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# Deferred prosecution agreements as miscarriage of justice: An exploratory study of corporate convenience

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ABSTRACT

Deferred prosecution agreements and similar arrangements are practiced in many countries when there is suspicion of corporate crime. It is an agreement based on a negotiation that permits the allegedly guilty party not to undergo a criminal trial if they avoid committing further wrongdoing for a specified period of time. This article reviews such agreements in light of two different situations where the corporation is actually guilty and where the corporation is actually not guilty. An innocent company signing such an agreement suffers from miscarriage of justice. A guilty company on the other hand can restore the convenience of committing corporate crime. This article argues that deferred prosecution agreements violate basic principles of justice. The research suggests that serious fraud offices and other public bodies need to be restored to enable complete criminal prosecution when there are suspicions of corporate wrongdoing. This suggestion is based on the assumption that the underlying problem is law enforcement incompetence at investigating and prosecuting corporate crime.

## Introduction

In some jurisdictions, national law enforcement agencies can offer companies that are suspected of white-collar and corporate economic and environmental crime deferred prosecution agreements. If an offer is accepted, then there will be no trial. Instead, the company agrees with the agency on some measures to avoid future wrongdoing by the company. If the company signs a deferred prosecution agreement, the company admits certain actions but does not admit guilt in terms of law violation. The company and the agency agree on termination of an unsolved public inquiry (Hertstein et al., 2024; Homer and Maume, 2024; King and Lord, 2020; Lüth, 2021; Parker and Dodge, 2023). Hock and Dávid-Barrett (2022) labeled the system of negotiated justice a compliance game that ultimately favors large corporations where executives may engage in bundling unrelated schemes to receive significant discounts by US and UK authorities (Hock, 2021).

In other jurisdictions, national law enforcement agencies cannot offer a company such an agreement. Instead in countries like Norway, a company fined by a public agency has to dispute the fine by taking the case to court. If the fine is accepted by a company without a trial, then the company admits guilt in terms of law violation.

This article takes the perspective of corporate executives rather than the traditional law enforcement perspective on deferred prosecution agreements. Specifically, this article addresses the following research question: *How convenient is the offer of deferred prosecution agreements for innocent companies accused of white-collar and corporate economic and environmental crime?* If the offer is attractive and thus convenient to the companies, then it leads to miscarriage of justice in democratic societies. In jurisdictions with criminal justice, a suspect or defendant should always have the benefit of the doubt. Conviction should only occur when guilt is proven beyond any reasonable and sensible doubt. This is a basic principle of justice. Criminal justice is secured in well-functioning democracies by two parties arguing their case in front of a third party, which is the agency versus the company in front of the court. The prosecutor presents one biased narrative, while the defendant presents a different biased narrative. When the agency takes over the role of the court, then miscarriage of justice might seem likely since the biased prosecution version tends to be accepted. An example is the French company Airbus punished in the United States by Zink (2020) at the Department of Justice without any real trial in the courtroom.

With the corporate perspective in mind, this article starts by presenting convenience theory for corporate offending. A number of fined companies in Norway are then reviewed. A presentation of some characteristics of deferred prosecution agreements follows based on the research literature. The convenience of accepting such agreements for innocent companies are then discussed.

This research is important, as more and more jurisdictions seem to be inclined to accept various versions of negotiated deals (OECD, 2021). The United States argues for such arrangements. For example, at the U.S. Department of Justice, they were in 2023 eager in the FCPA

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Unit within the Criminal Division to establish a revised policy for declinations (Fuhr, 2023). If corporate management demonstrates voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution, then the company avoids prosecution in the United States (Roth, 2020). However, the danger of miscarriage of justice is obvious when following this course of law enforcement action. An innocent company might accept the declination to avoid being occupied in the criminal justice system for years. The prosecutor enters into a double role of both accuser and judge. It is indeed miscarriage of justice if an innocent company accepts some kind of deal with a public agency based on statements that represent no violation of laws. Even admitting wrongdoing is not sufficient in Norwegian criminal courts for conviction when the prosecution fails in providing convincing evidence of the same. This is another basic principle of justice.

## Corporate crime convenience

Convenience theory suggests that there is a motive of possibilities and threats, an opportunity to commit and conceal, and a willingness for deviance based on choice or innocence. According to the theory of convenience for corporate crime, corporate executives chose illegitimate means to reach business goals if legitimate means are less convenient. It is a crime-as-a-choice theory (Gottschalk, 2022). An example is avoiding corruption in corrupt countries when selling goods and services. That is extremely inconvenient. Competitors that are willing to bribe will have the business contracts. Returning home with no contracts after months of negotiations does certainly not lead to promotion, but rather to termination of employment. Therefore, bribing customer representatives does indeed seem more convenient.

The motive for entering into corruption or other forms of economic crime might be possibilities or threats for the individual or the company. The individual possibility motive is often labeled greed, where greed implies that whatever there is already, one always wants more. The corporate possibility motive is often labeled goal, where achievement of ambitious business objectives is most important. Possibilities for the corporation include reaching business objectives by ignoring whether or not means are legitimate or illegitimate (Campbell and Göritz, 2014; Jonnergård et al., 2010; Kang and Thosuwanchot, 2017). Ends simply justify means that might represent crime. It may be so important to have a bottom line in accounting that satisfies investors and others that crime emerges as potentially acceptable. Welsh and Ordonez (2014) found that high performance goals cause unethical behavior. Dodge (2009): 15) suggested that tough rivalry among executives make them commit crime to attain goals: “The competitive environment generates pressures on the organization to violate the law in order to attain goals”.

The individual threat motive is often labeled strain and pain, where personal financial problems from divorce or other circumstances can easily lead to deviant behavior. The corporate threat motive is often labeled bankruptcy, where the survival of the company is most important. Again, ends justify means. For example, markets with crime forces can represent painful corporate economic threats (Goncharov and Peter, 2019). Threats can create moral panic. Moral panic can characterize reactions that do not accurately reflect the actual danger of a threat. During a moral panic, sensitization processes generate an escalation in the individual disturbance (Kang and Thosuwanchot, 2017). Chattopadhyay et al. (2001) studied organizational actions in response to threats. They found that threats are associated with urgency, difficulty, and high stakes. Threats involve a negative situation in which loss is likely and over which one has relatively little control.

Generally, in the motive dimension of convenience theory, the motive is not to be a criminal or to be involved in crime but rather to gain from possibilities and to avoid threats.

The opportunity for entering into corruption or other forms of economic crime is when committing crime and when concealing crime. The convenience of committing crime rests on the status of the offender and the person’s legitimate access to resources for deviant actions. High-status individuals enjoy trust (Pusch and Holtfreter, 2021; Reisig et al., 2022) and greater respect and deference from, as well as power and influence over, those who are positioned lower in the social hierarchy (Kakkar et al., 2020: 532):

Status is a property that rests in the eyes of others and is conferred to individuals who are deemed to have a higher rank or social standing in a pecking order based on a mutually valued set of social attributes. Higher social status or rank grants its holder a host of tangible benefits in both professional and personal domains. For instance, high-status actors are sought by groups for advice, are paid higher, receive unsolicited help, and are credited disproportionately in joint tasks. In innumerable ways, our social ecosystem consistently rewards those with high status.

A white-collar offender has typically legitimate access to resources to commit financial crime (Kempa, 2010; Huisman and Erp, 2013; Williams et al., 2019). A resource is an enabler applied and used to satisfy human and organizational needs. According to Petrocelli et al. (2003), access to resources equates access to power. Others are losers in the competition for resources (Wheelock et al., 2011).

The convenience of concealing crime rests on institutional deterioration, lack of oversight and guardianship, and criminal market forces. Crime concealment becomes more convenient when there is organizational decay in the form of institutional deterioration (Barton, 2004; Donk and Molloy, 2008). An institution is a system of interrelated formal and informal elements – rules, guidelines, norms, traditions, beliefs – governing relationships between institutional members within which members pursue their mutual interests (Gyõry, 2020). Institutional deterioration improves conditions of convenience for corruption and other forms of financial crime (Kostova et al., 2008; Pinto et al., 2008; Rodriguez et al., 2005).

Lack of control, oversight, and guardianship can create a chaos that improves the convenient opportunity to conceal financial crime in the organizational setting for a white-collar offender. The agency perspective suggests that a principal is often unable to control an agent who does work for the principal. The agency perspective assumes narrow self-interest among both principals and agents. The interests of principal and agent tend to diverge, they may have different risk willingness or risk aversion, there is knowledge asymmetry between the two parties, and the principal has imperfect information about the agent’s contribution (Williams, 2008).

Adding to concealment opportunity are criminal market forces and rule complexity. Criminal market forces such as cartels are active in many industries (Goncharov and Peter, 2019). Rule complexity might contribute to criminal market forces (Lehman et al., 2020).

The willingness for entering into corruption or other forms of economic crime is based on choice or innocence. A special kind of choice is narcissistic identification with the company where the offender sees little or no difference between self and the corporation. The company money is personal money that can be spent whatever way the narcissist prefers (Galvin et al., 2015). Identification with the organization is the process through which an individual’s identity becomes entangled with, and imprinted by, the corporation. The person’s unique sense of self comes to be understood in reference to that organization, where the organization defines individual self (Toubiana, 2020).

A more general choice perspective is rational choice where the offender considers advantages of crime exceeding disadvantages and thus the pros are stronger than the cons for crime (Müller, 2018). Individuals and organizations are less likely to comply if they conclude that following laws, rules, and regulations is less profitable than violating those laws, rules, and regulations (Peeters et al., 2020). Weaknesses in legal frameworks and enforcement systems contribute to the rational choice of crime. Transparency International (2022: 66) listed some weaknesses in Norway:

The main weaknesses include the lack of a central register of beneficial owners of companies in Norway; jurisdictional limitations; a lack of clarity about the extent to which companies may be held liable for the acts of intermediaries, including offences committed on behalf of foreign subsidiaries, a lack of clarity about the scope of corporate liability for offences committed through the operations of related entities (e.g. subsidiaries or joint venture); insufficient coordination among law enforcement authorities, including the FIA; a lack of transparency about how the amounts of fines and confiscation penalties are calculated in foreign bribery cases; and insufficient information on the application of penalty notices and the use of mitigating factors.

Learning deviance from others is also a matter of choice. Sutherland (1983) explained differential association by suggesting that potential offenders make a choice where they associate with those who agree with them, and distance themselves from those who agree. Learning by association from peer pressure refers to the influence from others with similar interests, experiences, or social statuses. McGloin and Thomas (2019: 243) referred to this association as the normative influence perspective:

Sutherland's differential association theory has been labeled a quintessential sociological theory of delinquency because it posits that one's tendencies toward crime (and conformity) develop primarily through his/her interactions with others. Sutherland outlined nine propositions that form his differential association theory that can be summarized in several key points. The first is that criminal behavior, like all human behavior, is learned through our communication with others; there is no special explanation required for crime and delinquency. Second, Sutherland asserted that this learning involves both the techniques and skills to commit crime as well as the definitions favorable to crime. The techniques and skills used to commit crime can range in complexity, from how to properly throw a punch to how to hotwire a car. Definitions favorable to crime include the motives, drives, attitudes, and rationalizations that promote criminal behavior.

The perception of innocence is either based on justification or neutralization. In a justification, the actor admits responsibility for the act in question but denies its pejorative and negative content (Schoen et al., 2021: 730):

People use justification mechanisms to protect their sense of self. People who sincerely believe that they are a specific kind of person but routinely demonstrate behaviors that indicate otherwise may avoid cognitive dissonance and maintain their sense of self by using justification mechanisms that allow them to "explain away" their behavior.

By applying neutralization techniques, white-collar criminals think they are doing nothing wrong (Sykes and Matza, 1957). They deny responsibility, injury, and victim. They condemn the condemners. They claim appeal to higher loyalties and normality of action (Sims and Barreto, 2022). They claim entitlement, and they argue the case of legal mistake. They find their own mistakes acceptable (Cullen et al., 2022; McGrath, 2021). They argue a dilemma arose, whereby they made a reasonable tradeoff before committing the act (Siponen and Vance, 2010). Often, neutralization is combined with low self-control (Holtfreter, 2015; Holtfreter et al., 2010).

As reviewed above, convenience theory has three dimensions with fourteen propositions. The motive dimension has four positions for individuals and organizations concerned with possibilities and threats. The opportunity dimension had two propositions how to commit and three propositions how to conceal financial crime. The willingness dimension has three propositions for choice and two propositions for innocence (Gottschalk, 2022).

## Some fined norwegian companies

Few scholars seem to have presented real cases of corporate crime in their research. Therefore, this section presents some examples mainly from Norway. The first example involves the two jurisdictions of the United States and Norway. On October 11, 2006, Statoil ASA (now Equinor), a Norwegian corporation, entered into a deferred prosecution agreement with the Department of Justice in the United States to resolve certain violations of the antibribery and books and records provisions of the Foreign Corrupt Practices Act. Statoil sought to expand its business internationally, and focused specifically on Iran as a country in which to secure oil and gas development rights. Statoil and later Equinor shares are traded on the stock exchange in New York. Statoil agreed to pay a penalty of $10.5 million, admitted responsibility for its employees' misconduct, and accepted an independent compliance consultant or monitor to review and oversee the implementation of Statoil's compliance program for a period of three years. Under the deferred prosecution agreement, Statoil was given a $3 million credit for the fines it previously paid to criminal law enforcement authorities in Norway (DOJ, 2006).

The latter information is interesting where the fine in Norway was much less, even though it did not involve any negotiated deal. While the Norwegian fine of $ 3 million was final, the U.S. fine of $10.5 million could end up in even more if the corporate compliance program failed. No Statoil executives were charged in the case. However, as illustrated by the following examples from Norway, law enforcement agencies often prosecute executives at the same time as they fine companies.

For example, a Norwegian company was in 2023 charged for having bought illegal fluorine gas. The company in the cooling and heating industry accepted a fine of NOK 300,000 (USD 30,000) by the prosecution for corporate negligence when buying smuggled fluorine-containing gas. The company was also confiscated approximately NOK 110,000. The seller had not paid special duty or obtained the necessary permission from the Norwegian Environmental Agency. As a result of strict regulations regarding fluorinated gases, with requirements for permission for importation and very high taxes, there is a great risk of illegal importation and sale. Buyers of gas must therefore make sure that the gas has been legally introduced and a fee has been paid for it. In this case, the company bought the gas outside of ordinary purchasing routines, after posting an advertisement on Facebook Marketplace. The company had not dealt with the seller before and they had no knowledge of him or his sole proprietorship.

"When you choose to buy from someone other than the major importers, you have to do extra inquiries to make sure that the gas has been legally imported. Such investigations were not carried out in this case", said state attorney Anne Allum at (Økokrim 2023a).

The gas was also sold in disposable containers, which have been illegal to place on the market in the European Union since 2007.

The seller was sentenced to prison earlier that year. He was sentenced to four years in prison for aggravated dealing in smuggled fluorinated gas to a value of at least NOK 11 million, as well as aggravated fraud of a state reimbursement scheme for gas. The sentence was final. The man sold 110 kilos of the fluorine-containing gas to the company, which has now accepted the fine.

The investigation into the case complex was initiated as a result of a tip to the Norwegian serious fraud office from the Norwegian environmental agency. In autumn 2020, the agency received several whistleblowing messages about advertisements on Facebook Marketplace, where fluorinated gas was being sold by private individuals for a suspiciously low price.

The police investigation revealed that the man, who was sentenced to four years in prison, had bought large quantities of gas from two of these advertisers.

"It is necessary to react strictly to illegal handling of fluorinated gas, because fluorinated gases are very harmful to the climate and contribute to global warming when they are released into the atmosphere, which affects everyone", said Allum at (Økokrim 2023a). The police were also investigating two other people in the same case complex who could expect prosecution and conviction in 2024.

A third Norwegian company was in 2023 charged and fined for illegal building at the shoreline. The company violated the Planning and

Building Act linked to summer mansions. The company was fined for building a shed and an annex in violation of the building ban in the 100 m belt along the sea without any permit. The company was fined NOK 300,000 and confiscated of profits of NOK 50,000. The company accepted the fine. At the same time, the responsible architect faced criminal charges (Økokrim, 2023b). The architect was already sentenced to prison in a similar case. The public impression was that some rich and mighty people had illegally occupied parts of the shoreline with their summer mansions (Gottschalk, 2021).

A fourth example is two seafood exporters that were fined for exporting king crab. They had violated the Customs Act and the Marine Resources Act when exporting king crab. The fines were given because the companies exported king crab as Norwegian king crab, without the documentation requirements for this being met. The companies were not considered to have violated the rules intentionally in order to obtain benefits. One company received a fine of NOK 4 million (USD 400,000) and just under NOK 5,7 million confiscated. The other company received a fine of NOK 200,000 and just over NOK 450,000 in confiscation. No individuals in the enterprises were held criminally liable.

"For reasons of proper customs processing and the traceability of the seafood, there are strict requirements for the documentation of the origin of the seafood. Seafood exporters have a strict responsibility for correct customs processing and the seafood's traceability", said state attorney Jens Bachke at (Økokrim 2023c).

The Norwegian Customs and the Norwegian Fisheries Directorate reported the case. Follow-up checks of the two seafood exporters revealed that incorrect origin documentation had been issued when exporting more than 380 tons of king crab at a value of approximately NOK 150 million.

"Violation of the rules of origin in Norway's free trade agreements contributes to poorer competition conditions for serious actors, and this is something we take seriously", said acting section head at Norwegian Customs, Baard Nenseter (Økokrim, 2023c).

"We work to ensure that consumers are confident about where the fish comes from, so it is important for the Norwegian Directorate of Fisheries to follow up violations of traceability", said acting department director at the Norwegian Directorate of Fisheries, Svanes Hjørungnes (Økokrim, 2023c). The fines and confiscation amounts were measured based on the customs benefit and financial benefit that the companies received as a result of the mistakes.

The fifth and final example is about the company Lycamobile that accepted a fine of NOK 3.5 million (USD 350,000) for tax evasion. Two convicts established a system in their work for Lycamobile where they arranged for retailers of calling cards to be able to buy these from Lycatel and Lycamobile in cash, without being invoiced. The invoices were instead issued to a network of straw companies. In this way, they contributed to the fact that the dealers failed to disclose commission income of a total of NOK 57.3 million to the tax authorities. Evaded tax amounted to approximately NOK 21.4 million. The convicts were two executives at Lycamobile who received sentences of 3 years and 2 months, and 2 years and 8 months, respectively in prison (Økokrim, 2023d).

"This is a serious tax fraud case that has an organizational character and involves many actors. Organized tax evasion leads to distortion of competition and discourages healthy competition in business. It is important to react strictly in such cases, where the community has suffered great losses, and the convicts have also taken advantage of vulnerable people as straw men", said first state prosecutor Geir Kavlie (Økokrim, 2023d).

## Characteristics OF agreements

Deferred prosecution agreements (DPAs) in its various forms in different jurisdictions are offered by law enforcement agencies to companies suspected of corporate economic and environmental crime when the law enforcement agencies would fail in proving corporate guilt beyond any reasonable and sensible doubt in the courtroom. It might seem that the "DPA regime stands on shaky foundations" as "castles of sand" (King and Lord, 2020: 307). Despite potential innocence, companies may accept such offers for various reasons, including the unpredictability of prosecution behavior, the uncertainty of court outcome, and the length of time in clarifying matters. However, the acceptance of such offers can represent miscarriage of justice where innocent companies needs to adhere to requirements from law enforcement agencies.

A deferred prosecution agreement (DPA) is an arrangement reached between a prosecutor and a company to resolve a matter that could otherwise be prosecuted. The agreement allows a prosecution to be suspended for a defined period, provided the organization meets certain specified conditions. An agreement is made with the approval or under the supervision of a judge. A DPA is "a negotiation that permits the allegedly guilty party from undergoing a criminal trial if they avoid committing further wrongdoing for a specified period of time" (Parker and Dodge, 2023: 940). Deferred prosecution agreements can be used in potential cases of fraud, bribery, or other economic crime. Such agreements have been used in the United States for decades, and their use in the United Kingdom has been increasing since UK law made them available in 2014. Other countries, including France, Singapore, Canada, and Australia have either introduced or are considering DPAs. Negotiated settlements are increasingly regarded as an alternative tool against corporate criminality, with numerous countries embracing such settlements.

Where a DPA is successfully negotiated, it may include a broad range of terms including a financial penalty, compensation to victims, donations to charities/third parties, disgorgement of any profits made, implementation of a rigorous internal compliance/training program, cooperation in any investigation, and payment of reasonable costs to the prosecutor (King and Lord, 2020). "In response to the possibility that corporate prosecutions may have collateral consequences on innocent parties, scholars have found that the probability of organizations going out of business after being prosecuted, or facing the corporate death penalty (the Arthur Andersen effect) is very low" (Homer and Maume, 2024: 17). In a study of 51 companies that were convicted of crime between 2001 and 2010, none of the companies had failed because of their convictions. Others have found that financial penalties are often so low that organizations are not financially harmed when they are penalized because the amounts are significantly lower than the organizations' profits (Homer and Maume,2024).

In their exploratory study of the deterrent effect of federal corporate prosecution agreements in the United States, Homer and Maume (2024): 15) found that the deterrent effect is very limited as there was substantial recidivism in their sample:

More specifically, this research examines the subsequent criminal, civil, and regulatory violations of 161 publicly traded firms that signed federal deferred prosecution agreements and non-prosecution agreements between 2001 and 2020. Our analysis identified 87 recidivist companies with a total of 629 subsequent violations.

Given the lack of deterrent effect of DPAs, Homer and Maume (2024) expressed support for the need to "strengthen the way we [the federal government] respond to corporate crime", and "prosecutors will be directed to consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation". As discussed below, the convenience of accepting DPAs and similar pretrial arrangements might explain the substantial extent of recidivism.

## Agreement acceptance convenience

In the corporate perspective applied in this article, similar to the offender perspective applied in other studies (e.g., Pereda and Décary-Hetu, 2023), the basic business attitude in management is to make

profits for the owners. Then goals might justify means. If means violate laws, then compliance is approached to the extent it is convenient. Often, corporate compliance is less important than corporate conformance where compliance refers to meeting legal and formal obligations (Teichmann and Wittmann, 2022), while conformance refers to meeting and potentially exceeding societal and other informal norms and obligations. Conformance characterizes voluntary actions that constitute a response to social and normative expectations (Durand et al., 2019). Lack of conformance by violations of the social license tends to have more frequent and unexpected negative consequences for companies compared to lack of compliance (Gottschalk and Hamerton, 2024).

DPAs have both advantages and disadvantages for corporations. It is a middle ground between innocence and criminal trial. Among corporate advantages, Parker and Dodge (2023) listed minor fine versus insolvency, fast solution, innocent third parties (collateral damage avoided), inadequately punishment of individuals, permit corporations to avoid criminal liability, avoid bankruptcy after committing significant misconduct, diminished faith in the legal system, and recede the predictability of law that was also emphasized by Lehman et al. (2020) in terms of rule complexity. Parker and Dodge (2023) further emphasized that a small fraction – if any at all – of employees has been individually prosecuted, there is thus a lack of individual accountability where nobody might be found guilty at trial. King and Lord (2020) mentioned the advantage of avoiding the distraction of prosecution, that companies are enabled to negotiate, or buy, their way out of prosecution, and that companies are not required to plead guilty.

Among corporate disadvantages, Parker and Doge (2023) listed remedies beyond what would be included at a criminal trial such as community service, and the role of the prosecutor who has neither the resources nor the experience to rehabilitate corrupt corporate culture effectively while having excessive power over the corporation for a long period of time into the future. Furthermore, DPAs violate the constitutional rights of corporations that claim innocence until proven guilty beyond any reasonable and sensible doubt, and corporations can face a trial penalty or statutory debarment if they refuse to consent to DPAs that they are offered by the prosecution. The innocence problem has emanated from DPA settlements when innocent companies are pleading guilty to avoid a trial, resulting in lack of criminal justice.

However, the argument here that DPAs are a miscarriage of justice because an innocent company might enter into a DPA has certain limitations since prosecutors frequently still must pass the essential test of evidence. Typically, it might seem difficult for a prosecutor to pass the evidential test establishing a realistic prospect of conviction in the case of an innocent company. Companies tend to submit a self-report of wrongdoing that may contain relevant indication or even evidence, which is certainly more difficult for companies to do in situations of real lack of guilt.

As argued by Parker and Dodge (2023), the incentive to cooperate with state and federal authorities forces corporations to consent to an invasion of privilege and privacy, thereby inhibits their attorneys' ability to advise them openly. When corporations are asked to waive the attorney-client privilege regarding secrecy, since DPAs are requiring transparency, the corporations are put in the vulnerable position of violating their employees' trust as they are forced to hand over incriminating evidence. In fact, an important basic principle in criminal justice is the protection against self-incrimination, which means that you do not have to provide information that can incriminate yourself. King and Lord (2020) also stressed the disadvantage of DPAs concerned with negotiated settlements that impinge upon the presumption of innocence. DPAs require admission of wrongdoing. There is a requirement to remediate the causes. There is also likely imposition of a substantial financial penalty.

For the corporate management guilty of corporate crime such as bribing foreign officials, the DPA has obvious convenience aspects. In the motive dimension of convenience theory, corporate financial possibilities were taken care by illegitimate means, and corporate financial threats were avoided by illegitimate means. There is no real punishment of executives or the company. In the opportunity dimension of convenience theory to commit white-collar crime, the status of offenders remains the same, and the legitimate access to resources is maintained. The only real change – that is temporary – is concerned with the reduced convenience of institutional deterioration from decay as well as the reduced convenience of lack of control, oversight and guardianship. This is where the settlement has an effect.

Crime concealment becomes less convenient when organizational decay in the form of institutional deterioration is prevented by transparency (Barton, 2004; Donk and Molloy, 2008). As mentioned above, an institution is a system of interrelated formal and informal elements – rules, guidelines, norms, traditions, beliefs – governing relationships between institutional members within which members pursue their mutual interests (Győry, 2020). Institutional recovery reduces the conditions of convenience for corruption and other forms of financial crime (Kostova et al., 2008; Pinto et al., 2008; Rodriguez et al., 2005).

New systems and routines for control, oversight, and guardianship – both from outside and inside the organization – can create a situation that improves the relative convenience of choosing legitimate rather than illegitimate ways in business activities. The agency perspective of control mechanisms by the DPA reduces deviance between principal and agent (Williams, 2008).

In the willingness dimension, there is an impact on the rational choice from the DPA where advantages of crime might be the same while the disadvantages will increase (Müller, 2018). Individuals and organizations are more likely to comply if they conclude that following laws, rules, and regulations is more profitable than violating those laws, rules, and regulations (Peeters et al., 2020).

Therefore, a guilty corporate management accepting a DPA remains crime convenient along eleven out of fourteen propositions in convenience theory. A corrupt management can thus continue with little punishment and minor reduction in future crime convenience. One criticism is "that DPAs inadequately punish individuals and permit corporations to avoid criminal liability" (Parker and Dodge, 2023: 940). Furthermore, as argued by Parker and Dodge (2023), when prosecutors fail to invoke the law's full extent of prosecution, then they diminish the deterrence effect of laws and increase the convenience of wrongdoing. However, companies do not completely avoid punishment through DPAs, they avoid a criminal conviction. They pay a fine plus any potential profits are disgorged. In addition, there are all the external as well as internal costs in the companies associated with the time-consuming legal process involving the criminal justice system. Furthermore, DPAs do not prevent prosecutors from the prosecution of individuals, i.e., entering into a DPA and prosecuting individuals is not mutually exclusive.

## Discussion

It is important to emphasize that the main reason for the introduction of DPAs in common law jurisdictions is the challenges with the attribution of criminal liability to corporate bodies, based on the identification doctrine. This article has so far been silent on this point. While one can argue about the pros and cons of DPAs as written above, one can hardly discuss them without even mentioning their main purpose – the challenges they are designed to overcome, i.e., the challenges of attribution of guilt to a corporate enterprise. Nevertheless, this article argues that given knowledge-based organizational insights in detective work by law enforcement agencies, it should indeed be possible to attribute criminal liability to corporate bodies. At least, this ambition of successful attribution should never be lost out of sight by investigators and prosecutors.

An important policy implication of this research is thus to forget about DPAs by following full criminal procedures when suspecting corporate law violations. The procedures should cover both responsible

corporate executives and the companies as well. We argue that companies do not commit crime, only employees – executives in particular – commit crime. Companies should nevertheless be held accountable even if they do not commit crime. This is a matter of unit of blame attribution where individuals might end up in prison while companies might be fined, where the latter is a fine imposed on a group of people, that is the total group of people in the company.

An important practical implication of this policy implication is to strengthen the expertise at serious fraud offices in terms of understanding various forms of white-collar crime, organizational settings and behaviors, and executive performance. Some serious fraud offices, such as the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) have a long way to go in this respect (Gottschalk, 2023). After a competence scandal at Økokrim, the body has taken on less serious fraud cases. Økokrim needs to strengthen its professional criminal investigation competence by insights into corporate behaviors (Gottschalk, 2024).

The suggestion in this article that deferred prosecution agreements represent miscarriage of justice needs to take into account the differences between jurisdictions. For example, the Norwegian context represents a kind of living in "a generous and universal welfare state" where "it becomes socially less acceptable to 'fail' and fall outside mainstream society, and socially more acceptable for the welfare state to exert measures of social control" (Andersen, 2023: 6):

Norway is located in the north of Europe, with a population of just over 5.4 million people. The country is relatively wealthy and provides high living standards for the majority of the population. The welfare state is typically characterized by generous and universal policies aimed at minimizing income differences, gender inequality, and income insecurity. The criminal justice system forms part of the public sector, and the Norwegian police and other criminal justice actors enjoy a strong foundation of legitimacy and trust among the Norwegian public. Crime rates are relatively speaking quite low, especially for violence. The Norwegian criminal justice system has been described by international scholars as lenient, with short custodial sentences, relatively humane conditions of confinement and widespread use of non-custodial sentencing options.

When comparing to Anglo-American countries, Andersen (2023): 6) argued that "the relatively lenient nature of the Norwegian correctional system could imply that the perceived cost of offending is lower than in the arguably harsher penal environment of Anglo-American countries". Norway as a small and wealthy country carries more collectivist values such as an egalitarian rather than an elitist culture, and equality rather than inequality (Andersen, 2023: 6):

This has led to general perceptions of crime as not only the responsibility of the individual, but of society, and the individuals as separate from their criminal actions.

The differences between jurisdictions as outlined here represent a suitable avenue for future research regarding the issue of whether deferred prosecution agreements represent miscarriage of justice.

This article has concentrated on the phenomenon of deferred prosecution agreements. Yet there are many kinds of arrangements for non-trial resolutions. Declination is such an arrangement where the prosecution decides not to prosecute. For example in the United States, Lifecore Medical had bribed Mexican government officials connected to the company's acquisition of Yucatan and Tanak (DOJ, 2023):

The Government has decided to decline prosecution of this matter based on an assessment of the factors set forth in the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy and the Principles of Federal Prosecution of Business Organizations, Justice Manual 9–28.300, including but not limited to: (1) Lifecore's timely and voluntary self-disclosure of the misconduct, which it reported to the Criminal Division, Fraud Section's FCPA Unit within three months of first discovering the possibility of misconduct and hours after an internal investigation confirmed that misconduct had occurred; (2) Lifecore's full and proactive cooperation in this matter (including its provision of all known relevant facts about the misconduct), and its agreement to continue to cooperate (…), (3) the nature and seriousness of the offense; (4) Lifecore's timely and appropriate remediation (…), and (5) the fact that Lifecore agrees to and will disgorge the costs it avoided.

Norway does also have a declination clause, which is, however, not triggered by the detected and revealed company suddenly being sorry and having some self-disclosure and demonstrating cooperation. The criteria for declination are quite different in Norway. It does not help the Norwegian company to "cooperate with any ongoing government investigations" or having "timely and appropriate remediation" (DOJ, 2023). The only relevant issue in Norway is "the nature and seriousness of the offense" (DOJ, 2023). For example, an architectural firm having violated the construction ban along the shoreline faced a declination as the prosecution argued that the nature and seriousness of the offense did not justify full criminal proceedings (Holmøy, 2024).

## Conclusion

Simply stated, it seems that deferred prosecution agreements are all about money and symbolism, and not about criminal justice. A murderer does not avoid incarceration by agreeing to a treatment program. A rapist does not avoid prison as long at the person voluntarily enters into an agreement with the prosecution. Why does a company (and its executives) avoid punishment by entering into such an agreement? The company does not commit crime. Corporate executives do. Only people commit crime. Therefore, it is not only miscarriage of justice to let an innocent company sign a deferred prosecution agreement. It is also miscarriage of justice to let a guilty company sign a deferred prosecution agreement without any responsible person(s) being brought to justice. However, sometimes companies might be offered DPAs because of the challenges with attribution. These challenges do not necessarily exist for natural persons. And contrary to the above, natural persons, especially in the US can also negotiate plea bargains or avoid prosecution completely, especially for economic crime, for whistleblowing or cooperation with prosecutors. Therefore, DPAs are not necessarily that extraordinary in some jurisdictions.

Nevertheless, in the main perspective of this article, people are responsible for crime, not systems or structures or organizational bodies since systems and structures and organizational bodies are as well the result of what people have been doing. Letting responsible persons hide behind a corporate wall and accepting a deferred prosecution agreement when in fact those individuals inside are responsible for crime is indeed a violation of basic principles of justice. Miscarriage of justice occurs when an unfair outcome results from law enforcement actions.

Crime refers to actions that (1) people think is wrong to do, and (2) people think it should be punished. However, to make harmful acts punishable by the criminal justice system, there needs to be (3) relevant criminal codes within the jurisdiction. When both criminal codes and facts about harmful acts are blurred, then criminal prosecution tends to fail. A punishment serves the purpose of deterrence from future crime, including the inability of incarcerated corporate executives to return to trusted positions with white-collar crime opportunity structures. If a crime has been committed, justice must be served.

## CRediT authorship contribution statement

**Petter Gottschalk:** Conceptualization.

## Declaration of Competing Interest

None.

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