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Reporting of the results of internal investigations – main types of cooperation between companies and prosecutorial authorities in the light of the threats to individuals in criminal proceedings

Reportando os resultados das investigações internas: principais modos de cooperação entre empresas e autoridades investigativas em relação a persecução de cidadãos no processo penal

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ABSTRACT: This study examines whether internal investigations conducted as a result of cooperation between the company and prosecutors may conflict with the rights of individuals in criminal proceedings. It demonstrates how the post-Enron era emphasized the importance of internal investigations as a component of corporate criminal compliance systems worldwide, leading to more frequent cooperation between companies and prosecutors in launching internal investigations. The purpose of this publication is to show that they have led to abuse against individuals, who, because internal investigations are private and largely unregulated, do not have the same guarantees as in criminal proceedings. This article aims to critically evaluate the regulations that have been introduced in this area and to demonstrate the need for legislative changes in the countries which allow such cooperation but have not considered the risks that arise from the nature of internal investigations.

KEYWORDS: white-collar crimes; internal investigations; pretrial diversion agreements; self-incrimination.

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RESUMO: *Este estudo analisa se as investigações internas realizadas como resultado da cooperação entre a empresa e o Ministério Público podem conflitar com os direitos dos indivíduos no processo penal. Demonstra-se como a era pós-Enron enfatizou a importância das investigações internas como um componente dos sistemas corporativos de compliance criminal em todo o mundo, levando a uma cooperação mais frequente entre empresas e promotores na realização de investigações internas. O objetivo deste artigo é demonstrar que isso ocasionou abusos contra indivíduos, que, por serem investigações internas privadas e em grande parte não regulamentadas, não têm as mesmas garantias que em processos criminais. Este artigo visa a avaliar criticamente as regulamentações que foram introduzidas nesta área e demonstrar a necessidade de mudanças legislativas nos países que permitem essa cooperação, mas não consideraram os riscos decorrentes da natureza das investigações internas.*

PALAVRAS-CHAVE: *crimes de colarinho branco; investigações internas; acordos pré-processuais; autoincriminação.*

INTRODUCTION

In February 2002, the board of directors of Enron Corporation - the company that perpetrated one of the largest accounting frauds in history - released the results of its private internal investigation, commonly known as the Powers Report, named after the head of the special investigation committee, William Powers Jr. The committee reviewed more than 430,000 pages of documents and interviewed more than 65 people, including Enron executives, employees, and some outside professional advisors, who subsequently helped the government identify the source and details of the crimes committed². Michael E. Anderson, then supervising FBI special agent who led the Enron Task Force in Houston, summed up the commission's work unambiguously: "That was a gold mine"³.

² The Report of the Special Investigation Committee of the Board of Directors of Enron Corporation issued on 1 February 2002, available at: <https://www.sec.gov/Archives/edgar/data/1024401/000090951802000089/big.txt>, accessed on 19 March 2023

³ The United States Federal Bureau of Investigation website, available at: <https://www.fbi.gov/history/famous-cases/enron>, accessed on 19 March 2023

Shortly thereafter, the United States Congress enacted one of the most important pieces of corporate compliance legislation, the Sarbanes-Oxley Act of 2002, which made internal investigations an integral part of public companies' corporate governance systems⁴. Additionally, the United States Department of Justice (DOJ) updated its guidelines for prosecuting corporations in a document called the Thompson Memorandum, which stated that relevant factors in determining whether to charge a corporation may be timely and voluntary disclosure of wrongdoing and willingness to cooperate with the government's investigation. Then, according to the DOJ guidelines, in gauging the extent of the corporation's cooperation, the prosecutor was to consider, inter alia, the corporation's willingness to disclose the complete results of its internal investigation⁵.

It is important to emphasize at the outset that the reach of the Sarbanes-Oxley Act of 2002 in terms of its impact on corporate law reform extended beyond the borders of the United States. As in other matters related to the doctrine of corporate criminal liability, there has also been a growing trend in the post-Enron era to implement the United States solutions in other legal systems, with the proviso, of course, that they are adapted to the specific systems of the countries that have chosen to do so⁶.

At the time when the term "internal investigation" was beginning to be incorporated into corporate criminal compliance systems and used

⁴ BENNET Robert S., KRIEGER Alan, RAUGH Carl S., WALKER Charles F., *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, Chicago: The Business Lawyer, 2006, p. 55-88, available at: <https://www.jstor.org/stable/40688411>, accessed on 19 March 2023; MISSAL Michael., Fishman Ed, OCHS, Brian, DUBILL Rebecca Kline "Conducting Corporate Criminal Investigations, *International Journal of Disclosure and Governance*, 2007, p. 297-308, available at: <https://doi.org/10.1057/palgrave.jdg.2050065>, accessed on 19 March 2023

⁵ KEEFE Brendan J., *Revisions of the Thompson Memorandum and Avoiding the Stein Problems: A Review of the Federal Policy on the Prosecution of Business Organizations Note*, Connecticut: Connecticut Law Review, 2009, p. 273-318, available at: https://opencommons.uconn.edu/law_review/48, accessed on 19 March 2023

⁶ DAVIES, Paul L., 'Enron and Corporate Law Reform in the UK and the European Community', in HOPT Klaus J. and others, *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*, Oxford, Oxford Academic, 2012, available at: <https://doi.org/10.1093/acprof:oso/9780199290703.003.0009>, accessed on 19 Mar 2023.

to set standards of integrity around the world, few foresaw that making the company's situation dependent on cooperation with the law enforcement authorities in disclosing the results of its corporate internal investigation could open the door to abuse. Only a few years after the details of the major economic scandals emerged, it was already clear - above all as a result of the well-known *Stein vs. the United States* case - that the actions of the government, through the hands of the company conducting internal investigations, had led to the violation of the fundamental rights of individuals in criminal proceedings⁷.

This would not be so controversial were it not for the fact that corporate internal investigations are private, unregulated, largely unchecked by legislation, and not covered by the rules of criminal procedure that protect individuals from governmental overreach⁸. They are a multimillion-dollar business in which control is largely in the hands of a company that can, in certain cases, carry out the orders of the government⁹. Thus, in a situation where internal investigations are part of a procedure that is not covered by any of the safeguards ensuring respect for the fundamental procedural rights of the person, such as the prohibition on asking the person interviewed questions suggesting an answer or influencing the statements of the person being interviewed by using coercion or unlawful threats, the procedural position of the individuals is fundamentally altered.

This article deals with the question of reporting the findings of an internal investigation to the government in connection with the cooperation between a company and the law enforcement authorities in a way that respects the procedural rights of individuals (possible future defendants) in criminal proceedings. For this purpose, we will describe the main cooperation legal constructions, as well as the directly related problems that concern the privilege against self-incrimination in criminal

⁷ *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006)

⁸ GRIFFIN Lisa Kern, *Compelled Cooperation and the New Corporate Criminal Procedure*, New York: New York University Law Review, 2007, p.311-382, available at: <https://doi.org/10.2307/20454705>, accessed on 19 March 2023

⁹ GREEN Bruce A., PROGDOR Ellen S., *Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents*, Boston: Boston College Law Review, 2013, p.73-126, available at: https://ir.lawnet.fordham.edu/faculty_scholarship/579/, accessed on 19 March 2023

proceedings. The analysis is based on model legal solutions initiated in the United States and subsequently modified and gradually implemented in the European countries.

1. SELF-DISCLOSURE

An internal investigation can be initiated for a variety of reasons but is typically triggered by allegations from an employee whistleblower, an unsolicited inquiry from a government investigator, the results of an external audit, or the company's assessment of its compliance program. Regardless of the jurisdiction, the guiding principles for conducting an internal investigation are broadly similar: in most cases, the company receives information, determines the nature of activities involved to develop the appropriate response and the scope of the internal investigation, and ultimately considers the evidence in deciding whether a full government investigation is warranted¹⁰. The potential disclosure of details of internal investigations to the relevant authorities can be voluntary, usually in the hope of receiving lenient treatment for early disclosure and cooperation, or mandatory, where an applicable law or regulation imposes an independent duty to disclose, or the failure to disclose information evidencing criminal conduct within the company is itself an independent crime. Either way, sooner or later every company must make a fundamental decision that boils down to one question - whether to disclose the details of conducted proceedings and detected misconduct.

In general, therefore, the company may benefit from being able to communicate the results of an internal investigation. In many countries, more on which will follow below, disclosing the results of an internal investigation to the government can, in certain circumstances, result in leniency and the prevention of criminal proceedings¹¹. In addition, an

¹⁰ TSAO Leo R., KAHN Daniel S., SOLTES Eugene F., *Corporate Internal Investigations and Prosecutions*, Aspen Publishing, 2022

¹¹ BOUTROS Andrew., *Deferred Prosecution Agreements, Nonprosecution Agreements, and Corporate Integrity Agreements*, FUNK T. Markus, BOUTROS Andrew S. Boutros, *From Baksheesh to Bribery: Understanding the Global Fight Against Corruption and Graft*, New York, Oxford Academic, 2019, available

internal investigation may allow the company to control the information and evidence that reaches the government and is subsequently used in a potential trial¹². It is also worth noting at this point the most recent guidance addressed to the United States prosecuting authorities, dated 22 February 2023, in which the United States Department of Justice (DOJ) announced the implementation of the new United States Attorney's Offices' Voluntary Self-Disclosure Policy for corporate criminal enforcement in all 94 United States Attorneys' Offices (USAOs) across the country: "Companies that voluntarily self-disclose misconduct to the USAO according to this policy will receive resolutions under more favorable terms than if the government had learned of the misconduct through other means"¹³.

On the other hand, self-disclosure can create legal, reputational, and operational risks for the company. Report of this type of data is particularly dangerous because they can create a very detailed "road map" for government regulators, reveal the identity of wrongdoers and lead to providing incriminating evidence¹⁴. Then, even partial concealment of the details of an internal investigation may be considered commission of another type of crime, such as the offense of giving false testimony or withholding evidence¹⁵. The results of an internal investigation then become a means for law enforcement agencies to accurately identify suspects and obtain valuable information that may expose the company itself or even expand the scope of such liability.

at: <https://doi.org/10.1093/oso/9780190232399.003.0026>, accessed on 19 Mar 2023

¹² STEVENS Charles J., CHAN Winston Y. *Disclosure of Results of Internal Investigations to the Government or Other Third Parties*, available at: <https://www.gibsondunn.com/wp-content/uploads/2018/01/Stevens-Chan-Disclosure-of-Results-of-Internal-Investigations-to-the-Government-or-Other-Third-Parties-Internal-Corp-Investigations-Dec-2017.pdf>, accessed on 19 Mar 2023

¹³ <https://www.justice.gov/usao/page/file/1569586/download>

¹⁴ MISSAL Michael., Fishman Ed, OCHS, Brian, DUBILL KLINE Rebecca *Conducting Corporate Criminal Investigations*, International Journal of Disclosure and Governance, 2007, p. 297–308 available at: <https://doi.org/10.1057/palgrave.jdg.2050065>, accessed on 19 March 2023

¹⁵ TSAO Leo R., KAHN Daniel S., SOLTES Eugene F., *Corporate Internal Investigations and Prosecutions*, Aspen Publishing, 2022

However, it is not always possible for a company to keep such a profit and loss account and to make independent decisions. If the misconduct has come to the attention of the government and criminal proceedings have been initiated, it is not always possible to identify potential wrongdoing exclusively internally, conduct and undertake a controlled internal investigation, view the full scope of evidence, and possibly make an independent self-disclosure decision. This refers to those cases where the company becomes aware of the wrongdoing at a time when it is approached by law enforcement after a government investigation has started. It may include a government contact requesting the production of documents or information, the arrest of a company employee, a physical search of the company's offices, or even an indictment¹⁶. It is worth mentioning the content of the famous speech by the head of the Criminal Division of the DOJ, Assistant Attorney General Leslie Caldwell, who confirmed that the DOJ takes the time to scrutinize and evaluate the quality of a company's internal investigation, does this evaluation "through our own investigation" as well as in considering what charges to bring against a company¹⁷.

As this analysis is concerned with the rights of individuals, it is worth noting in passing that the procedural rights of companies in such situations are regulated differently in different jurisdictions. The company often has little or no choice as to whether it wishes to produce such records. In the United States, for example, corporations have no rights under the self-incrimination clause of the Fifth Amendment to the US Constitution¹⁸. The collective entity doctrine recognizes that the Fifth Amendment treats corporations and collective entities differently from individuals because corporations and collective entities do not have a Fifth Amendment privilege against self-incrimination¹⁹. If a corporation receives

¹⁶ Ibid.

¹⁷ The United States Department of Justice website, available at: <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-week-conference>, accessed on 19 March 2023

¹⁸ *Braswell v. United States*, 487 U.S. 99 (1988)

¹⁹ COLE Lance, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities - Should Business Entities Have a Fifth Amendment Privilege*, 2005 Colum. Bus. L. Rev. 1

a grand jury subpoena for documents, it must provide the government with the requested documents, even if those documents incriminate the corporation²⁰. On the other hand, in Europe, for example, this remains a controversial issue, as both the European Court of Human Rights and the Court of Justice of the European Union are increasingly coming around to the argument that corporations should already be afforded procedural rights, i.e., the right to defense and the right not to incriminate oneself.

However, once the company no longer has this degree of freedom to decide whether to disclose the results of internal investigations, it is left with the choice of either cooperating with law enforcement - if it is offered the opportunity at all - or not, which may expose it to many negative consequences. However, if a company wishes to take advantage of an internal investigation and establish cooperation with the public prosecutor then things can get even more complex.

2. PRETRIAL DIVERSION AGREEMENTS

As noted above, a key issue arises when a company faces the prospect of prosecution or conviction in a criminal case and is offered the opportunity to cooperate with the government. The most common form of cooperation, which has become a mainstay of white-collar criminal law enforcement, originating in the United States, is pretrial diversion agreements, namely Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)²¹. Some also point out the importance of Corporate Integrity Agreements (CIAs), but they are much narrower in scope - generally, CIAs are only an option in cases of healthcare fraud²².

²⁰ MoloLamken LLP website, available at: <https://www.mololamken.com/knowledge-Can-a-Corporation-Invoke-the-Fifth-Amendment-Right-Against-Self-Incrimination>, accessed on 3 June 2023

²¹ PIETH Mark, IVORY Radha, *Corporate Criminal Liability Emergence, Convergence, and Risk*, Springer, 2011

²² BOUTROS Andrew., *Deferred Prosecution Agreements, Nonprosecution Agreements, and Corporate Integrity Agreements*, FUNK T. Markus, BOUTROS Andrew S. Boutros, *From Baksheesh to Bribery: Understanding the Global Fight Against Corruption and Graft*, New York, Oxford Academic, 2019, available

To understand the issues that are further discussed in this paper, it is necessary to briefly clarify the nature and specificity of these agreements.

In their simplest form, DPAs and their related NPAs are voluntary alternatives to traditional criminal proceedings in which the defendant avoids a criminal conviction by agreeing with the prosecutor to fulfill certain obligations set forth in a detailed “contract”, the successful fulfillment of which will result in the dismissal of the charges or them not being brought in the first place²³. In the United States, these agreements are negotiated between large corporations and government entities such as the DOJ or the Securities Exchange Commission (SEC).

DPAs are a hybrid of private contracts, consent decrees, and plea agreements which offer companies an intermediate sanction that avoids some of the collateral consequences of indictment and conviction in exchange for full cooperation with the investigation and post-settlement remediation²⁴. In the case of the DPA, the prosecutor will dismiss the charges upon the successful completion of the terms of the agreement or the diversion period²⁵. NPAs are very similar to DPAs - they generally require a company to pay a fine, admit relevant facts, cooperate with the government, etc. However, in the case of an NPA, the prosecutor does not bring charges at all²⁶. Both D/NPAs are carefully negotiated

at: <https://doi.org/10.1093/oso/9780190232399.003.0026>, accessed on 19 Mar 2023

²³ GRIFFIN Lisa Kern, *Compelled Cooperation and the New Corporate Criminal Procedure*, New York: New York University Law Review, 2007, p. 311-382, available at: https://scholarship.law.duke.edu/faculty_scholarship/1919, accessed on 19 March 2023

²⁴ GRIFFIN Lisa Kern, *Inside-Out Enforcement*, in BARKOW Anthony S., and BARKOW Rachel E., *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*, New York: NYU Press Scholarship Online, 2011, available at: <https://doi.org/10.18574/nyu/9780814787038.003.0005>, accessed on 19 March 2023

²⁵ AMULIC Andrea. “Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States.” *Michigan Law Review*, , 2017, pp. 123–53. *JSTOR*, available at: <http://www.jstor.org/stable/44985612>. accessed 19 Mar. 2023

²⁶ BOUTROS Andrew., *Deferred Prosecution Agreements, Nonprosecution Agreements, and Corporate Integrity Agreements*, FUNK T. Markus, BOUTROS Andrew S. Boutros, *From Baksheesh to Bribery: Understanding the Global Fight*

and heavily legalized documents²⁷. Significant from the perspective of the issues addressed in this article is that the basic agreements usually include elements such as an obligation to cooperate in ongoing and further investigations and prosecutions, often by providing evidence that may incriminate individuals, including officers and employees of the corporation²⁸.

By entering into such an agreement, the company will act as an agent of the prosecution and share the documents collected or, at the request and under the continuing direction of the law enforcement authorities, may conduct a full internal investigation, thereby obtaining an extremely valuable body of information about the scope, nature and participants in a particular incident. However, the possibility of such an investigation often means that the company must decide whether to extend the protection to itself, thereby gaining various benefits in a criminal proceeding, or in most cases its employees or directors. After all, the corporate investigation uncovers evidence of conduct that provides a substantial basis for the government's subsequent prosecution of individuals²⁹.

Regardless of whether the company decides to sign the agreement, the creation of such legal mechanisms undoubtedly encourages abuse against individuals, both by the state and, even worse, by the company³⁰. According to the DOJ, "it is important early in the corporate investigation

Against Corruption and Graft, New York, Oxford Academic, 2019, available at: <https://doi.org/10.1093/oso/9780190232399.003.0026>, accessed on 19 March 2023

²⁷ DAVIS Frederick T., *Judicial Review of Deferred Prosecution Agreements. A comparative study*, New York: Columbia Journal of Transnational Law, 2022, p.752-828, available at: <http://dx.doi.org/10.2139/ssrn.4072985>, accessed on 19 March 2023

²⁸ The United States Department of Justice website, available at <https://www.justice.gov/opa/pr/moneygram-international-inc-agrees-extend-deferred-prosecution-agreement-forfeits-125-million>, accessed on 19 March 2023

²⁹ PATTERSON Sarah, *Co-opted Cooperators: Corporate Internal Investigations and Brady v. Maryland*, New York: *Columbia Business Law Review*, 2021, available at: <https://journals.library.columbia.edu/index.php/CBLR/article/view/8482>, accessed on 19 March 2023

³⁰ ARLEN Jennifer, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements*, *Journal of Legal Analysis*,

to identify the responsible individuals and determine the nature and extent of their misconduct. Prosecutors should not allow delays in the corporate investigation to undermine the Department's ability to pursue potentially culpable individuals"³¹.

This is particularly dangerous because internal investigations are not usually under the direct control of the judicial authorities, and they are subject to internal rules of procedure or company resolutions. Thus, there is no guarantee that those conducting internal investigations will respect the rights of individuals. They are likely to want to avoid the inconvenience of full corporate criminal liability, and if threats and terminations are the only way to do so and to obtain the identity of the perpetrator, many companies will undoubtedly choose to resort to them.

This also seems likely given the nature of the disadvantages, including financial or reputational, that a company may face from the prospect of prosecution, let alone conviction, for a criminal offense. In the case of public companies, for example, it should be noted that a criminal prosecution itself carries with it the possibility of paralysis of share price, business relationships, and market activity. The stakes of a formal charge (let alone a conviction) are simply too high for most companies to risk³². It is impossible to forget the fate of Arthur Andersen LLP, where the DOJ proposed a DPA for Arthur Andersen LLP in connection with the Enron affair, which was rejected by the firm. As a result, the corporation went bankrupt within months, nearly 30,000 people lost their jobs, and few remember that the firm was ultimately acquitted. It then became clear that the mere fact of prosecution could be a corporate death sentence.

2016, p. 191–234, available at: <https://doi.org/10.1093/jla/law007>, accessed on 19 March 2023

³¹ The United States Department of Justice website, available at: <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1000>, accessed on 19 March 2023

³² ELDRED David, *The Defense Strikes Back: United States v. Stein—A Significant First Step in Recouping the Rights and Privileges of Targeted Employees*, Aspen Publishers, 2007, available at: https://www.dorsey.com/~media/files/news-resources/publications/2007/02/the-defense-strikes-back-united-states-v-steina___files/tbls13newspdf952838defensestrikescorporationfeb1___fileattachment/defensestrikes_corporation_feb15_2007.pdf, accessed on 19 March 2023

It is easy to conclude that some companies will do anything to avoid criminal reprisals³³.

The issue of violations of individual rights as a result of a pretrial diversion agreement was analyzed in the decision of the United States District Court for the Southern District of New York in *United States v. Connolly*, issued on May 2, 2019,³⁴. In that case, the Chief Judge for the Southern District of New York, the Honorable Colleen McMahon, issued a decision that sharply criticized certain long-standing practices by which companies conduct internal corporate investigations under the direction of the government. In doing so, Judge McMahon drew a clear line between conducting an internal investigation and becoming an agent of the federal government. That line turned out to be the Fifth Amendment's protection against self-incrimination.

In the above case, one of the defendants was forced, under threat of dismissal, to submit to questioning by lawyers from the law firm Paul Weiss, who were interviewing employees on behalf of Deutsche Bank, acting on behalf of the Commodity Futures Trading Commission, as part of the concluded DPA. The defendant was briefed before the interview on the basic "Upjohn warnings" in the US system but indicated that he had been coerced into making statements that were subsequently used against him in criminal proceedings.

However, the key to the issue addressed in this paper is that Deutsche Bank did something that the DOJ could not do directly - it began each interview with a question that went something like this: do you want to provide self-incriminating evidence, or do you want to lose your job and your career? Judge McMahon assessed this as the government's practice of "routinely outsourcing its investigations of complex financial matters to the [corporate] targets of those investigations, who are in a uniquely coercive position vis-à-vis potential targets of criminal activity". It was established that the interviews conducted as

³³ DELANEY Rachel, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, Wisconsin: Marquette Law Review, 2009, available at: <https://scholarship.law.marquette.edu/mulr/vol93/iss2/19>, accessed on 19 March 2023

³⁴ *United States v. Connolly*, No. 16 CR. 0370, 2019 WL 2120523, at *9 (S.D.N.Y. May 2, 2019)

part of the internal investigation, including the accused himself, were government-engineered interviews and violated the Fifth Amendment to the United States Constitution to the extent that no one may be compelled to testify in a criminal case to his detriment. It is also worth noting that the famous *Garrity v. New Jersey* decision was relied upon here. According to the judge, although the case involved the conduct of a government employer, the rule applies equally to private conduct where the private employer's actions in obtaining the statements are reasonably attributable to the government. In *Garrity v. New Jersey*, the Supreme Court held that the defendant's statements to police officers under threat of termination of employment were involuntary and inadmissible³⁵.

In this context, based on *United States v. Connolly*, it is not difficult to imagine a scenario, often encountered in practice, in which the employee in question participated in an interview conducted as part of an internal investigation without knowing that the material collected would be used in criminal proceedings. The interviewers did not inform the employee of his rights and the possibility that information from the internal investigation could be used in criminal proceedings, or the company which does not follow corporate "trends" did not implement such internal safeguards. In addition, the employee was convinced that the information he provided was protected by attorney-client privilege because he had been interviewed by the company's in-house counsel. It is therefore worth noting at this point, if only by way of clarification, that this is a problem that is repeatedly raised in the doctrine of attorney-client privilege³⁶. In a situation where an internal investigation is conducted by lawyers hired by the company for this purpose (in-house or outside counsel), it is at least ethical for them to warn the interviewee (in the United States, this is done by the so-called "Upjohn warnings" mentioned above) that the interrogators represent only the company, which may waive the attorney-client privilege to obtain a DPA, and that the contents of the interview may be used in criminal proceedings against the interviewee. However,

³⁵ *Garrity v. New Jersey*, 385 U.S. 493 (1967)

³⁶ LOTCHIN Theodore R., *No Good Deed Goes Unpunished? Establishing a Self-evaluating Privilege for Corporate Internal Investigations*, Williamsburg: William & Mary Law Review, 2004, available at: <https://scholarship.law.wm.edu/wmlr/vol46/iss3/5>, accessed on 19 March 2023

past practice shows that “attorneys often issue ‘watered down’ warnings to extract full information from employees and zealously represent their corporate employer clients,” and “these warnings do not negate the fact that the company will still seek to obtain information from its employees that may ultimately be damaging to them”³⁷. As a result, individuals with little or no legal training, and unaware of the ramifications and personal consequences, willingly cooperate in providing information to in-house counsel conducting internal investigations, even when the company is already assisting government prosecutors or regulators in their investigations of company employees or expects to do so in exchange for leniency³⁸.

United States v. Connolly illustrates how the delegation of investigative work to corporate investigators can negatively affect the procedural rights of individuals. Therefore, since such legal constructions create the possibility for a company to weigh its interests in such a severe way, it seems necessary from a legislative point of view to regulate precisely the content and scope of compliance procedures for private internal investigations carried out as a result of the competent corporate authority’s knowledge of an irregularity exposing the company or its associated individuals to criminal liability.

3. DE LEGE FERENDA PROPOSALS

The foregoing analysis, supported by the argumentation of Judge McMahon, leads to the following conclusions. First, where a jurisdiction authorizes close cooperation, particularly in the transmission of evidence between the company and the prosecution, the legislation enacted in this regard should ensure that the individual realizes the rights guaranteed to

³⁷ CUMMINGS Lawton P. Cummings, *The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege*, West Virginia: West Virginia Law Review, 2007, available at: <https://researchrepository.wvu.edu/wvlr/vol109/iss3/6>, accessed on 19 March 2023

³⁸ GREEN Bruce A. PROGODOR Ellen S. Progdor, *Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents*, Boston: Boston College Law Review, available at: https://ir.lawnet.fordham.edu/faculty_scholarship/579, accessed on 19 March 2023

him or her by the law of criminal procedure. If the content of the “interview” made during an internal investigation can be used against the accused in a criminal trial, he or she must be informed of all the consequences of what he or she has said during the internal investigation and must have an opportunity to be assisted by a defense counsel. This also applies both to the right to refuse to answer a question that could incriminate the person questioned, and the prohibition of coercion and threats, as well as the use of information covered by the attorney-client privilege.

Secondly, it seems necessary to create rules that would apply the main principles of criminal procedure to the reality of internal investigations and to establish judicial control over the actions of the public prosecutor. The company and the public prosecution, having established this formalized cooperation, have the same objective, which encourages various types of abuse. Unfortunately, with the prospect of obtaining various types of benefits, the company may use unlawful means to effectively obtain answers to the prosecutor’s indirect questions (after all, without obtaining these answers, the company cannot count on obtaining any benefit from the cooperation and the lawyers conducting the interrogation cannot count on generous contingency fees). Practical examples of this include threatening the interviewee with dismissal, losing the prospect of promotion or salary increase, creating the often-unrealistic prospect of various benefits for the interviewee in the event of confession, or providing false information to induce the interviewee to provide specific and necessary information to satisfy DPA obligations. Aligning corporate and criminal law with the requirements of criminal procedure, such as a mandatory and heavily sanctioned prohibition on the use of coercion or unlawful threats by interrogators, or an obligation to instruct the interrogator, would help avoid this type of abuse. Enforcement of such rules, however, would not be possible without adequate oversight by the courts, whose role would be to monitor and supervise the actions of prosecutors and corporations.

Third, it seems reasonable to adopt and enforce evidentiary prohibitions that will prevent the use against an individual of the information obtained without proper instructions and in violation of the rules of criminal procedure, including the use of threats, coercion, deception, or other such means. This seems justified because, in practice,

even the company initiating an internal investigation is often unaware that the reported irregularity fulfills the elements of a criminal offense and that the results of the investigation in question may in the future be analyzed by law enforcement authorities and form the basis for a conviction or, which would be less problematic in practice, an acquittal in a criminal trial. This would provide any person interviewed with the assurance that if the company does not meet all the requirements of sound criminal law compliance, the evidence provided by the company will not incriminate the potential defendant.

Fourth, it is necessary to discuss the need to limit the personal scope of persons who may conduct internal investigations into irregularities that may involve the commission of a criminal offense by a company. The lack of a legal definition of the entities authorized to carry out such procedures and the absence of a general and compliant instruction may lead to a situation in which persons without a legal background have to carry out an interrogation which is practically an equivalent of an interrogation carried out in the context of criminal proceedings, with all the consequences that this entails. This leads to the conclusion that the persons carrying out internal investigations should include lawyers or persons trained in this field. Moreover, from the point of view of the individuals to be interviewed, it seems best to employ people who have not previously worked with the company in any way. In the case of in-house counsel, they will often know the interviewees, have worked on joint projects, or simply have established relationships of various kinds. For this reason, an internal investigation may be more like a collegial conversation than an interrogation that will later be used as evidence in a criminal proceeding. Also, from a psychological point of view, it is much easier to obtain concrete information which, especially in the case of people who are unaware of the legal consequences, can easily be obtained by the lawyers paid by the company.

4. EXPANSION OF THE UNITED STATES SOLUTIONS AND POSSIBLE WAYS OF SOLVING PROBLEMS

It may seem that the problem described above only affects the United States, but the last few years have shown that it is going to

affect many other countries as well. Interestingly, the pretrial diversion agreements implemented by various jurisdictions have to a large degree addressed the problems that arose in the United States and proposed a kind of remedy for this.

While the United States created and developed the construct of pretrial diversion agreements in the context of corporate criminal liability over 30 years ago, it is only relatively recently that such constructs - apparently in response to the United States initiative - have been adopted and implemented in some other countries, while others are considering possible legislation to adopt them³⁹. In recent years, DPA equivalents have been introduced in many legal systems around the world, including, inter alia, the United Kingdom, France, Canada, Singapore, Ireland, Argentina, and Brazil⁴⁰. In many cases, as, for example, in Poland, the introduction of DPA equivalents is still in the drafting stage, but this undoubtedly indicates a clear international legislative trend that will become even more visible soon⁴¹. Because of the pace of development and change in recent times, as well as their diversity compared to the US system, the author of this paper has chosen to analyze the solutions adopted in the UK (England and Wales), France, and Poland.

As a precaution, it should be stressed at the outset that the solutions that have been adopted or are in the process of being developed often differ significantly from the model adopted in the United States, inter alia as to the form, scope, and benefits offered for cooperation,

³⁹ KAAL, Wulf A., and LACINE Timothy A. *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, *The Business Lawyer*, 2014, available at: <https://www.jstor.org/stable/43665690>, accessed on: 19 Mar. 2023

⁴⁰ DAVIS Frederick T., *Judicial Review of Deferred Prosecution Agreements. A comparative study*, New York: Columbia Journal of Transnational Law, 2022, p.752-828, available at SSRN: <https://ssrn.com/abstract=4072985> or <http://dx.doi.org/10.2139/ssrn.4072985>, accessed on 19 March 2023

The United States Department of Justice website, available at <https://www.justice.gov/opa/pr/moneygram-international-inc-agrees-extend-deferred-prosecution-agreement-forfeits-125-million>, accessed on 19 March 2023

⁴¹ The Polish Government Legislation Centre, available at: <https://legislacja.rcl.gov.pl/docs//2/12363700/12908952/12908953/dokument572980.pdf>, accessed on 19 March 2023

the role to be played by internal investigations, the bodies involved in the conclusion of such an agreement, and the role of the court and the prosecutor during its operation. For the purposes of this paper, only the main solutions of DPA/NPA constructions adopted in individual countries will be discussed here – and only those which are directly related to the topic of this paper – as a comparative analysis of the institutions in question would require a separate discussion.

The first DPA model discussed here is also a solution from another common law. DPAs in England and Wales were adopted under the provisions of Schedule 17 of the Crime and Courts Act 2013, which came into force in 2014⁴². This was followed by the famous Code of Practice on Deferred Prosecutions Agreements for Prosecutors, which was published jointly by the Serious Fraud Office (SFO) and the Crown Prosecution Service, and which detailed the procedure for the conclusion of pretrial diversion agreements⁴³.

The first significant legal solution is the so-called “evidential and public interest test”. According to the adopted Code of Practice, to enter the DPA, the prosecutor must apply the following two-step test: the evidential test and the public interest test. At the evidential stage, the SFO should demonstrate that the Code for Crown Prosecutors’ full Code test is satisfied, that there is sufficient evidence to provide a realistic prospect of conviction, reasonable suspicion that the company has committed the offense, and that there are reasonable grounds to believe that further investigation would produce further admissible evidence within a period so that all the evidence taken together would be satisfying. Once the evidential test has been met, the prosecutor must proceed to the public interest test to determine whether the prosecution is in the public interest (1.4, 1.5, 1.6, 1.7 of the Code of Practice on Deferred Prosecution Agreements).

⁴² The National Archives for the United Kingdom government website, available at: <https://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>, accessed on 19 March 2023

⁴³ The Serious Fraud Office website, available at: <https://www.sfo.gov.uk/2020/10/23/serious-fraud-office-releases-guidance-on-deferred-prosecution-agreements/>, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/>, accessed on 19 March 2023,

If the public interest test requires a prosecution rather than a DPA, then a full prosecution will follow, subject to there being sufficient evidence to give a realistic prospect of conviction. The solution introduced allows for an assessment of the actions of the prosecution and the companies and prevents the content of the agreement from leading to a conflict with the public interest.

Another noteworthy construction - from the perspective of the issues addressed in this paper - is the public hearing by a judge, who must conclude that the DPA is in the interest of justice. This is a different model of judicial oversight of a concluded agreement than in the United States. Once the terms have been agreed upon, the prosecutor must apply to the court for a declaration that the DPA is in the interests of justice and that the terms are fair, reasonable, and proportionate (only if the court has made a preliminary declaration). Once the court makes the final declaration, the DPA becomes effective. While the DPA is in force, if the Crown Prosecution Service considers that any of its requirements have not been met, it can apply to the Crown Court for a decision on whether the company has failed to comply⁴⁴.

Thus, the England and Wales courts have a much broader scope of supervision and review of agreements entered than is the case in the United States. This appears to be a much more rational and beneficial solution from the perspective of the public interest and the need for companies and law enforcement to respect the rights of individuals (including, most importantly, victims and potential defendants). Speaking on 7 March 2017, Ben Morgan, Joint Head of Bribery and Corruption at the SFO, said, "It is important to note that the entire process is only effective if, after full scrutiny, it is approved by the court. This is a key and distinguishing feature of the United Kingdom DPA system. The judge is asked to give a declaration; first, that disposal of the matter by way of a DPA is in the interests of justice; and secondly that the terms are fair, reasonable, and proportionate"⁴⁵. The introduction of such a model undoubtedly makes

⁴⁴ The National Archives for the United Kingdom government website, available at: <https://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted>

⁴⁵ The Serious Fraud Office website, available at: <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/>, accessed on 19 March 2023,

it possible to control the actions of prosecutors, who, in their efforts to obtain favorable evidence, may violate the autonomy of individuals associated with the company.

The French also proposed an equivalent to the DPA and responded by including the so-called convention judiciaire d'intérêt public (CJIP), which came into force in June 2017 after much debate, in SAPIN II⁴⁶. This is a response to the United States model, which is designed to give French prosecutors procedural flexibility while being applied to a very different criminal justice system, based on civil law rather than common law⁴⁷. In France, at the end of an investigation, the public prosecutor, under judicial review, decides whether there is sufficient evidence to proceed to trial or whether, subject to additional conditions relating to the stage of the proceedings and the public interest, a CJIP should be offered⁴⁸. Under Article 41-1-2 of the Code of Criminal Procedure, the National Financial Prosecutor may propose a CJIP to a legal person accused of one of the offenses listed in the French criminal code, if no criminal proceedings have been instituted. The regulation imposes one or more of the following obligations on the company: to pay a fine to the Public Treasury in the public interest - the amount of this fine will be determined in proportion to the benefit derived from the infringements found, up to a maximum of 30% of the average annual turnover calculated based on the last three annual turnovers known at the time of the discovery of the infringements. The second is to submit, for a maximum period of three years and under the supervision of the French Anti-Corruption Agency, to a compliance program aimed at ensuring the existence and implementation within the company of the measures and procedures listed in the French Penal Code, to compensate the victim for the damage caused by the offense

⁴⁶ The Agence Française Anticorruption website, available at: <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>, accessed on 19 March 2023

⁴⁷ DAVIS Frederick T., *Judicial Review of Deferred Prosecution Agreements. A comparative study*, New York: Columbia Journal of Transnational Law, 2022, p.752-828, available at SSRN: <https://ssrn.com/abstract=4072985> or <http://dx.doi.org/10.2139/ssrn.4072985>, accessed on 19 March 2023

⁴⁸ The Légifrance Le service public de la diffusion du droit website, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037526425/2018-10-25, accessed on 19 March 2023

or to submit to the compliance program of the French anti-corruption agency to implement the institutions of French substantive criminal law as defined by the law. If the accused legal person agrees to the agreement proposed by the public prosecutor, the public prosecutor submits a request for approval of the agreement to the president of the competent district court, who hears the accused and the victim in a public hearing, after which a final decision is taken. Notably, the prosecutor should consider additional considerations and significant factors, including: (1) whether all procedural rules have been followed during the negotiations between the company and the prosecutor; (2) whether it is appropriate to enter a settlement; (3) whether the fine imposed is lawful.

The French National Financial Prosecutor's Office published new CJIP Guidelines on its website on January 16, 2023, updating those published jointly with the French Anti-Corruption Agency (AFA) on June 26, 2019. Interestingly, the guidelines confirm and clarify the incentives referred to as "good faith conditions" of a legal nature. By refraining from imposing any conditions, other than legal ones, for joining the CJIP, the French Public Prosecutor's Office encourages a company wishing to enter negotiations to actively participate in establishing the truth by conducting an internal investigation into the facts, the persons involved and, where applicable, the failures of the compliance system that led to the violations. The model described above illustrates the contours of the DPA in a continental legal system, albeit one that appears to implement solutions adopted in both the United States and the United Kingdom⁴⁹.

It is also worth noting that, as mentioned above, the DPA continues to expand. An example of this is the Polish draft law on the criminal liability of collective entities for criminal offenses of November 2022, which is expected to be finalized by the end of the first quarter of 2023⁵⁰. The bill provides that if a collective entity cooperates with the prosecution

⁴⁹ The Tribunal de Paris de Ministère de la Justice website, available at: <https://www.tribunal-de-paris.justice.fr/sites/default/files/2023-01/Lignes%20directrices%20sur%20la%20mise%20en%20oeuvre%20de%20la%20convention%20judiciaire%20d%27int%C3%A9r%C3%AAt%20public%20PNF%20version%20sign%C3%A9e.pdf>, accessed on 19 March 2023

⁵⁰ The Polish Government Legislation Centre, available at: <https://legislacja.rcl.gov.pl/projekt/12363700>, accessed on 19 March 2023

authorities, the prosecutor may refrain from taking further procedural steps and request the court to allow the entity to voluntarily accept liability. An important element of the agreement between the public prosecutor and the collective entity is the provision by the latter of evidence useful for further proceedings. In addition, the collective entity must fulfill several conditions, including providing the prosecutor with information on the persons involved in the commission of the offense and the circumstances relevant to its commission, as well as paying an amount equivalent to the damage caused by the offense⁵¹. The Polish drafters of the bill react to the increase in the number of implementations of pretrial diversion agreements in the United States, but do not consider - at least in the draft - the form of the agreement entered or the control of the court.

In summary, many countries around the world are implementing, or just starting to implement, solutions that have been used in the United States for over 30 years. Interestingly, they are very different and have various design elements which, as shown above, improve on what has been done in the US. However, the institutions being put in place are undoubtedly similar, and the risks arising from the existence of legal constructs and the possibility of entering into such agreements are common to all the countries mentioned.

5. WHISTLEBLOWING DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 OCTOBER 2019

Incidentally, staying on the European continent, it is impossible not to mention the identical threat of the well-known Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report violations of Union law, which was the first attempt to unify minimum standards ensuring the protection of employees reporting various types of violations⁵². However, as a

⁵¹ The Polish Government Legislation Centre, available at: <https://legislacja.rcl.gov.pl/docs//2/12363700/12908952/12908953/dokument572980.pdf>, accessed on 19 March 2023

⁵² Whistleblowing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report

precaution, it should be noted that in this case, the obligation to report the results of internal investigations does not result from an agreement with the public prosecutor or other competent law enforcement authorities in the jurisdiction, but from an obligation arising from the Directive or the national law transposing it. Finally, the results of an internal investigation, according to the wording of the Directive, are not transmitted to the public prosecutor in the case of an internal report, but firstly to the whistleblower, who, with the knowledge of the results of the internal investigation, may take further and unknown follow-up steps for the company⁵³.

The Directive and other legal obligations to conduct an internal investigation are not the subject of this paper, and an analysis of the risks arising from the legal obligation to report the results of internal investigations would require a separate and more detailed discussion. However, it is important to at least outline the extent of the potential risks arising from them, if only for practical reasons.

The Directive, in setting minimum standards for the protection of whistleblowers by requiring Member States to establish channels and procedures for internal reporting and subsequent follow-up by legal entities in the public and private sectors, did not foresee that an internal investigation initiated as a result of an internal report could lead to numerous legal complications in the event of criminal proceedings.

Companies have become the bodies responsible for verifying the irregularity that is the subject of the report when it is made through an internal reporting channel, for following up properly and adequately on the receipt of the report in question, and thus for carrying out sound internal investigations. It appears that where a particular report falling within the scope of the Directive is made through both internal and external reporting channels, there is a high risk that the procedural rights of the person interviewed during an internal investigation may be violated in the event of potential criminal proceedings. Such a violation may undoubtedly occur when the reported irregularity also constitutes

breaches of Union law, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1937>, accessed on 3 June 2023

⁵³ European Parliament Website, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747103/EPRS_BRI\(2023\)747103_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747103/EPRS_BRI(2023)747103_EN.pdf), accessed on 3 June 2023

a criminal offense under national criminal law and the state provides for a corporate criminal liability structure in its legal system. It is therefore clear that in this case too, the company will seek to free itself from the risk of criminal liability and will try to minimize this risk through various types of measures (including looking for “the guilty” individual).

In Article 9(1)(d) of the Directive, which describes the internal reporting and follow-up procedures, the EU legislator has merely indicated that the internal reporting and follow-up procedures referred to in Article 8 shall include the following diligent follow-up by the designated person or department referred to in point (c) of the provision. The EU legislator’s use of the vague term “diligent follow-up” does not impose any requirements on the entity falling within the scope of the Directive regarding the risk - albeit potential - of criminal prosecution for the irregularity that is the subject of the internal investigation.

What happens is that the entity is obliged to start an internal investigation (collect all documents, interview employees, secure evidence) and provide feedback to the whistleblower within a “reasonable timeframe” not exceeding three months from the acknowledgment of receipt of the report or, if no acknowledgment has been sent to the whistleblower, three months from the expiry of seven days after the report (Article 9(1)(f) of the Directive). In the absence of an acknowledgment, if the whistleblower is not satisfied with the acknowledgment, or even irrespective of the content of the acknowledgment (Article 10 of the Directive provides for the possibility of making an immediate report through an external reporting channel), the whistleblower concerned may make an external report to the authority designated for that purpose by the Member State, which is normally already obliged to report the possible offense to the law enforcement authorities. In other words, the whistleblower may, before or after making an internal report, make an external report to an authority designated by the Member State and provide it with the results of the internal investigation received from the company, which may then be passed on to the law enforcement authorities.

A company confronted with the obligation to communicate the results of an internal investigation will then not consider whether the hearings conducted during the internal investigation were conducted in a manner consistent with the principles ensuring the exercise of the

rights of the individual, but whether consequences will be imposed on the company for failing to comply with its obligations under the Directive, including the duty of diligent follow-up. It seems that, as in the case of the DPA, the risks to the company are so high that it will want to seek to demonstrate its lack of fault to avoid criminal liability.

Thus, given that the potential risk of criminal liability is very high, and that the procedure is not precisely regulated, sooner or later the problem addressed in this paper may arise. However, as mentioned above, the company in question is left with no choice but to automatically initiate the procedure described above. It is appropriate to conclude here, as the Directive and other legal obligations are beyond the scope of this paper.

FINAL REMARKS

In the post-Enron era, the practice has repeatedly confirmed that internal investigations are not only of great assistance to the accused company but also a valuable resource for law enforcement agencies, which are usually eager to benefit from the work of a company's internal investigative bodies. From the results of an internal investigation, the prosecutor can learn a lot about the crime committed, the entire criminal process can take much less time, and often the evidence provided is irrefutable because it comes directly from the original source, which is especially important in the case of corporate criminal liability.

However, the above considerations have undeniably shown that there is a conflict between the rights of individuals and the actions of the company which cooperate with the prosecution on internal investigations. In a situation where the only way for the company to avoid various repressive consequences will be to name the "guilty" individuals to the prosecution in exchange for numerous benefits, including even the avoidance of huge financial penalties, there is a high risk that it will try to do so by force. The situation is not improved by the fact that corporate investigations themselves are a secondary issue for legislators and are largely unregulated, both nationally and internationally. As a result, it is not possible to enforce from within the company what is enforced by law enforcement during a prosecution.

In conclusion, while there are many tangible benefits to companies and law enforcement agencies in conducting internal investigations, it is important for legislators to consider whether this is a potential area for abuse against individuals. Pretrial diversion agreements, which are being introduced in an increasing number of jurisdictions each year, have several significant and critical flaws from a criminal procedure perspective that make them contrary to the guiding principles of due process of law. In any form of cooperation, including the DPA/NPA described above, when it is directly aimed at finding the guilty individual, that guilty individual should be protected with the same guarantees as a suspect in a criminal trial. Failure to make changes could be tragic in the future, when companies facing increasingly severe sanctions under corporate criminal liability regimes will be able to do much more just to ensure that the company survives and avoids at least fragmentary liability.

There is no doubt that legal systems around the world should look to the case law of the United States, particularly decisions such as *Connolly* and *Upjohn*, and adapt their laws to the realities of corporate criminal compliance systems by not allowing internal investigators to use threats, termination, and other such measures. It is encouraging that protections are being put in place in many of the implementing jurisdictions, such as England and Wales, although there is no doubt that, given the scale of the problem and the nature of internal investigations, they should be expanded and focused even more on the rights of the individual in criminal proceedings.

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