inquiry focusing on two or more inquisitorial procedural systems can offer a valuable opportunity to examine how each jurisdiction has selectively adapted or resisted NTR mechanisms for corporate offences. Such an approach would allow for a more controlled analysis of internal evolutions within the inquisitorial tradition, minimising the structural asymmetries that arise when comparing adversarial and inquisitorial systems. It may also contribute to a deeper understanding of how inquisitorial legal cultures reinterpret and reshape transnational legal models, such as NTRs.

The second limitation relates to the theoretical perspectives of narrative expressivism adopted in this study. Narrative expressivism suggests that legal narratives transcend the legal arenas in which they are produced, as they shape public perceptions and beliefs and influence political discourses about the issues they address. In the same vein, they constitute guiding points for specific audiences, such as companies implementing anti-compliance structures and attorneys preparing legal defence strategies. This thesis limited itself to the uncovering and analysis of the legal narratives crafted within NTR decisions, without considering how these narratives are received by their numerous audiences. Future research should examine how the narratives constructed within NTRs extend beyond their immediate legal context to shape discourses and trajectories in broader political and professional domains related to anti-bribery enforcement. A particularly promising avenue would involve investigating the impact of NTR stories on the workings of anti-compliance structures within companies. As discussed in this study, corporate criminal liability for TCB offences in both Switzerland and the UK is contingent on broad principles rather than straightforward rules. The Swiss corporate criminal liability regime is predicated on companies omitting to take “reasonable organisational measures”, in the same vein as the UKBA’s section 7 offence, which grounds liability on the company’s neglect to take “adequate procedures”. These broad standards leave considerable room for interpretation by companies. The question remains whether NTR narratives serve as guidance for company compliance personnel seeking to define anti-bribery strategies, and how exactly they are received and interpreted by these audiences.

A third limitation relates to the performative character of NTR narratives. Throughout this thesis, NTR narratives were consistently defined and interpreted as performances, as orchestrated retellings of events that strive to accommodate the expectations of their audiences or to evoke specific reactions

¹⁰⁷¹ Langer, ‘From Legal Transplants to Legal Translations’, 62.

¹⁰⁷² *Ibid.*

from that same public. Recognising the representational character of stories, this research analysed and interpreted the emerging legal narratives from the perspective of the legal, institutional, and cultural frameworks in which they are produced. However, expanding the analytical focus to include the storytelling process itself can yield deeper insights into the performative aspects of these narratives. NTR stories are crafted within the institutional backstages of prosecutors' and defence lawyers' offices. What the public ultimately encounters is not the process of narrative formation, but its outcome: the finalised NTR decision. Fully grasping the performative character of NTR stories requires a research method and analysis that includes not only the story's content and its structural embeddedness, but also the storytellers, their actions and the social situations surrounding these stories¹⁰⁷³. A promising direction for future research may involve combining narrative analysis of NTR content with qualitative interviews of key narrative actors, including prosecutors, corporate representatives, judges, and defence lawyers. Such a multi-data-and-method approach would enable a more comprehensive understanding of the motives, concerns, and strategic considerations that inform narrative construction from the perspective of those directly involved in shaping it. This type of inquiry could also illuminate how narrative choices are influenced not only by institutional and legal constraints but by broader professional norms, personal judgments, and the communicative goals of the storytellers themselves.

¹⁰⁷³ For a definition of narrative ethnography, see Gubrium and Holstein, *Analyzing Narrative Reality*, 250.

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Annexes

Annexe 1: List of Analysed Documents

Summary Penalty Orders

Summary Penalty Order no. EAI.1.04.0325-LEN against Alstom Network Schweiz AG (22 November 2011)

Summary Penalty Order no. SV.12.0120-DCA against Nitrochem (31 Mai 2016)

Summary Penalty Order no. SV.16.1280-LEN against Odebrecht SA and Construtora Norberto Odebrecht SA (CNO) (21 December 2016)

Summary Penalty Order no. SV.15.0584-MAD against KBA-Notasys (23 March 2017)

Summary Penalty Order no. AV.14.0177-DCA against Environmental and Marine Engineering NV and Dredging International Services (Cyprus) Ltd (1 mai 2017)

Summary Penalty Order no. SV.18.0958-SAG against Gunvor International BV and Gunvor SA (14 October 2019)

Summary Penalty Order no. SV.15.0787-BECY against Andrade-Gutierrez (15 November 2019)

Summary Penalty Order no. SV.20.1217-MGR against SBM Holding Inc. SA, Single Buoy Moorings Inc., and SBM Production Contractors Inc. SA (18 November 2021).

Summary Penalty Order no. SV.19.0989-POM against ABB Management Services SA (2 December 2022)

Summary Penalty Order no. SV.14.1618-KOU against SICPA (27 April 2023).

Deferred Prosecution Agreements

Serious Fraud Office v. Standard Bank PLC, Southwark Crown Court, case no. U20150854 (30 November 2015).

Serious Fraud Office v. Rolls-Royce PLC and Rolls-Royce Energy Systems INC, Southwark Crown Court, case no. U20170036 (17 January 2017).

Serious Fraud Office v. Güralp Systems Limited, Southwark Crown Court, case no. U20190840 (22 October 2019)

Serious Fraud Office v. Airbus SE, Southwark Crown Court, case no. U20200108 (31 January 2020).

Serious Fraud Office v. Amec Foster Wheeler Energy Limited, Southwark Crown Court, indictment no. T20210867 (1 July 2021).

Annexe 2: Legal Provisions: Key Articles

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD-ABC, 1997)

Article 1: The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:
 - a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - b) "foreign country" includes all levels and subdivisions of government, from national to local;
 - c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2: Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3: Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 5: Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Swiss Criminal Code (SCC)

Article 102 : Liability under the criminal law

1. If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour is attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.
2. If the offence committed falls under Articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} paragraph 1 or 322^{octies}, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.

3. The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.
4. Undertakings within the meaning of this title are:
 - a. any legal entity under private law;
 - b. any legal entity under public law with exception of local authorities;
 - c. companies;
 - d. sole proprietorships.

Article 322^{septies}: Bribery of Foreign Public Officials

Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces who is acting for a foreign state or international organisation an undue advantage, or gives such an advantage to a third party, in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion, any person who as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organisation demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

Swiss Criminal Code of Procedure (SCCP)

Article 352: Summary Penalty Order Procedure: Requirements

1. If the accused has accepted responsibility for the offence in the preliminary proceedings or if his or her responsibility has otherwise been satisfactorily established, the public prosecutor shall issue a summary penalty order if, having taken account of any suspended sentence or parole order that must be revoked, it regards any of the following sentences as appropriate:
 - a. fine;
 - b. a monetary penalty of no more than 180 daily penalty units;
 - c. ...
 - d. a custodial sentence of no more than 6 months.
2. Any of these sentences may be combined with a measure in accordance with Articles 66 and 67e–73 SCC.

3. Sentences in accordance with paragraph 1 letters b–d may be combined with each other provided the total sentence imposed corresponds to a custodial sentence of no more than 6 months. A fine may always be combined with any another sentence.

UK Bribery Act (UKBA)

Section 6: Bribery of foreign public officials

(1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P’s intention is to influence F in F’s capacity as a foreign public official.

(2) P must also intend to obtain or retain—

- (a) business, or
- (b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

- (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
 - (i) to F, or
 - (ii) to another person at F’s request or with F’s assent or acquiescence, and
- (b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift.

...

(5) “Foreign public official” means an individual who—

- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
- (b) exercises a public function—
 - (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
 - (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
- (c) is an official or agent of a public international organisation.

(6) “Public international organisation” means an organisation whose members are any of the following—

- (a) countries or territories,
- (b) governments of countries or territories,
- (c) other public international organisations,
- (d) a mixture of any of the above.

Section 7: Failure of commercial organisations to prevent bribery

- (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.
- (3) For the purposes of this section, A bribes another person if, and only if, A—
 - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
 - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
- (5) In this section— “partnership” means—
 - (a) a partnership within the Partnership Act 1890, or
 - (b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,“relevant commercial organisation” means—
 - (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
 - (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
 - (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
 - (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business