2. Negotiating settlements in a broader law enforcement context

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1. THE AMBIGUITY OF NEGOTIATED SETTLEMENTS

Negotiated settlements to end criminal proceedings are a modern topic. And yet, one should not take for granted that countries see eye to eye on this issue. In times when plea agreements were used primarily in US procedures against individuals, continental European lawyers were full of disdain: in their view, settlements went against all established principles of fair procedure. They were considered a breach of the concept of equality; they went – in their view – against the notion of legality, of the search for material truth and typically defendants were forced to give up their privilege against self-incrimination.[1]

Times have changed with the expansion of corporate criminal liability. Corporations are typically complex institutions. They find it easy to structure themselves in a multitude of subsidiaries and similar sub-entities. Law enforcement agencies are frequently at a loss to detect the responsible entity or managers. Some authors speak of the 'corporate fortress'.[2] With intensified regulation on bribery of foreign public officials,[3] international organizations placed far more emphasis on corporate liability.[4] Whereas the Anglo-Saxon countries had developed corporate criminal liability from the early 20th centu-

[1] Cf. NIKLAUS OBERHOLZER, GRUNDZÜGE DES STRAFPROZESSRECHTS DARGESTELLT AM BEISPIEL DES KANTONS ST. GALLEN 525 (2nd ed. 2005).

[2] GORM TOFTEGAARD NIELSEN, *Procedural Law for Corporate Entities: A Danish View*, in CORPORATE RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES 321 et seq. (Albin Eser, Günter Heine and Barbara Huber eds., 1999).

[3] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

[4] Ibid. Art. 2.

ry,[5] continental European countries (and with them Asian and Latin-American states) took far more time to follow suit. Some countries, such as Belgium, Denmark, France and the Netherlands, adopted laws primarily to combat environmental crime between the 1970s and the 1990s. A real worldwide move to establish corporate liability for economic crime was closely linked to regulation on money laundering and corruption between 1990 and 2000.

Even if some countries have introduced abbreviated proceedings involving negotiations between law enforcement and individual defendants, the main debate on settlements, in particular in corruption cases, focuses on proceedings against corporate entities.

2. ADVANTAGES

Beyond complexity and the lack of transparency of corporate structures, several other reasons are given for negotiated settlements: law enforcement agencies are generally understaffed and overwhelmed by their workload. In some countries laws against economic crime are insufficient. As an example, one might mention the Italian Statute of Limitation, which is short in duration and runs on until the final instance, an arrangement leading to as much as 60 per cent of corruption proceedings ending up time barred.[6] Settlements have contributed to increasing the level of successful prosecution of corporate corruption. This is an observation that may be made for France and the UK since they have endorsed settlement regimes. Another example of deficient legislation is the Swiss law on confiscation. Slush funds destined for bribery are considered too remote from the actual crime to be confiscated even if the general purpose – keeping a nest egg for future bribery – is clearly established.[7] In such untested legal situations, both parties may prefer a negotiated outcome to the uncertainty of a court ruling. Further reasons motivating settlement are the difficulties in obtaining convincing evidence from abroad, in particular in transnational bribery cases. Finally, settlements have motivated companies to develop adequate compliance regimes. In a wider sense, an entire compliance industry has been fostered, in particular by US settlement practice.

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[5] MARK PIETH AND RHADA IVORY, *Emergence and Convergence: Corporate Criminal Liability Principles in Overview*, in CORPORATE CRIMINAL LIABILITY, EMERGENCE, CONVERGENCE, AND RISK 7 et seq. (Mark Pieth and Rhada Ivory eds., 2011).

[6] OECD Working Group on Bribery, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy, December 2011, para. 13.

[7] MARK PIETH, WIRTSCHAFTSSTRAFRECHT 91 et seq. (with further references) (2016).

The advantages of settlements for both law enforcement and the defendant are obvious: instead of protracted proceedings, keeping the company in the news headlines and entailing the risk of prescription for the prosecution, both parties gain from settlement. For the prosecution, settlements have the advantage of a quick win; companies, on the other hand, are in a better position to calculate their costs.

3. BROKERING OF SETTLEMENTS BY PRIVATE MEDIATORS?

To expand on the Swiss example above of how law enforcement and defence may find a joint solution, I can add a recent Swiss anecdote on a settlement that I helped broker personally. Law enforcement agencies had frozen several hundred millions of dollars of a company accused of large-scale transnational bribery. The proceedings were not advancing, as law enforcement was afraid that the funds would be returned to the company, even though they were clearly destined for bribery, although not yet earmarked for specific contracts. Various opinions of professors were written, coming to diverging conclusions. The prosecution feared that the case would become time barred.

On the other hand, the company remained continuously in the media as the case dragged on. It was interested in terminating the case – if possible – obtaining at least part of the money back and knowing how much money to write off.

In this impasse, I offered to both parties to hear them out and to suggest a possible outcome. The first session was held in the offices of the national prosecution agency, the next two at the university: both the company and the prosecutors had to take the suggestion home. It was then, with a few minor changes, transformed into an official agreement. The prosecution services freed a certain amount of the seized funds and forfeited the rest. The company waived its appeals and the solution was implemented with the agreement of both parties.

What may seem an elegant way out of an impasse is of course the consequence of unclear legislation or slow justice.

4. CHALLENGES

Even though settlements are increasingly used in trials against corporate crime on a worldwide scale, the legal profession and the wider public are far from convinced: there is a clear tendency to settle rather than to test legal arguments in court. Inevitably, the law is losing its precision. Settlements are also considered a form of privatization of justice: typically, a company will, upon its own initiative, or in agreement with the prosecution, engage private internal investigators (law firms and forensics companies). Lawyers will negotiate on

the basis of the outcome of this investigation and the parties will replace the judiciary. In many instances, the wider public is right to suspect that companies are let off lightly. Such an experience was made in one of the first negotiated settlements the UK's Serious Fraud Office (SFO) struck on corruption: in the BAE corruption case relating to the delivery of a radar system to Tanzania. The company did not have to admit guilt, the sanction was minimal and the facts were largely drafted by company lawyers.[8] In a similar way, the NGO Human Rights Watch is correct in its criticism of Swiss prosecutors.[9] In the recent case of the son of President Obiang of Equatorial Guinea, Swiss prosecutors struck a deal with the defendant and the relevant country, confiscating 25 vehicles and CHF 1.3 million to pay court fees in Geneva,[10] while, however, releasing to the culprit his yacht *Ebony Shine*, valued at €100 million. That settlements allow defendants to be let off lightly is highly problematic. It calls into question one of the key principles of the criminal justice system: it goes against equal treatment.

5. SETTLEMENTS UNDERMINED BY CANADA'S POLITICIANS

Settlements have also been called into question by a recent crisis in Canada. The current Prime Minister Justin Trudeau sent his senior officials to suggest that the Minister of Justice and Attorney General Jody Wilson-Raybould find a settlement in a large international corruption case involving the engineering company SNC-Lavalin. When she steadfastly insisted on taking the company to court, the Prime Minister and his collaborators lost their nerve; after all, SNC-Lavalin was Trudeau's most important campaign contributor. Due to Canada's automatic debarment law, he feared a dramatic loss of jobs in his key constituency. When Jody Wilson-Raybould refused to offer the company a settlement, she was relieved of her office and pushed into the Veterans Ministry. This episode demonstrates that settlements are only acceptable if the public prosecutor is independent from political lobbying. This kind of settlement again calls into question a key feature of criminal justice: judges need to be independent from the executive power. This is what we have learned from the

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[8] Ben Taylor, BAE payment to Tanzania undermines justice and accountability, THE GUARDIAN, 20 March 2012.

[9] Sarah Saadoun, Swiss Prosecutors Squander Opportunity to Counter Kleptocracy, Equator Guinea Vice President Gets to Keep $100 Million Yacht in Settlement, HUMAN RIGHTS WATCH, 8 February 2019.

[10] Stephanie Nebehay and John Stonestreet, Geneva closes graft case against Obiang's son, confiscates 25 luxury cars, REUTERS, 7 February 2019.

French Revolution. The Canadian example, therefore, seriously undermines the credibility of settlements.

6. THE NEED TO REGULATE SETTLEMENT PROCEEDINGS

This brief overview of the advantages and challenges of settlement leads to a call for action: we need regulation. States allowing their prosecution services to enter into settlements need to establish a clear legal basis and to define standards and procedural rules. From experience I am aware that in the past, settlements have been struck totally outside official standards – in particular in the area of confiscation. What needs to be clarified in particular are the rules on fair hearing. Furthermore, states need to define the menu ranging from deferred prosecution or closure against restitution to guilty pleas linked to an acknowledgement of guilt. A fundamental issue is whether the agreements are subject to judicial approval. Obviously, even if a judge has to sign off on the settlement, typically after a short public proceeding, the judge would not be given the right to hear the case *de novo*; rather, he or she would need to decide whether to accept or refuse. In the case of refusal a further problem arises: what should become of evidence submitted voluntarily and of confessions by the accused? Regularly, this type of evidence would need to be eliminated from the file[11] since it is influenced by the hope of leniency. This is a consequence of the classic right against self-incrimination.

If negotiated settlements were to win public trust, the facts of the case would need to be made public. However, there may be reasons for exceptions, such as commercial or state secrecy or the names of third parties who are implicated but did not get a chance to defend themselves.

Finally, the principle of double jeopardy (or *ne bis in idem*) poses far greater challenges than in the ordinary procedure. As the facts are negotiated, they represent a kind of formal rather than substantive truth. Furthermore, if the facts are drafted in a cursory, imprecise manner, the downside for the corporation may be that the agreement does not prevent future proceedings in the same matter.

7. INTERNATIONAL HARMONIZATION

Increasingly, countries cooperate in combating transnational bribery. Also from a company perspective, it is reasonable to negotiate collectively with several jurisdictions. However, joint negotiations require a minimum of

[11] E.g. Art. 362(4) of the Swiss Code of Criminal Procedure.

harmonization of standards. This is the main reason why the OECD Working Group on Bribery should follow the advice of the 'Recommendation 6 Network' to draft an 'International Guideline for Non-Trial Resolutions of Foreign Bribery Cases'.[12]

[12] Developed by a working party following the presentation of the March 2017 Report of the Recommendations of the Secretary General's High Level Advisory Group.