

# ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## DEFERRED PROSECUTION AGREEMENTS, PLEA BARGAINING, IMMUNITY PROGRAMMES AND CORRUPTION

### QUERY

Can you provide some information on Transparency International policy and international good practice in relation to deferred prosecution agreements, immunity programmes and plea bargaining?

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### SUMMARY

This brief explores the advantages and disadvantages of a number of legal tools commonly employed in cases related to the prosecution of corruption, including deferred prosecution agreements, immunity programmes and plea bargains. Whenever possible, the authors include country examples to illustrate the use of these tools, as well as best practices found in the literature.



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## 1 INTRODUCTION

In a country operating under the rule of law, securing a conviction at trial relies on evidence collected during a criminal investigation and presented at court. Plea bargains, deferred prosecution agreements and immunity programmes are a series of mechanisms aimed at facilitating the process of investigating, prosecuting and sanctioning criminal activity.

Plea bargaining refers to a negotiated agreement where a defendant pleads guilty to a lesser charge and receives a more lenient sentence. Plea bargains present several benefits for defendants and for the prosecution. They allow for expedited trial procedures and a consensual and more efficient resolution of cases, which contributes to judicial and prosecutorial efficiency. Given the uncertainty of trial outcomes, plea bargaining may also be a way to ensure that defendants receive some degree of punishment for their criminal activity, even if this is in the form of a reduced sentence. Also, some argue that public admission of guilt involves taking responsibility for criminal conduct and is a first step towards rehabilitation (Strang 2014).

Unlike plea bargaining, which is used to expedite the judicial process, cooperation agreements are primarily employed to assist law enforcement during the investigative phase. From the perspective of law enforcement, securing an admission of guilt is not the primary goal here. Instead, the focus is on ensuring the cooperation of a defendant in garnering evidence which can be used to prosecute other individuals (typically co-conspirators). The strategy of co-opting defendants as witnesses is increasingly accepted as a legal practice, including in the fight against corruption. Article 37 of UNCAC provides for the possibility to encourage persons who have participated in corruption to supply useful information to relevant authorities for investigative and evidentiary purposes in return for less serious sanctions (Strang 2014)

In some countries, cooperating witnesses can be granted full immunity and face no criminal liability at all provided they give a truthful testimony. Article 37 of UNCAC also provides for the granting of immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of a corruption offence. Immunity is usually limited to the individual in the criminal conspiracy with the lowest

culpability. The rationale for offering immunity is to encourage whistleblowing and cooperation with relevant authorities by removing the threat of exposure and by avoiding that their testimony can then be used directly or indirectly against them if they testify.

This can be particularly useful in corporate criminal liability where lower-level employees may be pressurised by their superiors to engage in criminal conduct. In cases where there is insufficient evidence against suspects, they can be pressured to become a witness for the prosecution and help gather the necessary information to pursue a criminal case against a different defendant (Strang 2014).

Corporate settlements in the form of deferred prosecution agreements or no prosecution agreements are becoming an important tool to resolve bribery cases. Promoted as a quick, cheap and easy way to deal with corruption, there are many expected benefits in resorting to them, as they:

- 1) prevent the collapse of convicted companies and protect them from reputational damages or debarment
- 2) achieve the same outcome in terms of financial penalties and remedial action without the cost of a lengthy trial
- 3) provide opportunities to promote corporate governance reform by making anti-fraud, anti-bribery and anti-corruption training programmes a condition of the agreement
- 4) encourage firms to self-report wrongdoing and cooperate with law enforcement
- 5) bring money into the treasury

However, the use of such settlements is becoming increasingly controversial as they can fuel an impression of impunity for corrupt acts (when the offenders can afford the fines), undermine effective accountability and sanctioning, create a two-tier justice for companies and fail to deter economic crimes by protecting companies from collateral consequences, such as reputational damage and debarment (Corruption Watch 2016).

To be effective, such mechanisms need to be designed carefully, with adequate safeguards to prevent their misuse by criminals to escape punishment.

## 2 PLEA BARGAINING

According to Strang (2014), The term “plea bargaining” has become a label often used to describe a range of disparate mechanisms to investigate, prosecute and adjudicate criminal liability. For some, plea bargaining is an indispensable tool to get an insight on criminal activities, while for others it has become a symbol of coercion and injustice (Strang 2014).

In essence, a plea bargain is an admission of guilt in return for, or in hope of, a shorter sentence or alternative benefits. It does not necessarily require cooperation, just acceptance of personal responsibility in return for leniency.

Law enforcement officials might offer favourable plea bargains to induce some defendants to provide evidence and testimony against other corrupt actors. As explained by Stephenson (2015), sometimes the strategy is to “flip” lower-level participants in a corrupt scheme to get evidence on the ringleaders (who would otherwise be impossible to prosecute).

While this has become a standard strategy in some countries, it remains controversial because law enforcement officials promise leniency or immunity to the first person or entity from a group of co-conspirators who comes forward, in order to deter future unlawful conspiracies or transactions (Stephenson 2015).

Strang (2014) identifies a number of reasons why countries might want to adopt plea bargaining. First, the expedited procedures allow for more efficient resolution of cases, which contributes to judicial and prosecutorial efficiency. Since a full trial often requires substantial judicial resources, bargaining can help reduce court congestion (Strang 2014).

Another possible motivation is that trials are inherently uncertain and prosecutors can use plea bargaining to ensure that defendants believed to have engaged in criminal activity receive at least some form of punishment, even if the length of sentence is reduced (Strang 2014). Finally, in cases where investigative or other confidential information is involved or where law enforcement authorities relied on illegal investigative actions, a plea bargain may avoid the need to disclose such information during a public trial (Strang 2014).

## Plea bargaining: country examples

### *England*

In England, negotiated plea agreements were introduced by the attorney general in 2009 for cases of serious or complex fraud. Following this regulation, some high-profile corruption cases have involved the use of these plea agreements, most notably in the cases against Innospec, BAE Systems Plc. and Dougall (all 2010).

Public perception in the country, however, seems to be that plea bargaining is used by defendants to escape punishments they deserve under the law. Such sentiments were contained in the 1993 Royal Commission on Criminal Justice, the 2001 Auld Report and the Justice for All white paper, published in 2002 (allAfrica 2015).

### *Nigeria*

In Nigeria, plea bargaining has been employed in a number of high-profile corruption cases, such as those against former governors Diepreye Alamiyeseigha and Lucky Igbinedion. In 2010, a plea bargain was struck with Cecilia Ibru, the former chief executive of Oceanic Bank. Upon conviction for fraud, she was made to forfeit assets valued at 191 billion Nigerian naira (around US\$500 million) and sentenced to 18 months’ imprisonment, though she was released after just six months.

In May 2015, the Nigerian Commissioner for Justice introduced the Administration of Criminal Justice Act (ACJA) and the Cybercrime Act. The purpose of ACJA was to guarantee more humane treatment for suspects and reduce the delay in criminal justice delivery. Plea bargaining was one of the tools included to achieve these objectives and was expected to play a significant role in the fight against corruption (allAfrica 2015).

The act included new guidelines for plea bargaining and states that the prosecution may enter into a plea bargain only with the consent of the defendant during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence. Plea bargains may be permitted if: the evidence of the prosecution is insufficient to prove the offence charged beyond

reasonable doubt; where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative; or where the defendant, in a case of conspiracy, has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders (Falana 2015).

According to the ACJA 2015, plea bargains can only be accepted under circumstances where the prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process. Despite these new guidelines, experts are still divided on the benefits of plea bargaining. Some experts claim it will save the government the money of the prosecution and the accused the harassment of standing trial, others claim that this tool can be easily abused and sends the wrong message: for those caught for corruption-related offences, it is possible to negotiate with the government and “get away with it” in exchange for a portion of the proceeds (Vanguard 2015).

The recent pension fraud case against Esai Dangabar serves as a good example of this. During the case, the high court directed one of the defendants to pay a fine of just 750,000 Nigerian naira (US\$2,000). Shortly after, the accused, a former deputy director in the pension office, admitted that he conspired with others to steal some 23 billion Nigerian naira (US\$62 million) from the police pension fund. This “bargain” led to the judge's suspension by the National Judicial Council and caused a public outcry (allAfrica 2015).

### *Brazil*

On March 2014, the Brazilian Federal Police launched an investigation entitled “Lava Jato”, referencing car-washing services offered in Brazilian gas stations. Originally intended to investigate illegal currency exchange operations and money laundering, the investigation unveiled an alleged fraud scheme designed to launder embezzled assets from Petrobras, a publicly traded energy and petroleum company controlled by the Brazilian federal government. The breakthrough of the operation took place when several of the individuals under investigation agreed to enter plea bargain agreements with the prosecution.

Plea bargains are not common in Brazil, but they helped open the investigations to the alleged participation of private companies in the scheme, including the largest Brazilian construction companies and their officers. Specific names and bank accounts allegedly used to make deposits were identified as a part of the plea bargains, including false contracts and invoices used to justify deposits and transfers to the accounts of alleged shell companies, which, according to allegations, never rendered any services in return.

The plea bargains also revealed the existence of an alleged cartel-like operation designed to defraud procurement procedures by Petrobras. As a result, officers of some of the largest companies in Brazil were arrested and are currently facing criminal charges. The companies themselves may also be subject to administrative and civil sanctions.

### Good practice in plea bargaining

Given the nature of this legal tool, there is a risk that plea bargaining affords excessive discretion to the prosecutor and that this may be used inappropriately. To avoid this, the following recommendations should be observed (see Fair Trials 2016):

1. Access to information and evidence: early, comprehensive discovery and disclosure, including exculpatory evidence must be provided to defendants before any plea agreement can be made.
2. Access to adequate legal assistance: to engage in plea bargaining, defendants must have advice from counsel whose remuneration is sufficient that lawyers are not incentivised to advise clients to plead guilty against their interests. Ideally, access to a lawyer should be facilitated at the earliest moment, post-arrest, so that counsel is in a good position to advise the client about any early plea offers and can receive and request evidence earlier.
3. Recording of plea offers: plea offers and, if possible, subsequent negotiations should be recorded and made available to judges. This will allow the judge to probe the conditions of the offer. For example, were the defendants properly advised of the consequences of pleading guilty (including being given information about the likely sentence they would receive after conviction at trial and any collateral consequences on immigration,

public benefits, and so on) and was sufficient evidence disclosed to the defence prior to the plea deal? This would also facilitate any later appeals against plea agreements and would help to promote greater transparency and accountability for prosecutorial practices.

4. Greater involvement of judges in plea bargaining: judges should take a more active role in plea bargaining to ensure that defendants' rights are respected. Quasi-mediation might be appropriate for some cases.
5. Higher standards in charging practices: where trials become relatively rare, the need to have a rigorous system for vetting the strength of cases arises earlier in the criminal procedure. Higher charging standards might take the form of requiring prosecutorial oversight of police complaints and reforms to the grand jury system such that the defence may take a more active role and it may function as a filter for indictment.

### 3 DEFERRED PROSECUTION AGREEMENTS

The UK's Serious Fraud Office (SFO) defines deferred prosecution agreements (DPAs) as an agreement reached between a prosecutor and an organisation which could be prosecuted under the supervision of a judge. This agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions (SFO 2017). DPAs have been used in the United States for over 20 years and were only incorporated into the UK legal framework in 2014 (Radmore and Hill Jr. 2017). They are mostly used in cases of fraud, bribery and other economic crime.

Although initially used with individuals in the USA, DPAs are now increasingly used in matters involving business organisations across a wide spectrum of alleged federal crimes (Radmore and Hill Jr. 2017). In the UK, however, DPAs apply only to organisations, not individuals (SFO 2017).

According to Stephenson (2016), some of the main reasons why it might make sense use corporate settlements, such as DPAs, to resolve bribery cases include:

- Lower costs: a settlement allows the government and the defendant to avoid the cost of a trial, as

well as the potential uncertainty about the outcome. This is especially important in contexts where the government's enforcement resources are limited.

- Incentives for self-reporting: the prospect of negotiating a more favourable settlement with the government gives corporations a stronger incentive to self-report violations and to cooperate with the investigation. While a similar result might be achieved through sentencing guidelines that take self-reporting and cooperation into account, the flexibility associated with settlement negotiations may be more attractive.
- Avoidance of reputational harm for defendants: DPAs can help corporate defendants avoid significant adverse consequences such as a debarment from public contracting, or more general reputational harm associated with a criminal indictment.

For these reasons, DPAs have been described as useful enforcement tools that allow the authorities to accomplish as much as, and sometimes even more, than they could from a criminal conviction (Sack 2015). This is partly because DPAs can require corporations to establish compliance programmes and ask for cooperation to be implemented worldwide, rather than just in the country where the offence is being prosecuted (Sack 2015). Moreover, if the implementation of such programmes is not deemed satisfactory by the authorities, the legal process can be relaunched.

From a government perspective, creating mechanisms that allow corporate defendants to avoid negative consequences might also make sense for three main reasons: i) corporations' desires to avoid negative consequences give the government leverage in settlement negotiations; ii) such a system may strengthen corporations' incentive to self-report and cooperate; and iii) the adverse consequences of indictment (especially of draconian sanctions like debarment) may fall substantially on customers, innocent employees, and other third parties (Stephenson 2016).

#### Criticisms of DPAs

Despite the advantages mentioned above, the use of DPAs has become increasingly controversial,

particularly in the USA, where DPAs have been around for longer.

Perhaps the most serious and recurring criticism is that DPAs have become a substitute for individual accountability for financial crime (Corruption Watch 2016). Prior to the introduction of DPAs as a means to prosecute Foreign Corrupt Practices Act (FCPA) charges, 83 per cent of FCPA enforcement actions also involved the criminal prosecution of an individual. However, between 2004 and 2014 (when DPAs were used more frequently), only 24 per cent of Department of Justice enforcement actions resulted in individual prosecutions (Corruption Watch 2016). This decline in individual prosecutions has been used as an argument against the deterrent effect of DPAs.

The second point of criticism against DPAs is that their use creates the impression that companies can buy their way out of the justice system in a way that no other person can and that DPAs represent an overly lenient response on the part of the authorities to serious crimes (Corruption Watch 2016). Some authors argue that the system could potentially create a “two-tier” justice system because corporations accused of criminal conduct can settle the case pre-indictment, while an individual defendant cannot (Corruption Watch 2016; Hawley 2016).

There is also growing concern that, at least in the case of the USA, DPAs fail to deter economic crime (Corruption Watch 2016). Despite the record fines imposed through DPAs in the USA, there is growing concern that these agreements offer little deterrent value and are seen as a cost of doing business. Research cited by Corruption Watch (2016) alludes to the fact that current sanctions imposed through DPAs are insufficient to offset firms’ economic incentives to bribe and that financial penalties would need to increase by 9.2 times or the probability of getting caught to 58.5 per cent to offset those incentives. This is because the fines imposed for engaging in foreign corrupt practices comprise a tiny fraction of the potential revenue generated by lucrative contracts (Corruption Watch 2016).

Another key reason why the use of DPAs is believed to limit the deterrent value of the anti-corruption framework is that it also shields companies from potential debarment. The OECD Working Group on Bribery noted in 2010, that the US, despite having an

appropriate legal framework to comply with the OECD’s anti-bribery convention, including the right to debar companies for FCPA violations, has rarely done so (OECD 2010). While DPAs, in theory do not stop an agency from debaring a company, this does not appear to have happened in practice yet (Corruption Watch 2016).

Finally, another common criticism against the use of DPAs is that they are often unregulated and lack oversight. According to Corruption Watch (2016), there is growing consensus that the lack of judicial or independent oversight in the use of DPAs in the US has left prosecutors with unrestrained power and allow them to act as judge and jury and without the presence of a neutral arbiter to check the exercise of prosecutorial discretion.

### Good practice in DPA

According to Transparency International (2015) and Corruption Watch (2016), analysis of the existing DPA regimes in the USA, the UK and other European countries suggests the need for increased transparency and accountability in the system. To make sure that settlements effectively deter corruption, the following principles should be considered (see Corruption Watch 2016):

1. Settlements on their own are unlikely to achieve real deterrence and should only be used as part of a broader enforcement strategy where prosecution is the norm. If settlements are used sparingly as part of a broader enforcement regime where prosecution is the norm, they can have a role to play in encouraging corporate self-reporting of crime. However, enforcement agencies need to be able to show that they are willing and able to detect and prosecute cases of corruption to give full deterrent effect to the law.
2. Settlements should only be used where a company has self-reported, cooperated with enforcement authorities and admitted guilt, and where the wrongdoing is not of a serious or egregious nature. Unless high standards are set for when companies can agree a settlement, the danger is that settlement fines become a cost of doing business. The use of settlements for cases of very serious wrongdoing, meanwhile, offends notions of justice and undermines public confidence in their use.

3. Individuals must be held to account and prosecuted wherever possible whenever a settlement is entered into. All countries should move to the position outlined in the 2015 Yates memo in the US that a settlement is conditional on a company giving evidence about individuals' involvement and responsibility for wrongdoing right up the chain of command. Ideally, settlements should not be entered into unless they can be accompanied by individual prosecutions for the wrongdoing in question.
4. Judicial oversight undertaken in a public hearing is crucial to public confidence in the settlement process but only if it allows for proper scrutiny of the evidence. Rubber-stamping of agreements by judges is unlikely to provide public confidence. Such oversight should be exercised in public with full transparency.
5. Settlements must provide an equivalent level of detail about the wrongdoing to the public as a court hearing would. This must include names and rank of officials and company employees involved in the wrongdoing, amounts paid, how the offence was committed and a full analysis of the public interest factors considered when deciding to offer a settlement.
6. Compensation to victim countries must be an inherent part of a settlement. It cannot be right that the wealthiest countries bringing enforcement actions against their own companies for paying bribes in other countries should reap the financial gain when there is widespread recognition of the social harm that bribery causes. Compensation should be broader than just the bribes paid, however, and reflect the real social harm.
7. Affected countries and victims should be given a right to representation at settlement hearings or during settlement negotiations. Best practice would include giving affected states a right of objection to a settlement. Where affected states chose not to be represented at a hearing or during negotiations, civil society organisations should be able to make representations about the harm of the corruption through impact statements.
8. Settlements should be used to leverage full disclosure of wrongdoing within a company. Since settlements are usually based on an internal investigation by a company, settlements should only be given where prosecutors can satisfy themselves that the company has revealed the full extent of the wrongdoing committed and provided

information about any other wrongdoing it has uncovered in the process.

9. Settlements should not be given to companies that have been subject to previous enforcement or regulatory action. Repeated use of settlements for companies that have already been subject to enforcement actions of any type encourages recidivism and removes the deterrent value of a settlement completely. To this effect, settlements should enjoin companies not to commit any further offences.

## 4 IMMUNITY AND LENIENCY PROGRAMMES

### Leniency and immunity programmes

Leniency and immunity programmes offer immunity or reduced sentences to witnesses/co-conspirators if they blow the whistle, self-report criminal activity and cooperate with law enforcement. They differ from plea bargaining or deferred prosecution agreements in that, in many cases, they are targeted at wrongdoers prior to detection and before criminal activity has been exposed. In addition, rather than granting a reduced penalty on a case by case basis, leniency is usually granted to anybody fulfilling a number of requirements in a codified situation. Compared to plea bargaining, this reduces judges' discretion and legal uncertainty, and is likely to promote self-reporting by providing wrongdoers with an "exit option" they can rely on (Nell 2008).

Such voluntary disclosure programmes were first introduced in the context of competition law enforcement by the US Department of Justice Anti-Trust Division in the late 1970s, offering immunity to the first cartel member reporting the cartel to the anti-trust authority. In view of the impact of such policies on increasing the number of successful prosecutions, these policies have since become one of the most important tools against all forms of collusion. However, as cartel infringement is often connected to other offences such as corruption, cartel members blowing the whistle are likely to have to disclose information on other offences for which they may be prosecuted, undermining the effectiveness of such anti-trust leniency programmes. This has led some to argue in favour of the introduction of leniency programmes for other connected offences such as corruption and bribery (Luz and Spagnolo 2016).

Such leniency approaches encouraging whistleblowing and cooperation with law enforcement are also expected to work for the fight against corruption, and some countries such as Brazil and Mexico have explicitly introduced leniency programmes for corruption. Similar to collusion, corruption requires a certain level of trust between co-conspirators, and leniency provisions aim to provide incentives for wrongdoers to betray their partners in crime (Luz and Spagnolo 2016). In addition to granting immunity to criminals who testify against their accomplices, some countries like Poland also provide identity protection in case of retaliation (Ware et al 2007).

Some authors argue that such approaches may even be more effective in deterring corrupt behaviour than imposing maximum penalties, especially in countries where detection is low and the judiciary is weak. Granting milder penalties to one party in a corrupt deal is likely to destabilise the corrupt deal by undermining the trustworthiness of both players, making the corrupt transaction riskier and introducing some uncertainty about whether or not the bribe will be reciprocated, which may have a dissuasive effect on engaging in corruption (Lambsdorff 2010; Buccirosi et al. 2005).

Evidence from China, which introduced one-sided leniency policies and asymmetric punishment in 1997, points to a stable and substantial reduction in the number of major corruption cases after such policies were introduced, which tend to confirm the deterrent effect of the 1997 reform (Perrotta Berlin & Spagnolo 2016).

In addition to its deterrence effect, such leniency programmes significantly reduce law enforcement costs for individual crimes as wrongdoers spontaneously report undetected crime and may help convict their accomplices, rendering an investigation unnecessary (Buccirosi and Spagnolo 2005).

## Country examples of immunity/leniency programmes

### *United States*

The US has the most experience of whistleblowing mechanisms in anti-trust. The anti-trust immunity programme grants immunity from prosecution to the

first company reporting a cartel. In addition, the company earns a de-trebling of damages in any civil action instituted by customers or suppliers that may have suffered financial harm as a result of the company's involvement. That means the company has to pay single damages instead of paying three times the damages. After the first company enters the leniency programme, further companies can report and cooperate, but the benefits diminish as the number of cooperating entities increases, with the last company receiving very little benefits from cooperating with the investigation (Volkov 2017).

In the US federal system, such immunity can only be granted by a centralised office, the Department of Justice's Office of Enforcement Operations, to ensure: i) that immunity is granted only in appropriate cases and ii) that a prosecution office does not grant immunity to a witness who is subject to another active criminal investigation by another office (Strang 2014).

In anti-corruption, a leniency pilot programme was launched in 2016 for the Foreign Corrupt Practice Act (FCPA), using a different approach to leniency. The programme grants credits in FCPA matters to companies that voluntarily self-disclose, fully cooperate and implement remediation. Remediation requirements include improving the company's compliance programme against a set of criteria (existence, resources, capacity and independence of the compliance function, qualification of its staff, among others), the disciplining of offending officers and employees, and additional steps demonstrating acceptance of responsibility for the company's misconduct and implementation of measures to avoid the risk of repetition (Volkov 2017; McFadden et al. 2016). More specifically, the programme specifies that self-reporting must be done in a timely manner, all facts relevant to the wrongdoing must be disclosed, including those involving the corporation's officers, employees and agents in the criminal activity, and cooperation must be proactive rather than reactive, among other requirements (MacFadden et al. 2016).

Credits grant a 50 per cent reduction from the bottom of applicable sentencing guideline range (and even a declination) to companies that disclose their involvement in foreign bribery provided that the company cooperates with the investigation and engages in timely and appropriate remediation. For companies that cooperate and implement remediation



but do not voluntarily self-disclose, the pilot programme provides for a maximum 25 per cent reduction off the bottom of the applicable sentencing guideline range the fine. (MacFadden et al. 2016). However, even if the company is granted a reduction, it must divest any ill-gotten profits from the bribery scheme (Volkov 2017).

### Brazil

Brazil's anti-corruption law allows for leniency agreements in corruption cases, ranging from a reduction of fines to exemption from sanctions. These agreements may also cover administrative liability for illegal acts under the Brazilian procurement law.

The highest authority of each public body or entity of any of the spheres of government has competence to conclude leniency agreements. For the executive branch of the federal government, for example, the Office of the Comptroller General has the power to offer a leniency agreement. Leniency can reduce the applicable fine by two thirds, exempt the entity from publication of the conviction as well as exempt it from being prohibited from receiving public money for one to five years (World Economic Forum 2015).

However, such agreements only apply to legal entities, as individual criminal prosecutions fall under the Brazilian penal code, which is considered a major drawback of the anti-corruption law. While it is ultimately individuals that report wrongdoing, the anti-corruption law does not protect collaborating individuals from prosecution (Luz and Spagnolo 2016). Individuals can benefit from leniency measures granted by the judge under the penal code, in the form of a reduction of penalty, but such provisions are at the judge's discretion and not automatic, which can potentially undermine wrongdoers' incentives to blow the whistle as there is no guarantee that they will obtain a reduced sentence after confessing to participating in the offence (Luz and Spagnolo 2016).

### Mexico

The Mexican Federal Anti-Corruption Law in Public Procurement was passed in 2012 and introduces leniency provisions to encourage whistleblowing, including the possibility of a reduction in administrative sanctions to any legal or natural person who confesses wrongdoings. As in Brazil, individual criminal sanctions for corruption are administered

under the Mexican penal code, and there are no immunity instruments in relation to criminal sanctions against individuals. A reduction of the sentence in exchange for whistleblowing and collaboration can be granted by the judge at the end of the judicial process, but is fully discretionary, which is likely to undermine the effectiveness of the programme.

### Turkey

The Turkish penal code also introduces some elements of a voluntary disclosure programme for active and passive bribery. Article 254 exempts wrongdoers from any penalty when they inform the authorities prior to the commencement of an investigation. Under article 254, leniency is codified, automatic and public if self-reporting occurs prior to detection and investigation. However, according to some authors, the Turkish leniency regime contains several strategic mistakes that may undermine its effectiveness in curbing corruption (Nell 2008):

- Bribe-payers can use the threat of reporting to force recipients of the bribe to enforce the corrupt deal, as the latter can be punished under Turkish law as soon as they have agreed to accept or have accepted the bribe. To eliminate this threat, leniency should only be granted to the reporting bribe-payer after the bribe recipient has returned the bribe favour.
- Similarly, bribe-takers can use the threat of reporting to ensure that bribe-payers comply with their part of the deal. To eliminate this threat, the law should provide exemption from punishment for the reporting bribe-taker only if the bribe was actually handed over.

### Towards good practices in immunity programmes

Ill-designed leniency programmes can be misused to escape punishment and let guilty corporations and individuals off the hook. In some cases, they can even be exploited by corrupt individuals to ensure that corrupt transactions are enforced and secure corrupt deals that would not be possible otherwise (Buccirossi & Spagnolo 2005). Adequate safeguards need to be in place to ensure that immunity orders are not misused to fuel impunity for serious crimes. This involves establishing clear and transparent criteria and processes for granting immunity (Strang 2014).

### *Coverage of the leniency/immunity programmes*

To maximise incentives for whistleblowing and self-reporting, voluntary disclosure programmes should create ex-ante leniency or immunity for corruption that does not rely on prosecutorial or judiciary discretion for corruption infringements. Automatic leniency should be extended to individual criminal sanctions, covering not only companies but also individuals, provided they meet specific codified criteria (Luz and Spagnolo 2016; Nell 2008).

In terms of the types of offences covered by such leniency programmes, a 2006 analysis of the penal code of 56 countries found that 26 countries (46 per cent) had established voluntary disclosure programmes for active or passive bribery. While all of those did this for active bribery, only three (Hungary, Senegal and Turkey) also exempted self-reporting wrongdoers in the case of passive bribery. While granting leniency in cases of self-reporting acts of passive bribery is the exception, leniency provisions should target acts of passive and active bribery alike to avoid creating asymmetric conditions for bribe-payers and bribe-takers, thereby supplying bribe-payers with a means to enforce corrupt deals (Nell 2008).

Voluntary disclosure programmes can be divided into three categories. The first category relates to seven of the 26 countries that grant leniency to bribe-payers only if they report and the bribe was solicited or extorted from them. The second category of countries grants leniency to the bribe-payer irrespective of whether the bribe was solicited/extorted or promised/offered to the bribe-taker. In the case of extortion, reporting is not necessary to be exempted from punishment. The third category of programmes grants leniency in all instances of bribe-payer reports, but reporting is also necessary in the case of extortion.

All countries grant leniency at any stage of the corrupt deal, which, as mentioned earlier, can be misused as a way to leverage enforcement of the corrupt transaction. Some authors recommend that leniency programmes permit self-reporting only after the bribe has been paid and the favour reciprocated (Nell 2008).

In line with Article 37 of the UNCAC, some experts (Nell 2008) recommend that leniency only be extended to a party to a corrupt transaction where:

1. that party reports to the authorities prior to detection or investigation
2. the corrupt transaction was completed
3. that party provides testimony against the other party

### *Criteria for granting immunity*

Where leniency is not automatically granted by law in certain codified situations but rather decided on a case by case basis by a judge, criteria for granting immunity can include (Strang 2014):

- the seriousness of the offence and importance of the case in achieving effective enforcement
- the value of the potential witness testimony or information for the investigation or prosecution
- the likelihood of the witness providing a useful testimony
- the witness's guilt relative to other defendants
- the possibility of successfully prosecuting the witness without granting immunity
- the possibility of adverse harm to the witness if they testify under a compulsion order

### *Coordination between law enforcement and prosecution agencies*

The effectiveness of immunity programmes can be undermined if the whistleblower can be prosecuted for other connected offences. For example, when reporting a cartel, an individual may be prosecuted for other offences related to cartel infringements, including corruption and bribery, which is likely to disincentivise whistleblowing and self-reporting.

Legal coordination, harmonisation and cooperation inter and intra jurisdiction is therefore key for the effectiveness of such immunity programmes. There is, however, also a need to define a set of rules that mitigate the undermining effect of leniency programmes. This involves developing a common approach among law enforcement and prosecution agencies on immunity from prosecution to avoid one agency's offer of immunity impeding another agency's efforts to prosecute. In the UK, other prosecuting agencies need to agree not to prosecute the individual for other offences related to cartel infringements to ensure that a cartel member may report the cartel without being prosecuted for bribery by another agency (UK). The Serious Fraud Office and Crown

Prosecution Services have published jointly agreed guidelines on their approach to prosecuting corruption cases and a joined code of practice for prosecutors on the use of DPAs (Luz and Spagnolo 2016). In the US, a centralised office, (the Department of Justice's Office of Enforcement Operations) has sole authority to grant immunities in order to avoid inter-agency confusion.

Another proposal is the creation of "one stop shops" for reporting wrongdoing, which would establish clear legal provisions binding various enforcement authorities to allow enabling firms and individuals to report different crimes simultaneously and be guaranteed leniency for all connected offences upon collaboration with the authorities (Luz and Spagnolo 2016).

Similarly, legal harmonisation and international cooperation are required for immunity programmes to provide incentives for self-reporting in international corruption cases (Luz and Spagnolo 2016). Companies and individuals from jurisdictions where there are no leniency provisions for corruption or where such provisions rely on prosecutorial or judiciary discretion are less inclined to blow the whistle or cooperate, as they would risk being prosecuted for corruption in their own countries.

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