Negotiating without the victim state: the exclusiveness of anticorruption settlements

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Abstract

Purpose – Corporate foreign bribery can have devastating consequences on communities and states. Over the past decade, there have been several promising developments, both national and international, that might increase the chances of victim states to receive remediation for the harm they suffered from foreign bribery. In particular, awareness has risen that victim states must be considered and new innovative items have been added to the toolbox of prosecutors in the fight against corruption that is assumed to also improve victim states' standing in these procedures. This study aims to assess whether indeed victim states receive compensation through these novel procedures.

Design/methodology/approach – This study uses the three case studies of Switzerland, France and England and Wales for a comprehensive empirical and normative analysis of settlement agreements between defendants and prosecution authorities and of court jurisprudence.

Findings – This study shows that although *de jure*, it seems warranted to order the payment of remedies to victim states within domestic criminal proceedings, in practice, this rarely happens. A number of legal and practical obstacles account for this situation. This study, therefore, calls for the formulation of international guidelines containing the obligation to inform victim states of ongoing criminal proceedings on corporate foreign bribery, and guidance on how to identify the victim of this crime, as well as the damage caused.

Originality/value – This is the first contribution to verify whether claims that settlement agreements, recently introduced in England and Wales and France (and similar procedures are available in Switzerland), are beneficial for victim states in their quest to receive compensation. As this study shows that this is – not yet – the case in practice, this study proposes solutions that could lead the way for remediation of the harm caused by corporate corruption – and thereby, ultimately, to a more just outcome.

Keywords Criminal law, Negotiated settlements, Transnational corporate corruption, Victim states

Paper type Research paper

1. Introduction

This article focusses the question of whether countries that have lost assets because of foreign bribery by corporations are *de jure* and *de facto* able to participate in settlement procedures – which have become the main way to enforce anticorruption laws in many countries (OECD, 2019, p. 3) – to get some kind of remediation for the harm they suffered [1].

Fighting corporate foreign bribery is a global task today (Gantz, 1997/1998, p. 469 ff.; Delmas-Marty and Manacorda, 2000, pp. 401–405; Webb, 2005, pp. 191–229; Garzon and Hafsi, 2007, pp. 61–80; Manacorda, 2014, pp. 3–30), involving high sums of money in terms of penalties and confiscated assets. There is even talk of the emerged market for anticorruption enforcement that is itself globalizing (Brewster and Buell, 2017, p. 195). States, non-state actors and international

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organisations such as the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the Council of Europe and the European Union have sought to increase the criminalisation of corruption, especially with regard to companies' large-scale global business corruption. In addition, as awareness has risen that international corruption demands an international reaction, co-ordination and co-operation initiatives have proliferated. International conventions recommend the sharing of assets confiscated in domestic criminal proceedings with those states who have provided support (for example, UN Model Agreement Asset Sharing, the Economic and Social Council by means of joint and parallel investigations and coordinated conclusions of settlements). Adopted in 2003, the United Nations Convention against Corruption (UNCC) already contained the fundamental principle that seeds of corruption should be returned to the legitimate initial owner and that state parties should "afford one another the widest measure of cooperation and assistance in this regard" (Article 51; see generally Chapter V of the UNCC).

Nevertheless, according to the World Bank and the United Nations Office on Drugs and Crime, a "huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries" (Gray *et al.*, 2014, p. 2). Therefore, the two international organisations have jointly started the Stolen-Asset Recovery (StAR) initiative (see point 2 of the Draft OHCHR Guidelines on a Human Rights Framework for Asset Recovery) [2]. Also in the context of the 2030 Agenda for Sustainable Development, UN Member States committed to recover and return missing money by 2030 (*ibid*, point 3). These initiatives exemplify how recovery and return of assets have become a priority on the political agenda of concerned countries.

One of the problems about returning stolen assets is that there is no consensus on the definition of victims of foreign bribery, their rights or the extent of their compensation in either international conventions or national legislation (Rahman, 2020, p. 4). This is insofar important as criminal procedures tackling corruption would normally allow for recovering and returning the proceeds of corruption to the owner. Therefore, we analyse this possibility and do not deal with reparations that victims can ask for in civil proceedings, nor with restitution of assets through mutual legal assistance.

Moreover, we focus on victim *states*, i.e. those states whose communities and citizens are affected by the devastating consequences ensuing from transnational corporate corruption of foreign officials [3] (as an example for such consequences see the RAID, 2020; FCPA Blog-Theriault-Lachance, 2020). The Global Forum for Asset Recovery (GFAR), an intergovernmental initiative organized by the World Bank, postulates in the 2017 "GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases" that "stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct" (principle 5). As it is the state with its sovereign power who is the legal representative of the people (Peters, 2009, p. 272), we define 'victim states' as those states that are legally legitimated to represent the damaged nation in settlement procedures regarding corporate foreign bribery.

Of course, victim states might be suffering from corrupt structures, at times even to an extent that it becomes unlikely that the people of that state would actually benefit from returned money. With its "Guidelines on a Human Rights Framework for Asset Recovery", the Office of the United Nations High Commissioner for Human Rights (OHCHR) attempts to formulate appropriate measures in this regard. They state, for instance, that requested states have an obligation to return embezzled public funds to requesting states (principle 9) and receiving states have "a duty to use recovered assets in a manner that contributes to the realization of human rights" (principle 8).

We do not ignore the problem that state officials might be the principal actors in grand-scale foreign bribery cases (Makinwa, 2018, p. 24) and that anticorruption prosecutions might be politically tainted (Mészáros, 2020, pp. 54–73). However, arguments against restitution to these kinds of states assume that all public officials at all levels of these states are corrupt; they do not take into account possible regime changes and the role of

international pressure; and they do not consider that there are ways to prevent the money from being stolen again (De Simone and Zagaris, 2014, p. 24).

Building on the finding of a study published by the StAR Initiative (Oduor *et al.*, 2014) that victim state participation and their remediation is – with rare exceptions – lacking, we will review settlements and look for reasons for the underrepresentation of victim states in the literature and case law. In fact, one could think that the situation might have changed since this finding from 2014: recently, major modifications of the national legal framework took place in many European countries, such as in Switzerland, France or England and Wales. New legal tools (settlements) for criminal justice authorities to deal with corporate foreign bribery have been introduced. These tools avoid not only a full trial, but allow, under certain conditions, to even defer prosecutions altogether. These settlement solutions have become the preponderant way to deal with corporate corruption (OECD, 2019), and many assume that negotiated settlements would provide the best prospects for – speedily – securing some form of financial consideration for the victims of complex economic crime (Harrington, 2020, pp. 251, 262; Cassani, 2020, p. 9).

Our findings will show, however, that victim states remain excluded from settlements. We demonstrate that there are still major obstacles – both legal and practical – for including victim states and granting them remedies. Therefore, we conclude that concrete guidelines need to be formulated at the international level that would ensure the inclusion of victim states in an adequate manner and the respect for human rights concerning the return of proceeds of corruption.

After describing our data and research methodology (Section 2), we compare the legal frameworks of Switzerland, France and England and Wales (hereinafter: England) [4] regarding possibilities to settle a criminal case (Section 3), before analysing all publicly available settlements from these three countries (Section 4). In Section 5, we investigate the possibilities for victim states to receive remediation in trial proceedings and settlement procedures in our case study countries. In the end, we discuss the reasons we found for failures to consider victim states within criminal proceedings and review the current efforts both in France and England to correct these failures, before making suggestions for an international solution (Section 6). Section 7 concludes this contribution with suggestions for future research.

2. Methodology

This contribution relies on three case studies, namely, Switzerland, France and England. We chose Switzerland as a starting point as Switzerland is a crucial country for the fight against transnational corruption for several reasons: the country harbours the headquarters of important export-oriented corporations that are active, in particular, in the commodity-trading sector – a sector particularly exposed to corruption. Until recently, many of these companies received a favourable tax treatment through special fiscal status, resulting in a large number of "letterbox" companies in Switzerland. In addition, Switzerland has a strong financial market offering a diversity of services. Swiss courts regularly have jurisdiction for transnational corruption cases, as Switzerland is often the location from where the transfers of funds were made to execute the bribery scheme. At the same time, Switzerland is among the most active states in the prosecution of transnational corruption. In addition, in view of its historical record as a safe haven for the wealth of politically exposed persons, Switzerland has taken over a 'leadership' role in asset recovery matters (Adams, 2013, p. 253).

For comparison, we chose for France (another civil law country) and England (a common law country) as representatives of their respective legal traditions to be able to consider the different solutions that different legal traditions might propose for remedying the harm suffered by victim states. At the same time, and despite the great divergences in how

criminal procedure is generally organized in the two countries, the settlement procedures we are interested in are comparable on a number of aspects (most importantly, that the defendant will not be convicted in the end).

We use the generic term "settlements" throughout our contribution, referring to deferred prosecution agreements (DPAs) in England and Wales [5], the public interest judicial agreement (*convention judiciaire d'intérêt public*, PIJA) in France, and the simplified procedure in combination with a summary penalty order or orders to dismiss in Switzerland.

Section 3 was written based on a comparative doctrinal analysis of laws and case law in all three case study countries.

For the empirical analysis in Section 4, we collected settlements from the case study countries that deal with foreign bribery of companies between 2011 and 2021. We analysed these settlements in three steps: the first consisted of a document analysis in view of the question whether victim states are even mentioned in the first place. Once such a reference was detected, we reviewed the settlement to understand whether the victim was a constituted plaintiff party or not (for Swiss and French settlements). In a third step, we examined the reasons mentioned in the settlement itself on why or why not the victim received remediation.

We received access to 15 summary penalty orders and orders to dismiss rendered by the Office of the Attorney General of Switzerland (OAG; i.e. at federal level) between 2011 and 2017 for corruption offences (Article 322^{septies} CH-CC) against natural and legal persons. The relevant settlements were sent to one of the authors by the OAG upon request and in the context of previous research. Settlements are not published online or in an official gazette in Switzerland, but merely physically showcased in a public institution for a short period of time. There is therefore no way to verify whether all settlements were sent for the relevant time period. We exclude from our empirical analysis the cantonal level in Switzerland, as there are very few procedures in the cantons.

In France and England, most settlements are publicly available online [6]. At the time of writing [7], 11 public interest judicial agreements had been concluded between 2017 and 2021 in France and five DPAs, concluded between 2015 and 2020, were publicly available.

Section 5 begins with a normative analysis of the Swiss, French and English legal frameworks on possibilities for victims to receive remediation within traditional trial proceedings (Section 5.1) before reviewing the literature on why these possibilities seem not to take effect in settlements procedures (Section 5.2).

Section 6 reviews policy documents on current initiatives to remedy the lack of inclusion of victim states in settlements procedures for corporate foreign bribery.

We will begin our analysis in the following section by briefly introducing the legal framework on settlements in France, England and Switzerland.

3. Settling criminal cases of corporate foreign bribery in France, England and Switzerland

In all three countries, criminal justice authorities most often respond to cases of corporate foreign bribery by resorting to an abbreviated procedure that entails a negotiation between the prosecutor and the defendant, instead of bringing these cases to a full trial – and in the case of France and the England, even by resorting to procedures replacing a prosecution.

3.1 France

In France, the Law No. 2016–1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life (*Sapin II*) introduced a new prosecutorial instrument into Article 41–1-2 of the French code of criminal procedure (F-CCP): the public

interest judicial agreement. It is supposed to be an efficient tool to conclude open procedures against legal persons for corruption and influence peddling, tax fraud, money laundering or related offences. While defendants are, at the end, not considered to be convicted, a PIJA can nevertheless impose a series of requirements on the legal person in question, namely, to pay a fine proportionate to the illicit gains, to implement a corporate compliance programme under the control of the French Anticorruption Agency, and to pay reparations to the victim of the crime (Ministère de la Justice, 2021).

3.2 England and Wales

In England and Wales, the concept of deferred prosecution agreements, introduced through Section 45 and Schedule 17 of the 2013 Crime and Courts Act (which came into force in 2014), is inspired by a similar instrument that prosecutors in the USA have at their disposal [8]. Its purpose is to provide a mechanism whereby a corporation can avoid prosecution for certain economic or financial offences by entering into an agreement on negotiated terms with a prosecutor (Judgment approving the DPA with Standard Bank plc, 30/11/2015: par. 1). According to Schedule 17, paragraph 5 (3), the requirements that a DPA may impose on the defendant include, but are not limited to, the following:

- to pay to the prosecutor a financial penalty;
- to compensate victims of the alleged offence;
- to donate money to a charity or other third party;
- to disgorge any profits made by the corporation from the alleged offence;
- to implement a compliance programme or make changes to an existing compliance programme relating to the defendant's policies or to the training of the corporation's employees or both;
- to co-operate in any investigation related to the alleged offence; and
- to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.

The DPA may impose time limits within which the defendant must comply with these requirements.

3.3 Switzerland

The Swiss criminal law system theoretically offers three ways to settle criminal procedures: a dismissal according to Article 53 of the Swiss criminal code (CH-CC); the so-called simplified procedure leading to a negotiated indictment which is only checked by the court for plausibility [Article 358 of the Swiss code of criminal procedure (CH-CCP)]; the procedure that leads to a summary penalty order (Article 352 CH-CCP), which becomes a final judgement unless a valid rejection is filed. As the defendant has the choice to accept or to reject the summary penalty order, also this procedure is based on a consensual agreement.

In the context of criminal proceedings against companies for foreign bribery, summary penalty orders are frequent as this kind of procedure has several advantages over the simplified procedure: if it fails, it does not carry the risk that the declarations of all parties (that is, the plea of the defendant) become inadmissible – as is the case in the simplified procedure. Moreover, this procedure offers (even more) discretion (in the sense of confidentiality) to the defendant than the simplified procedure, because – if the defendant company does not oppose the summary penalty order – no court hearing takes place at all. Avoiding court trials is of great interest for companies due to these trials' openness to the

public. In fact, unless the cantonal or federal Office of the Attorney General decides otherwise and publishes a press release, summary penalty orders are issued without public debate, they are put in writing, and are only accessible to persons who can demonstrate a well-founded interest (Article 69 (2) CH-CCP), under the condition that there is no overriding private or public interest in opposition to the request. This also applies to decisions to dismiss proceedings (Federal Supreme Court (FSC), 02/04/2008: 287).

These advantages have led to the combination of these two settlement procedures in Switzerland. That is, procedures are opened as simplified procedures to get the chance to negotiate the outcome, but then closed as summary penalty procedures to avoid the implication of the court and the mentioned risk of losing evidence that becomes inadmissible if the agreement eventually fails.

However, only dismissal orders under Article 53 CH-CC are similar to the recently introduced settlement procedures in France and England in the sense that the defendant will not be considered convicted. According to this provision, the competent authority shall, under certain conditions, refrain from prosecuting the offender, bringing him/her to court or punishing him/her if he/she has repaired the loss, damage, or injury or made every reasonable effort to right the wrong that he/she has caused. However, as the main criterion in Article 53 CH-CC is that the public interest in prosecution should be "of little importance", its application to foreign corporate bribery offences was criticised by the examiners of the OECD-Anti-Bribery-Working-Group. They recommended to no longer "have recourse to Article 53 CC in foreign bribery cases" (OECD Phase 4 Report, 2018: 42). As a reaction, the federal Office of the Attorney General announced to henceforth refrain from applying this reparation possibility (OECD Phase 4 Report, 2018: par. 84). Indeed, Article 53 CH-CC has since 2018 apparently not been used – neither by the federal nor by a cantonal OAG – to settle a case of foreign bribery (OECD Phase 4 Two-Year-Follow-up-Report, 2020: 31f.).

The most common way to settle a foreign bribery case in Switzerland is thus the simplified procedure terminating with a summary penalty order.

4. Victim states are still left out of settlements

In the following, we will briefly outline our findings from a settlement analysis concerning the inclusion of victim states in settlement procedures in France, England and Switzerland and whether they received compensation in the context of these procedures.

Few of the French public interest judicial agreements explicitly mention the victim. Of those PIJAs that dealt with foreign bribery, there is only one. Here, the victim – a foreign public institution – had received reparations ("*le dommage causé à la [. . .] victime [. . .] a été réparé*"), albeit in the context of parallel civil proceedings in another country, namely before the High Court of Justice of England and Wales (PIJA with Société Générale, 24/05/2018: par. 49). With this, it was concluded that the defendant had complied with its obligations in terms of remedies (PIJA with Société Générale, 24/05/2018: par. 50).

However, several PIJAs dealing with *other* offences than foreign bribery, such as active corruption or fraud, explicitly mention the victim of the crime (for instance, PIJA with SWIRU Holding AG, 04/05/2020: par. 33–34). In the lead-up to the conclusion of the PIJA, these victims were invited to claim damages and will now receive remedies for the damage suffered through an order included in the PIJA (for instance, PIJA with Bank of China, 10/01/2020: par. 27–28). Not in all of these cases, victims were explicitly referred to as plaintiff parties, leaving it unclear whether they participated as a plaintiff in the proceedings or were simply otherwise considered (for instance, PIJA with Bank of China, 10/01/2020; or PIJA with Google Ireland LTD, 03/09/2019). In other cases, the victim clearly constituted a plaintiff party (for instance, PIJA with SAS SET Environment, 14/02/2018: 4; or PIJA with

HSBC Private Bank (Suisse) SA, 18/10/2017: par. 45). Remarkably, all constituted plaintiff parties were French national institutions or – in one case – even the state of France. Overall, in French proceedings leading to a PIJA, third parties can clearly become plaintiff – both *de jure* and *de facto*. Nevertheless, no foreign state was included as a plaintiff party in any of the proceedings for foreign bribery of companies.

In England, as this is legally not possible, no victim participated as plaintiff party in the proceedings leading to a deferred prosecution agreement. However, "compensation" for the victim (a foreign state) was ordered in one DPA analysed here (DPA with Standard Bank plc (now known as ICBC Standard Bank plc): par. 12). In another DPA, it was explained that the victim could not be identified (Judgment approving the DPA with Sarcland Limited, 11/07/2016: par. 20), and in two more DPA proceedings, it was impossible to identify a quantifiable loss arising from the criminal conduct (Judgment approving the DPA with Rolls-Royce plc, 17/01/2017: par. 81–84; and Judgment approving the DPA with Airbus SE, 31/01/2020: par. 94–96). Along with the justification for not ordering any compensation, it was noted that "[i]n any event, any of the victims of the criminal conduct covered by the proposed DPA is in a position to pursue a claim for compensation" (Judgment approving the DPA with Rolls-Royce plc, 17/01/2017: par. 84; and similar: Judgment approving the DPA with Airbus SE, 31/01/2020: par. 96). One DPA makes no remarks about the victim of the crime at all (Judgment approving DPA with Guralp Systems Limited, 22/10/2019).

In Switzerland, the picture is clear: none of the Swiss summary penalty orders that were analysed explicitly mentions the victims of the crime in question or mandates the payment of remedies. No plaintiff party seems to have appeared in any of these procedures. In one case, a dismissal according to Article 53 CH-CC, remedies were ordered – but not to be paid to the victim, but to a charity organisation, stating that "[r]eparation is the compensation of the consequences of the crime through a voluntary payment by the offender, which may also take the form of a donation to a charitable institution" (Discontinuation order, 05/09/2013: par. 4).

Our empirical analysis shows that, until now, *de facto*, victim states never received remedies through settlement proceedings in any of the three countries, with the exception of one case in England. In the following section, we will investigate the reasons for this situation.

5. (Im-)possibilities for victim states to receive remedies

We begin with an analysis of the legal framework governing each country to determine whether victim states would – *de jure* – stand any chance to get the harm suffered remedied. We first look at the victim's possibilities in traditional (trial) proceedings before addressing the rules governing settlement procedures and discussing some practical problems that arise in the context of such negotiated procedures concerning corporate foreign bribery.

5.1 In traditional criminal procedures

5.1.1 Switzerland. In Switzerland, a private claimant – a person who suffered harm as a result of the crime in question – has to expressly declare that he/she wishes to participate in the criminal proceedings as a criminal or civil claimant (Article 118 CH-CCP). If admitted as a plaintiff party, a victim state would get a whole bundle of procedural rights, such as the right to be heard which includes the right to inspect case documents, to participate in procedural acts, to request that further evidence be taken (Article 107 CH-CCP) or seek an appellate remedy (Article 382 (1) CH-CCP).

However, the admission as a plaintiff party is additionally conditioned by the following two requirements:

(1) the injured person has to be recognised as the holder of the legal good specifically protected by the criminal provision in question (FSC, 20/09/2012: par. 2.2ff.; FSC, 03/09/2015: par. 2.3.4; FCC, 20/03/2012, par. 2.1; Mazzucchelli and Postizzi, 2014: Article 115, par. 21, footnote 45; Echle, 2018, p. 19f); and

(2) direct causality must be demonstrated between the offence prosecuted and the injury of the legal good specifically protected by the criminal provision in question or, in the case of endangerment offences, the infringement must appear at least probable (FSC, 01/09/2014: par. 3.2; FSC, 19/10/2015: par. 2.3.1; FSC, 20/09/2012: par. 2; FCC 20/03/2012: par. 2.3.1/a).

However, both requirements are rooted in the traditional theory of criminalisation according to which the function of criminal law is the protection of legal goods ("*Rechtsgüter*") – a theory issuing from German criminal law theory, but with a widespread influence not only on Switzerland, but on many other European civil law countries such as Spain, Portugal, Croatia, Greece, Turkey, Austria, Finland and Sweden, but as well Israel and the Spanish- and Portuguese-speaking countries of Latin America, or Asian countries like Taiwan, South Korea and Japan (Dubber, 2005, p. 2, 27). According to this theory, for each criminal law provision, specific legal goods must be defined, as a criminal law provision not protecting such a legal good would be illegitimate. These legal goods subsequently determine the circle of potential plaintiff parties because the constitution as a plaintiff party is only possible with regard to *individual* legal goods as opposed to *collective* legal goods (FSC, 08/09/2003; Cassani, 2001, pp. 393–415, 394; Mazzucchelli and Postizzi, 2014: Article 118, par. 45).

With regard to the legal provision in our context (Article 322^{septies} CH-CC defining the offence of bribery of foreign public officials), it is worth mentioning that governmental statements accompanying its introduction into the Swiss criminal code were referring to the globalisation of markets and the danger of distortion of competition on the one hand (Federal Department of Justice, 2014, p. 3436), and, on the other hand, to the "objectivity and impartiality of the administrative actions" of the foreign state (Federal Department of Justice, 1999, p. 5071f; Perrin, 2008, p. 95ff). We therefore must conclude that from a theoretical point of view, there is no doubt: the criminal provision of bribery of foreign public officials protects purely collective legal goods. This is – in theory – a major constraint to admitting victim states or any other individual as plaintiff party in proceedings concerning this offence. Indeed, this would only be possible if the 'legal good-concept' related to Article 322^{septies} CH-CC would be widened in the sense of including the protection of not only collective legal goods, but at least both, collective and individual legal goods (e.g. the impartiality of the public administration and the assets of the foreign state).

A comprehensive analysis of the relevant Swiss case law shows that the practice of the Federal Supreme Court and the Federal Criminal Court has in fact evolved in this direction despite the theoretical constraints. Both courts have repeatedly ruled that the circle of protected legal goods of the criminal law provision on foreign bribery also includes the assets of the foreign state damaged by acts of corruption (FSC, 03/11/2009: par. 2.3.2; FCC 20/03/2012; FCC, 30/04/2012: par. 5.3: "In particular, the acts of corruption under investigation would have enabled the perpetrators to obtain pecuniary advantages to the detriment of the State [. . .]." [9]; FCC, 29/07/2013: par. 4.15; Lenz and Mäder, 2013, p. 37). Moreover, both courts have even maintained that a collective legal good in itself may just as well justify the constitution as a plaintiff of a victim state in criminal proceedings for corruption (FSC, non-published judgement 17/10/2017: par. 3; FCC, 29/07/2013: par. 4.13ff (Banque Mondiale); FCC, 07/08/2018: par. 4.3 b et par. 4.5).

Also on the second requirement for admission as a plaintiff party, Swiss courts have adopted a more lenient view. Whether or not there has been a *direct* violation of the individual legal good depends on whether Article 322^{septies} CH-CC is classified as an offence causing a result as opposed to an offence representing a mere danger. Swiss criminal law, as German criminal law does as well, distinguishes between concrete and abstract dangerousness offences. The danger is concrete whenever an actual endangerment exists. On the contrary, abstract endangerment offences criminalise a behaviour whether or not that danger was in fact created by the particular conduct in question (Dubber, 2005, p. 33). In the latter case, no direct violation of an individual legal good can result, and therefore no individual can be considered a private claimant. Most interestingly, despite the clear classification of bribery of foreign public officials as an abstract dangerousness offence (Echle, 2018, p. 19f; Perrin, 2017: Article 322^{septies}, par. 9), Swiss courts have opened the way to retain a directly caused injury even in the case of an abstract endangerment offence and have recognised victim states as plaintiff parties supposing a direct injury resulting from the transnational corruption offence (FSC, non-published judgement 03/11/2010: par. 2.3.2; FCC, 20/03/2012: par. 2.3.1a; FCC, 22/01/2013: par. 2.3; FCC, 12/122012: par. 3.2; FCC, 29/07/2013: par. 4.15; Garbarski, 2013, p. 126).

Summarising the pertinent case law, we conclude that, according to Swiss courts and contrary to legal theory, a state (or international organisation) can be recognised as directly harmed by acts of corruption (FCC, 29/07/2013) and that the approval of the injured party's status may be based, on the one hand, on the violation of the state's patrimony as an individual legal good. On the other hand, even the infringement of collective legal goods of the foreign state has also been accepted as a ground to attribute the required status as a plaintiff party. The courts admitted, moreover, that it is generally not even necessary to provide conclusive evidence of the infringement: probability of injury is entirely sufficient or not even required at all in the hypothesis of the abstract dangerousness offence classification.

5.1.2 France. French law does not provide for a generic definition of the term "victim". Instead, victims are only recognised as "*partie civile*" (Meyer and Romanova, 2014, p. 36f).

According to Article 2 F-CCP, "civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage directly caused by the offence" [10]. The victim thus has the right to file a complaint with constitution as civil party ("plainte avec constitution de partie civile"), submitted directly to the investigating judge. The investigating judge can transmit the claim to the prosecutor, but is not obliged to. The victim can appeal the decisions of the investigating judge not to take the investigation forward ("refus d'informer") or to dismiss the charges ("non-lieu") before the instruction chamber (Meyer and Romanova, 2014, pp. 38–39).

Civil parties have the right to restitution of seized property or to compensation for damages (Article 420–1 F-CCP in conjunction with Article 2 F-CCP) – even without requesting it. Article 41–1 F-CCP lists a series of measures the prosecutor can take if it appears to him/her that such a measure may "secure reparation for the damage suffered by the victim". Among these measures are "a request to the author of the acts to repair the damage resulting from such acts" or the order of a mediation – which could bring the offender to agree on compensation. Thus, the victim state of a foreign bribery offence would have to become a civil party in the French criminal proceedings to receive one of the available forms of remedies. Nothing in the French code of criminal procedure excludes that states, or even foreign states, could constitute themselves as civil parties. And indeed, although French legal theory is similar to Swiss legal theory in that corruption offences

protect public "values", courts have admitted private civil parties that claim individual remedies during criminal proceedings (Lepage *et al.*, 2018, p. 195).

5.1.3 England and Wales. Contrary to civil law jurisdictions, in common-law jurisdictions, victims cannot claim a right of plaintiff or civil party in criminal proceedings. The reason is that the participation of the victim in the criminal procedure is contrary to their adversarial nature opposing the offender and the prosecutor (Rahman, 2020, p. 10). Victim states nevertheless have the possibility to receive remedies for the harm suffered in the context of criminal proceedings. There are two possibilities: under the Powers of Criminal Courts (Sentencing) Act 2000, the court can order compensation for personal injury, loss, or damage during the sentencing stage (Section 130 (4) Powers of Criminal Courts (Sentencing) Act 2000). In fact, if the court refrains from passing a compensation order, this must be justified (Section 130 (3) Powers of Criminal Courts (Sentencing) Act 2000), indicating a strong presumption for such an order. The amount of compensation must be "appropriate", with an assessment being made on the basis of submissions from both the defendant and the prosecutor (Section 130 (4) Powers of Criminal Courts (Sentencing) Act 2000). In any case, to pass a compensation order, the court must know the identity of the victim that the loss resulted from the offence, and the quantum of the loss (SFO website; and Hickey and Can, 2019, 17). The victim and the quantum must be either established by evidence or agreed with the offender (SFO website, with reference to Vivian [1979] 1 All ER 48).

The court can make – in addition to that or alternatively – a confiscation order under Section 6 of the Proceeds of Crime Act 2002 following a conviction, the main condition is that the convicted person has "benefitted" from a general "criminal lifestyle" or specific "criminal conduct" (Section 6 (4) and (5) Proceeds of Crime Act 2002). The recoverable amount is an amount equal to the defendant's benefit from the conduct concerned (Section 7 Proceeds of Crime Act 2002). Normally, if a confiscation order is made, the payments made by the defendant are shared between the Home Office, Her Majesty's Courts and Tribunals Service, the prosecutor and investigator as part of the Asset Recovery Incentivisation Scheme [11] (SFO, 2021). Where the victim is a foreign person or state, whether the proceeds of crime will be returned to that country is evaluated on a case-by-case basis (SFO, 2021). Consideration should be given to seeking an agreement with government partners that funds received under the confiscation order be paid in lieu of compensation to that victim. This will, however, be an entirely voluntary decision on the part of the Government of the UK and the relevant departments (SFO, 2021).

5.1.4 Summary. The analysis shows that – *de jure* – victim states could receive remedies for the harm suffered in all three countries, but for different reasons: while in Switzerland, legal theory would exclude their inclusion in criminal proceedings as plaintiff parties, courts rule in their favour on this matter. In France, foreign states may apply for remedies in their capacity as civil parties. In England, courts must consider how the victim states can be compensated for the damage suffered.

5.2 In settlement proceedings

In all three countries, in principle, the choice of the procedure should not prejudice the protection of the interests of the injured parties. Theoretically, the constitution as a plaintiff or civil party in a settlement procedure would allow victim states to assert all the rights of the parties and to plead for the allocation of tort assets in both France and Switzerland. And indeed, in both countries, the right of the victim as a plaintiff exists irrespective of whether the procedure is in-court or out-of-court (Galeazzi, 2016, p. 81). Also in England, the principles governing compensation or confiscation orders apply equally to cases resolved by

conviction, a deferred prosecution agreement and by non-conviction based asset recovery (SFO, 2021).

In Switzerland, the constitution as a plaintiff party remains possible until the end of the preliminary proceedings (Article 118 (3) CH-CCP; Federal Criminal Court April 24, 2012 TPF BB.2011.142 par. 2.3. with regard to the simplified procedure), and in France, even until the beginning of the first hearing (Article 418 F-CCP). It would be the responsibility of the prosecutor to ensure that the injured parties are informed of their right to constitute a plaintiff (Switzerland: Article 118 (4) CH-CCP; Jeanneret and Kuhn, 2018: 560 N 17059; Moreillon and Parein-Reymond, 2016: Article 359, par. 8a.; France: Ministère de la Cohésion des Territoires et des Relations avec les Collectivités Territoriales, 2019, p. 45).

However, not actively informing victims does not apparently entail any sanctions (Mazzucchelli and Postizzi, 2014: Article 118, par. 12°), as the failure to grant participation rights does not seem to affect the validity of procedural agreements in view of concluding a summary penalty order or a PIJA. As far as can be ascertained, in particular from the analysis of Swiss summary penalty orders and French PIJAs (Section 4), there is in fact no well-established practice of informing victim states of settlement procedures under way when prosecuting companies for foreign bribery. It cannot be ruled out, therefore, that foreign states adversely affected by the acts of corruption under investigation in France and Switzerland may never even learn of the existence of the investigation, or at least not in time.

One reason for the systematic failure to inform victim states of the upcoming conclusion of an agreement between the prosecutor and the defendant company could be that the participation of victim states is in practice clearly a disturbing factor to prosecutors and defendants: their inclusion in the circle of parties to the proceedings often runs counter to the logic of negotiated criminal justice, whose primary objective is in fact to reach a consensual and discreet agreement between the prosecutor and the offending company as quickly as possible (Capus, 2013, p. 410f). The more interests that have to be taken into account, the more difficult it is to negotiate a compromise acceptable to all parties with regard to the presentation of the facts and the financial consequences (Scholl, 2012, p. 214). For instance, in accordance with Article 360 CH-CCP, indictments in the simplified procedure require the consent of all parties. Hence, a single plaintiff party could cause the implementation of the simplified procedure to fail and force the conduct of an ordinary procedure. Such a veto right does not exist in summary penalty proceedings, where the role of the plaintiff party is not so strong. This explains the decision of prosecutors to combine the two special procedures (Section 3).

The *de facto* veto rights of victim states in negotiated settlements would also adversely affect the company's willingness to co-operate and voluntarily submit to criminal proceedings and therefore decrease the number of self-reports. On the other hand, it can be beneficial for companies to combine settlements in as many countries as possible that claim jurisdiction as states will often take account of damages already paid in foreign procedures [12]. Nevertheless, the incentive to settle with victim states is low – compared to the adverse effects described above – as it is often not the victim states who have the greatest leverage in terms of punishment over the defendant company.

Finally, in the case of states where corruption is widespread, another problem arises: the offences under criminal investigation are usually political in nature and involve officials up to the highest levels of government in the injured state. In such cases, it will often be almost impossible for the prosecutor to determine whether the political influence of allegedly corrupt foreign officials still lasts at the time of the criminal proceedings. However, where the political influence of the actors involved persist, it is not excluded that the constitution of

the victim state as a party in the Swiss or French proceedings may be used as a platform for collusion, abuse of rights and delaying tactics.

In England, alongside the court's obligation to address compensation for victims, the DPA Code of Practice states in paragraph 7.2 that "[i]t is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation". Nevertheless, until now, only one victim state has received compensation in the context of a deferred prosecution agreement [13]. The reason seems to be the following: judges assessing deferred prosecution agreements have consistently held that compensation is only possible in "clear and simple cases", also described as "simple, straightforward" (both: Judgment approving the DPA with Rolls-Royce, 17/01/2017: par. 81) [14]. It has been clarified that "there is no jurisdiction to make an order where there are real issues as to whether those to benefit have suffered any, and if so, what loss" (Judgment approving the DPA with Rolls-Royce, 17/01/2017: par. 81, referring to R v Ben Stapylton [2012] EWCA Crim 728 and R. v Horsham Justices Ex p. Richards (1985) 7 Cr. App. R. (S.) 158, 993). In several cases, compensation was not sought by the Serious Fraud Office (SFO) – and this was confirmed by the judges – for reasons of "factual complexity of the totality of the allegations in the Statement of Facts, including the use of intermediaries", which "makes quantifying bribes actually paid impossible" (Judgment approving the DPA with Rolls-Royce, 17/01/2017: par. 83; Judgment approving the DPA with Airbus SE, 31/01/2020: par. 96). This jurisprudence seems to be contrary to the clear legal obligation to seek compensation on behalf of the victim and opens the door for dismissing this task all too fast.

It becomes clear that despite the fact that in all three countries, victim states would have the right to be considered for remedies also in negotiated settlement procedures, practical problems still hinder their inclusion. We will now turn to a discussion of these problems and make suggestions how to overcome them.

6. Remedying the lack of inclusion of victim states

We have explained (Section 3) that in all three countries under examination here, the legal possibilities to address corporate foreign bribery were extended to include non-trial negotiated settlement procedures in the past decade: in Switzerland, the summary penalty order was introduced with the revision of the code of criminal procedure in 2012, in England, deferred prosecution agreements were made available in 2014, and the public interest judicial agreement became part of the French legal order in 2016. Their application has now become the norm in respect of corporate foreign bribery. Many believe that this is also a chance for victim states suffering from the consequences of foreign corruption to receive remedies in a swifter way than through trial proceedings.

However, our empirical (Section 4) and legal analyses (Section 5) show that victim states of corporate foreign bribery offences have in fact little chances – even if not *de jure*, but *de facto* – to receive remedies in non-trial proceedings in Switzerland, France or England.

This is even more astonishing as recent political initiatives both, at the international and at the national level in England and France, suggest that states aim at improving their legal framework and policies on this matter. While in fact, they would simply implement their obligations, stemming from the United Nations Convention against Corruption which all three countries ratified more than a decade ago (France in 2005, UK in 2006 and Switzerland in 2009), to return the seeds of corruption, things started to move quicker rather recently.

In 2016, the UK hosted the London Anti-Corruption Summit, which brought together governments, as well as representatives from the civil society and the business world (Government of the United Kingdom, 2021). At the summit, the Global Declaration against Corruption was signed and more than 600 country-specific "summit commitments" were

entered into (Transparency International, 2016). The UK committed to consult on "stronger asset recovery legislation, including non-conviction based confiscation powers [. . .]." The country endorses "guidelines for the transparent and accountable management of returned stolen assets, and common principles governing the payment of compensation to the countries affected" (Government of the United Kingdom, 2016, p. 2). The 2019 Asset Recovery Action Plan of the UK Home Office endorses the commitment to "ensuring the return of corruptly recovered assets to victim states" (Home Office, 2019, p. 19). The UK Anti-Corruption Strategy 2017–2022 committed to reduce the impact of corruption where it takes place, including redress from injustice caused by corruption and supporting international processes for asset return and compensation. As a result, the "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases" were agreed by the Serious Fraud Office, the National Crime Agency, and the Crown Prosecution Service and published in June 2018. These state, for instance, that "[i]f compensation is appropriate," "whatever legal mechanisms" will be used to secure it (Principle 2). Collaboration with other government authorities will be sought to: identify who should be regarded as potential victims overseas (including states); assess the case for compensation; obtain evidence which may include statements in support of compensation claims; ensure the process for the payment of compensation is transparent, accountable and fair; and to identify a suitable means by which compensation can be paid to avoid the risk of further corruption (Principle 3). The Serious Fraud Office writes on its website that it is "[t]he role of the SFO in the context of these principles [. . .] to ensure that the question of compensation or asset repatriation is considered in every case and use all available legal mechanisms to secure it whenever appropriate" (SFO, 2021).

However, how this obligation is fulfilled depends on the individual case at hand. In June the SFO (2018) reported that they had secured £49.2m of compensation for overseas victims in five cases since 2014, including one through a deferred prosecution agreement (SFO, 2021). While this number of cases is arguably low, it is even more telling that since then, remedies were not sought in any other DPA procedure. Thus, despite the repeated commitment by UK authorities, practice proves to be more challenging.

France committed, among other things, to strengthening its asset recovery legislation at the 2016 London Anti-Corruption Summit (Government of France, 2016, p. 2). In 2019, two deputies of the National Assembly of France submitted a report entitled "Invest to better seize, confiscate to better sanction" (Saint-Martin and Warsmann, 2019), in which the authors recommend implementing a pragmatic legislative, budgetary and legislative mechanism for the restitution of assets confiscated in cases of corruption and other similar offences (recommendation 34). On the basis of this report, a new law was adopted in February 2021 foreseeing the restitution of seeds from foreign bribery (and similar) offences to the population of the victim state in the context of French development policies (Assemblée Nationale, 2021).

The authors of this new law did not choose to strengthen victim states' access to domestic proceedings by, for instance, introducing a clear legal basis for their participation as the injured party in corruption offences. Instead, a surrogate solution via development aid was adopted. This is surprising in view of the fact that it is legally possible for foreign states to participate in criminal proceedings (whether trial or PIJA) and that the explanatory report accompanying the proposal for the new law even explicitly refers to this possibility.

In Switzerland, despite the fact that courts have opened the door for compensating victim states in the context of criminal proceedings, there is currently no discussion on introducing guidelines on how to inform and include victim states, let alone a clear legal basis for this.

The fact that France seems to be making a step back in terms of rights for victim states to receive remedies in the context of criminal proceedings for corporate foreign bribery is little encouraging for the situation for victim states in Switzerland – since the main causes for excluding them from domestic proceedings in Switzerland also exist in France. Our analysis of the Swiss case reveals that, in this country, obstacles to including victim states are related to theoretical concepts, such as the theory of the legal good, which was obviously not developed bearing in mind corporate foreign bribery offences damaging states. Other civil law countries – that follow the harm to the legal good principle – will have similar fundamental conceptual problems to accept victim states as plaintiff parties for foreign bribery offences. Even if domestic actors find ways to overcome these obstacles, such solutions will remain ad-hoc and their success depends heavily on the specific circumstances of the individual case. Also, the mere introduction of new principles and commitments will not solve the problems.

At the same time, the case study of England demonstrates that even when the legal problem of the lack of standing of victim states as constituted plaintiff parties can be ignored (as in England, the obligation is upon the prosecutor to seek remedies for the victim), practical problems remain. Indeed, as long as no common rule is developed, domestic judiciaries will struggle defining the main parameters of "how to identify a victim state" and of "how to evaluate the amount of damage caused" with regard to foreign bribery criminality.

Moreover, as we have previously pointed out, a well-established practice of informing victim states of settlement procedures underway when prosecuting companies for foreign bribery is lacking. This lack will continue to exist as long as the participation of victim states is perceived to be a disturbing factor to prosecutors and defendants as it runs counter to the logic of negotiated criminal justice aiming at reaching a consensual and discreet agreement between the prosecutor and the offending company as quickly as possible. These adverse effects on the attractiveness of including victim states are particularly important as they influence the decision of corporations to report themselves in a particular country – and thus the competition between states on who settles first (and thus can impose the heaviest penalty). Competition in this regard would decrease if the same rules were applied in every state.

This is why we think that only concrete guidelines formulated on the basis of Chapter V ("Asset recovery") of the UN Convention against Corruption could remedy the current situation of exclusion of victim states. At the very least, these guidelines would need to include guidance on how to identify the victim state, the instruction for judicial authorities to inform victim states about ongoing settlement procedures, as well as advice on how to determine the damage and the remedy. They could also guide judicial authorities on how to recognise those victim states whose structures are corrupt to a point where there is a risk that returned money would be lost again. Orientation in this regard could be provided by classifications of the World Bank. At the same time, guidelines should suggest appropriate measures for restitution to those victim states.

International guidelines would not only reduce the competition between states to settle first and relieve domestic courts and prosecution authorities of the burden of finding appropriate ways to deal with each individual case. They could also work as a trigger for countries like France and Switzerland to include in their legal framework a clear legal basis for informing and including victim states in an appropriate manner within criminal procedures.

7. Conclusion

In recent years, several European states have inserted in their criminal law framework the possibility for prosecution authorities to settle cases for foreign bribery of companies

instead of bringing these cases to court. The advantages of these procedures both for the prosecution and the defence are obvious: first, they are more efficient than trial proceedings as they often include an agreement about the facts and responsibility of the defendant instead of a full investigation with evidence that would stand court scrutiny. This is not only advantageous for the prosecution who is (partially) relieved of often complicated and long investigations but also for the defendant who can (partially) influence what criminal conduct will be considered in the settlement. At the same time, settlement procedures are held in private, with only the final settlement being published, which is less damaging to the reputation of the defendant corporation than a long court trial which gives plenty to opportunity for press coverage of the misconduct of the company in question.

Also Switzerland, France and England have introduced such settlement procedures. In Switzerland, prosecutors have the possibility to dismiss a case but at the same time order the payment of compensation for the victim. But more often, with regard to corporate foreign bribery, prosecutors start a so-called simplified procedure which foresees an agreement between the prosecutor and the defendant and very limited court oversight and terminate the procedure with a summary penalty order which avoids court oversight altogether (unless the defendant objects the order). In France, prosecutors can conclude a public interest judicial agreement with legal persons with regard to corruption and similar offences. A PIJA can foresee a series of requirements to be met by the defendant within a certain period of time. If the prosecutor is, at the end of this times period, satisfied with the conduct of the defendant, no further prosecution will be initiated and the defendant will not be considered convicted. This is also how deferred prosecution agreements work in England and Wales.

It was considered that these procedures would be an opportunity also for victim states of corporate foreign bribery to receive compensation for the harm they suffered in a swift way. After all, also victim states would profit from the efficiency and prospects of success of these procedures. The objective of this contribution was to find out whether indeed the possibilities of victim states to receive some kind of remediation have changed.

Our analysis of a series of Swiss dismissal and summary penalty orders and of all public French PIJAs and English DPAs shows that this is not the case. In fact, the victim of the crime is not even mentioned in most of the settlements. In a few French PIJAs, the injured party participated as a plaintiff and received compensation for the harm suffered. None of these procedures concerned corporate foreign bribery though. No plaintiff parties participated in any of the Swiss procedures, although this is legally possible. The defendant was ordered to pay compensation in one of the Swiss procedures, however, the addressee of the money was not the victim but a charity organisation. Of all Swiss, French and English procedures analysed, only one victim state received compensation – namely, in the context of an English DPA.

The reasons for this are both of legal and practical nature. In Switzerland, strictly abiding by traditional legal theory would preclude victim states from participating in proceedings for corporate foreign bribery. Similar reasons might apply in France. However, Swiss courts have opened up ways to include victim states – this has, however, not yet been taken over in Swiss prosecutors' practice in settlement procedures. At least one of the reasons might be that welcoming yet another party at the negotiation table can be detrimental to the success of this negotiation and thus to the interests of both the prosecutor and the defendant. In England and Wales, the problem lies more at the practical implementation of the inclusion of victim states, namely, that judicial authorities fail to recognise the victim and the harm and thus the appropriate compensation.

To overcome these obstacles, we propose the drafting of guidelines on the basis of states' obligations from the UN Convention against Corruption. They could be the trigger for states to introduce legal bases for informing and including victim states in settlement procedures and guide them on how to identify the victim and the harm of corporate foreign bribery.

Further research might develop open questions that are related to the integration of victim states as parties to settlements (i.e. with regard to information sharing and the risk of circumvention of the mutual legal assistance setting, or with regard to the potential loss of state immunity when intervening as a party in settlements). In addition, contributions regarding the parameters for the identification of the victim, harm and the compensation would be welcome.

Notes

1. By remediation, we mean any sort of compensation that victims might receive in different legal orders and through different judicial acts, such as confiscation, disgorgement of profits, fines, compensation, reparation or contractual restitution (for an overview, see OECD-StAR, 2012: 15ff.). We refer to the specific domestic terms whenever necessary.
2. 'Stolen assets' is used as a synonym of 'proceeds of corruption'.
3. In Switzerland, this concerns Art. 322^{septies} of the Swiss criminal code (Bribery of foreign public officials), in France: Art. 435-3 of the French criminal code (Corruption of a foreign public agent), in the UK: s. 6 of the Foreign Bribery Act 2010 (Bribery of foreign public officials).
4. The authority responsible for investigating and prosecuting economic criminality is the Serious Fraud Office (SFO). Schedule 17 of the Crime and Courts Act 2013, which gives the SFO the authority to conclude deferred prosecution agreements (DPAs) with companies suspected of corruption, is only applicable in England and Wales. Thus, even though the SFO has jurisdiction over Northern Ireland, it will be impossible to conclude DPAs concerning crimes connected to that territory. The SFO does not have jurisdiction over Scotland. For simplicity reasons, in the following, we will refer to "England" when meaning "England and Wales."
5. We do not consider plea agreements for the practical reason that the four plea agreements that have been concluded by the SFO with companies are not publicly available and were not provided to the authors by the SFO upon request.
6. Here: www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public and here: www.sfo.gov.uk/our-cases/ (last accessed 14/04/2021). As mentioned above (footnote 5), the four plea agreements concluded for foreign bribery with companies are not publicly accessible.
7. April 2021.
8. Contrary to the rules in the USA, however, English courts exercise control over the conclusion and the content of DPAs. In particular, the Crown Court has to verify whether the DPA is in the interests of justice and whether the proposed terms are fair, reasonable and proportionate (see paragraph 7 and 8 of Schedule 17 of the 2013 Crime and Courts Act).
9. In the original: *[N]otamment les actes de corruption sous enquête auraient permis à leurs auteurs d'obtenir des avantages pécuniaires au détriment de l'Etat* [. . .].
10. In the original: *L'action civile en réparation du dommage causé par un crime, un délit ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction.*
11. The Asset Recovery Incentivisation Scheme was launched in 2006. The objective of the Scheme is to provide operational partners with incentives to pursue asset recovery as a contribution to the overall aims of cutting crime and delivering justice. It divides net receipts from asset recovery between the Home Office and operational partners (Home Office, 2015, p. 2).

12. See, for instance, the PIJA with with Société Générale (Section 4), where the French prosecutor took account of the compensation paid to the victim in the context of proceedings in England.
13. At least of those DPAs that are public.
14. As proof, the DPA with Rolls Royce refers to case law from decades ago: R v Michael Brian Kneeshaw (1974) 58 Cr App R 439 ("clear and simple cases") and R v Kenneth Donovan (1981) 3 Cr App R (S) 192 ("simple, straightforward case").

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