DIVERSION IN CRIMINAL PROCEEDINGS AGAINST LEGAL PERSONS IN THE CZECH REPUBLIC AS AN ALTERNATIVE TO PUNISHMENT? POTENTIAL AND RISKS OF NON-TRIAL RESOLUTIONS

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Abstract: This article examines the purpose of corporate criminal liability, a concept not yet firmly established in theory. A proper definition of this purpose – one that respects the specific nature of legal entities – gives an answer to the question of what we expect to achieve by holding corporations criminally liable. It is though crucial to develop effective means of achieving these goals. Is diversion capable of fulfilling this purpose and under what conditions? Article addresses this question, taking into account experiences from foreign legal systems, based on the new diversion in criminal proceedings against legal entities under Czech criminal law.

Keywords: corporate criminal liability; deferred prosecution agreement (DPA); purpose of criminal liability; non-trial resolutions; negotiated justice

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Across legal systems, corporate criminal liability raises a debated question: what purpose does it serve, and what means should be deployed to attain that purpose efficiently? The intrinsic role of criminal liability is to punish and deter the perpetrator through the imposition of a penalty. Such a penalty, however, often lacks motivational and preventive elements. It is thus worth asking how to establish the best mutual balance between the punitive and the preventive aspect of corporate criminal liability, and whether and under what circumstances diversion – used ever more broadly in criminal proceedings against legal entities in the past decade in particular – might represent a full-fledged alternative to punishment.

THE ROLE OF CRIMINAL CORPORATE LIABILITY

The development of corporate criminal liability has always been informed by the specific features that set legal entities apart from natural persons. Theories of the purpose of criminal justice[1] were conceived in connection with the need to justify

[1] SOLNAŘ, V. – FENYK, J. – CÍSAŘOVÁ, D. – VANDUCHOVÁ, M. *Systém českého trestního práva. III: Tresty a ochranná opatření* [System of Czech Criminal Law. Vol. III: Punishments and Protective Measures]. Prague: Novatrix, 2009, p. 27.

the imposition of punishment on delinquent individuals, which is why they cannot be automatically applied to legal entities. The purpose of punishment is not defined by law, and its specific application to legal entities is thus determined exclusively by judicial practice and its doctrinal guidance. The rationale for corporate criminal liability is different because of the underlying differences on the part of the perpetrator, in particular the specific causes of corporate crime, and the absence of any immediate deterring mechanisms which would naturally discourage a corporate actor from engaging in criminal activities.[2]

Given that legal entities are a wholly artificial construction, the punitive potential of criminal penalties to their actions is limited, or at the very least requires modifications, compared to natural persons as perpetrators of crime. Legal entities do not have the capacity to appear as subjects endowed with moral responsibility, nor do they possess a conscience which could influence their behavior; as such, the actions of legal entities are from a subjective point of view value-indifferent.[3] The actions and decisions which they take are subject to a rational calculation of potential gains and losses.[4] Hence, the deterrent effect of corporate criminal liability rests in the threat that the corporation may be restricted in its activities – which includes the possibility of becoming ineligible for public subsidies or being excluded from participation in public tenders – as a consequence of a criminal-law conviction; in the threat of substantial reputational damage or jeopardy; and in the direct and indirect impact which a conviction might have on the legal entity's bottom line.[5] A properly configured corporate culture – understood as a set of procedures that influence the behavior of individuals inside a corporation, who in turn shape the culture of their organization – may act as a corrective factor for the basic decision-making mechanism of a corporation, taking into account the likelihood and consequences of potential criminal penalties.[6] Criminological findings confirm that a deviant corporate structure is often the cause behind the lack of preventative mechanisms (in the form of compliance programs) and thus represents an important criminogenic factor for white-collar crime on the part of legal entities.[7]

Achieving the objective of corporate criminal liability therefore requires a proper balance between its punitive elements and those that play an individually preventative role – focused on restoring a healthy corporate culture and preventing further criminal

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[2] O'SULLIVAN, J. R. How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction. *American Criminal Law Review*. 2014, Vol. 53, No. 1, pp. 32–33.

[3] WELLS, C. *Corporations and Criminal Responsibility*. 2nd ed. Oxford: Oxford University Press, 2005, pp. 79–80.

[4] GOBERT, J. – PUNCH, M. *Rethinking Corporate Crime*. London: LexisNexis Butterworths, 2003, pp. 774–776.

[5] KHANNA, V. S. Corporate Criminal Liability: What Purpose Does It Serve? *Harvard Law Review* [online]. 1996, Vol. 109, No. 7, pp. 1493–1496 [cit. 2026-06-04]. Available at: https://ssrn.com/abstract=803867.

[6] SARRE, R. Penalising Corporate "Culture": The Key to Safer Corporate Activity? In: GOBERT, J. – PASCAL, A.-M. (eds.). *European Developments in Corporate Criminal Liability*. London, New York: Routledge, 2011, pp. 84–98.

[7] For the details, cf. DANKOVÁ, K. *Kriminogenní faktory trestní odpovědnosti právnických osob* [Criminogenic Factors of Corporate Criminal Liability]. *Acta Universitatis Carolinae Iuridica*. 2017, Vol. LXIII, No. 2, pp. 59–70.

conduct. The recent amendments to the Act No. 418/2011 Sb., on the criminal liability of legal persons and on proceedings against them (CCL Act), show that these two aspects can be combined to some degree, even so, one of them will unavoidably play the dominant role. The choice between them necessarily depends on the nature of the legal entity in question, the likelihood that it may be rehabilitated even in the absence of direct sanctioning, its history of deviance, and the scope and severity of the failure of corporate governance which was one of the causes of the crime committed by the legal entity.

However, as one searches for suitable means by which the state may respond to criminal activities by corporate entities, an additional aspect of sanctioning legal entities emerges. Any punishment imposed on a legal person affects the corporation only through the economic consequences which are directly or indirectly associated with it. Likewise, the individually preventive purpose of punishment – intended to alter the way the legal person operates and to avert future criminal conduct – is not really aimed at the legal person "itself". In both cases, corporate criminal liability is *de facto* an indirect means of taking influence on *natural* persons, namely the individuals holding executive management positions within the legal person. They are the ones motivated primarily by an interest in the further economic functioning of legal entities under the conditions of the imposed sanction, who are not directly affected by the sanction itself (unlike its consequences).[8] When assessing whether society is being effectively protected by the way in which justice is served on delinquent actors, one must take into account that the purpose of punishment is being entrusted to natural persons acting on behalf of corporation.

DEVELOPMENT OF THE CZECH LEGAL PERSPECTIVE FROM PURELY PUNITIVE CORPORATE CRIMINAL LIABILITY TO GREATER EMPHASIS ON INDIVIDUAL PREVENTION

Fourteen years have passed since corporate criminal liability was introduced in the Czech Republic by the CCL Act. Over the course of its existence the law has been amended on average once a year. In its fundamentals, however, only few major milestones have gradually shifted the view on the proper shape and purpose of the state's criminal-law sanctions against corporate crime.

Although the CCL Act does not define the purpose of sanctioning, originally it tended toward an almost exclusively punitive understanding of criminal liability. The original model of imputability of the actions taken by individuals in an executive or supervisory role [Sec. 8 (1)(a)–(c) and (2)(a) of the CCL Act], while based on the subject element of culpability on the part of such individual (a natural person), was construed strictly objectively, giving the legal entity no opportunity to prevent its liability or to escape punishment. The law contained only one explicit reflection of the preventive function: a corporation's liability for an employee's crime was conditional upon a failure of corporate governance [cf. Sec. 8(1)(d), (2)(b) of the CCL Act].

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8 KHANNA, *c. d.*

The preventive function of the CCL Act was first strengthened by amendment No. 183/2016 Sb. The opportunity for exculpation of legal person from criminal liability, irrespective of the position held by the primary perpetrator, by showing that it had made every reasonable effort to prevent the crime, was introduced in Sec. 8(5) CCL Act. By its nature the exculpation clause aims at general prevention. Its primary objective is to compel legal entities to introduce and observe compliance programs, so as to prevent future criminal conduct within their operations and to mitigate the risk of criminal liability if a crime is nonetheless committed. At this stage, however, the CCL Act still lacked any mechanism that would motivate delinquent entities to implement effective preventative measures.

The amendment No. 133/2022 Sb. recognized the role of individual prevention during the on-going enforcement of a ban on certain activities as a form of criminal sanction. Under Sec. 22a(1) convicted legal entities may have the remainder of their sentence suspended, subject to probation for a set period, if they show that they have implemented effective preventive and remedial measures rendering further enforcement of the ban unnecessary. This is a further manifestation of the effort to reduce the punitive and deterrent role of criminal justice in favor of strengthening its preventive role.

A fundamental shift toward individual prevention came with amendment No. 270/2025 Sb., effective as of 1 January 2026. Following this amendment, the CCL Act [Sec. 14(1)] expressly stipulates, that the legal entity's efforts to implement effective preventive and remedial measures in response to a criminal offense shall be taken in account as an important circumstance in sentencing, including when assessing whether an alternative procedure (including the new form of diversion) may be applied. The goal is to motivate delinquent entities to adopt measures upon finding that a crime has been committed as a tool fostering the restoration of corporate culture. This approach dovetails with criminologists' findings according to which the absence or ineffectiveness of preventative measures is a major criminogenic factor for crimes committed by legal entities.

Despite their particular character, these changes already show how the law has reoriented itself toward corporate criminal liability as a combination of punitive and preventative features through what is known as compliance systems, which may be taken into account in criminal proceedings, depending on the stage to which they have progressed, in favor of the legal entity.

DIVERSION[9] AS A MEANS TO THE END OF ATTAINING THE PURPOSE OF CORPORATE CRIMINAL LIABILITY – YEA OR NAY?

The punitive and deterrent function of criminal liability is of key importance, and as such is irreplaceable. But in the interest of making the response

[9] The term *diversion* is used here in its narrow sense of a procedural course of action which does not result in a judgment.

of the state to crime faster and more efficient, room has increasingly been made for the application of pre-trial diversion instruments, as an alternative to sentencing. It is self-evident that such instruments cannot have the same deterrent effect, nor the same consequences, as the punishment imposed in a public court trial. However, in suitable cases they may hold greater potential for individual prevention which, in combination with the quasi-punitive impact on corporate perpetrators, may prove sufficiently effective to attain the purpose of the punishment that would otherwise have been imposed.

Unlike the punishment of natural persons, Czech criminal law does not recognize suspended sentences for legal persons. Any conceivable sentence thus has immediate punitive consequences (in the specific sense applicable to legal entities). The implementation of individual preventative measures following the imposition of such a sentence is left entirely to the legal entity, and if it were to fail in this endeavor, no further public-law response is provided for, even in cases in which public-law oversight would otherwise be relevant.

This shortcoming may be addressed by diversions combined with a conditional deferral of criminal prosecution. This concept is referred to as a Deferred Prosecution Agreement (DPA). DPAs are negotiated between the public prosecutor and the accused party. They resolve the alleged corporate misconduct outside the standard procedure of a court trial leading to judgment and criminal sentence. DPAs make the definitive end of prosecution conditional upon fulfilment of specified conditions during a probation period, with the threat that proceedings may be resumed if the legal entity fails to comply. Used in full awareness of their benefits and drawbacks, DPAs may properly balance the deterrent and preventive functions of criminal justice. To fulfill its (quasi-)punitive role,[10] it must (aside from stipulating a probation period) set out punitive obligations and restrictions as placing a bond; implementing a functioning compliance program; and, where applicable, submission to monitoring which ensures that the perpetrator discharges its obligations.

On the part of the indicted legal entities benefit of DPAs is twofold: they avoid the adverse consequences of a conviction and gain room to participate in addressing the consequences of criminal liability free from the inherent uncertainty of a court trial.[11] For the criminal-justice authorities, by contrast, DPAs offer an individualized response tailored to the specific corporate perpetrator, offering oversight over the entity's compliance with the duties imposed during the probation period, and the possibility to resume prosecution if the entity fails to comply, avoiding lengthy evidentiary proceedings.

The downsides follow from the experiences stemming from DPAs abroad. The most strident criticism can be heard in the United States of America, where the use of non-trial resolutions over the past twenty years has been identified as the biggest

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[10] ŠČERBA, F. Odklon jako sankční opatření [Diversion as a Sanctioning Measure]. *Trestněprávní revue* [Criminal Law Review]. 2009, Vol. 8, No. 2, pp. 33–36.

[11] DAVIS, F. Judicial Review of Deferred Prosecution Agreements: A Comparative Study. *Columbia Journal of Transnational Law* [online]. 2022, Vol. 60, No. 3, p. 751 [cit. 2026-06-04]. Available at: https://ssrn.com/abstract=4072985.

shift in addressing white-collar crime.[12] Some critics even consider the way in which these resolutions are used an erosion of corporate criminal liability and, indeed, of the rule of law.[13] Particular reference is made to their excessive use in matters of serious crimes committed by large corporations that draw heavy media attention, where little consideration appears to be given whether the DPA will achieve the anticipated purpose in the spirit of motto *"too big to jail"*;[14] to the high reoffending rate of corporations whose criminal case was resolved by diversion;[15] to the unwillingness of prosecutors to respond to corporations' failure to adhere to the agreed terms by reopening the criminal case and instead tending to rather reword the terms of the agreement;[16] to the absence of uniform and predictable rules for entering into DPAs and lack of public oversight.[17]

Legal scholars hold wildly different opinions on the effectiveness of DPAs as an alternative to punishment. In full awareness of the fact that both camps have compelling arguments to support their view, one may conclude that:

i) Both the direct and the collateral effects of punitive measures against legal entities are very different from those against natural persons, and have their limits.

ii) In this regard, DPAs may represent an effective alternative to punishment, as long as the character of the legal entity and the circumstances of the case allow for the conclusion that the purpose of criminal liability will be attained through the DPA at least as well as through punishment, so that a direct punitive effect is unnecessary.

iii) Attaining the purpose of criminal liability presupposes that the punitive and the preventative effects on the legal person are properly balanced.

iv) If the DPA is to be considered a sufficient alternative to sentencing and find broad use, one must put mechanisms into place which guarantee an equitable and transparent approach under which public interest is sufficiently protected, as well as safeguards against potential abuse.

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12 O'SULLIVAN, *c. d.*, p. 77.

13 UHLMANN, D. M. Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability. *Maryland Law Review* [online]. 2013, Vol. 72, No. 4, pp. 1295–1344 [cit. 2026-06-04]. Available at: https://ssrn.com/abstract=2334230; GOTTSCHALK, P. Deferred Prosecution Agreements as Miscarriage of Justice: An Exploratory Study of Corporate Convenience. *Journal of Economic Criminology* [online]. 2024, Vol. 4, No. 30 [cit. 2026-06-04]. Available at: https://www.sciencedirect.com/science/article/pii/S2949791424000113.

14 PARKER, M. J. – DODGE, M. An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime. *Journal of Financial Crime*. 2023, Vol. 30, No. 4, p. 950.

15 HOMER, E. M. – MAUME, O. M. The Deterrent Effect of Federal Corporate Prosecution Agreements: An Exploratory Analysis. *Journal of White Collar and Corporate Crime*. 2024, Vol. 5, No. 1, pp. 20–22.

16 Ibid., p. 18.

17 REILLY, P. R. Sweetheart Deal, Deferred Prosecution, and Making Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts. *Arizona State Law Journal*. 2018, Vol. 50, No. 4, pp. 1113–1170.

Following the example of legislation in other European countries,[18] and with reference to the OECD's 2021 Anti-Bribery Recommendation,[19] which calls for the broader application of non-trial resolutions in corporate criminal matters, amendment bill No. 270/2025 Sb. has added to the CCL Act (Sec. 37b–37f) the legal institution of deferred prosecution agreements (DPAs – *"podmíněné upuštění od trestního stíhání"*)[20] exclusively for legal entities (which comes into force on a deferred schedule on 1 July 2026).[21]

The decision-making process for making use of a DPA depends on the stage to which proceedings have progressed: during the pre-trial period, the decision lies with the state prosecutor and with the presiding judge during the court trial. Very unusual to the Czech criminal procedure system is the option to enter into the DPA even before (and in lieu of) the resolution whereby the criminal prosecution of the legal entity is being commenced. Deferred prosecution in proceedings against legal entities is not restricted by the category of severity of the criminal offense but is conditional upon one substantive

[18] One may observe how DPAs have made gradual inroads across individual European jurisdictions from 2013 onward. France introduced its own flavor of DPA (known as *"convention judiciaire d'intérêt public"*) by way of the 2016 law known as Sapin II Law. Here, diversion is implemented by giving the state prosecutor the discretion to offer an agreement to the legal entity in the public interest, which is subject to a public hearing and approval by the court. For the details, see Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique. In: *Légifrance* [online]. [cit. 2026-06-03]. Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033558528.

In Great Britain, the DPA was implemented through the Crime and Courts Act 2013. DPAs allow prosecutors to suspend criminal proceedings against corporate bodies for economic crimes, in exchange for financial penalties, reparation, and compliance measures. In the Netherlands, there is no specific diversion for legal entities; instead, the general diversion – transaction (transactie) – set forth in Section 74 of the Criminal Code is used. More detailed rules for so-called large transactions, in which a higher monetary amount (over EUR 200,000) is required to be paid by both natural and legal persons, are set forth in the Public Prosecution Service's guidelines – see College van Procureurs-General. Aanwijzing hoge transacties (2020A005) [Directive on High-Value Settlements (2020A005)]. In: *Openbaar Ministerie* [Public Prosecutor's Office] [online]. 2020 [cit. 2026-06-03]. Available at: https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/executie/aanwijzing-hoge-transacties-2020a005.

[19] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. In: *OECD Legal Instruments* [online]. [cit. 2026-06-03]. Available at: https://legalinstruments.oecd.org/en/instruments/oecd-legal-0378.

[20] [conditional suspension of criminal prosecution].

[21] Even before deferred prosecution was implemented, one could, in proceedings against legal entities, take recourse to the institution of setting aside prosecution subject to probation (which was however limited to misdemeanors) or to a plea bargain (in Czech terminology, an "agreement on guilt and punishment"), which must however be approved by the court (in the form of a judgment of conviction). To some degree, both approaches face a constraint when it comes to their practical application: they require that the legal entity has confessed or, as it were, has pled guilty – whereas it is regularly being called into question whether these forms of diversion may at all invoked when the natural person whose crime is imputed to the legal entity refuses to confess.

requirement and several formal requirements being satisfied, including the imposition of (quasi)punitive measures.[22]

I. THE SUBSTANTIVE CONDITION FOR DEFERRED PROSECUTION

Whether or not a DPA may be concluded is dependent on the assessment of whether diversion will adequately protect public interest. The law provides a non-exhaustive list of relevant factors [Sec. 14(1), (3) of the CCL Act]. These include the nature and severity of the criminal offense; the circumstances of the legal entity (such as its history of operations and the size of its workforce); the existence or absence of an effective set of preventative measures; the conduct of the legal entity after the crime (such as efforts to compensate damages or the ex-post implementation of preventative and remedial measures); the likely consequences of a sentence for its future operations; and the consequences for third parties whose interests are protected under the law (i.e., injured parties and the corporation's creditors).

The substantive requirement is of primary importance. Unless it is sufficient in terms of protection of the public interest, the road to the DPA is blocked. The aforementioned list of such circumstances is already fairly broad; moreover, it has been conceived as a non-exhaustive list, built on general legal terms. Taken together, this provides the law enforcement authorities with relatively broad discretion in their assessment. Consequently, it is highly advisable that the decision on diversion includes in each individual case the reasons why and how the purpose of criminal liability is being achieved, based on the specific circumstances of the case that speak in favor and against diversion, respectively, so as to ensure that the decision remains open to a proper review. It is for this reason that DPAs are in some countries made conditional upon court oversight.[23] A frequent objection is that DPAs must not be used as a way for corporations to buy themselves out of criminal liability, as this would undermine society's trust in the administration of criminal justice. This has given rise to recommendations[24] that DPAs be made part of the public record, disclosing the rationale behind the diversion, the specific circumstances that were taken into account, and the justification given as to why the imposed measures are considered sufficient. However, public disclosure at the same time diminishes one important aspect of non-trial resolutions, namely the absence of defamatory impact.

In order to be able to monitor the way in which justice is being administered, DPAs (and the related court decisions) are usually made public. However, various jurisdictions

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[22] As to the discussion in the run-up to the implementation of DPAs in Czech law, cf. GŘIVNA, T. – BOHUSLAV, L. Konsenzuální vyřízení věci v trestním řízení proti právnickým osobám [Consensual Resolution of Cases in Criminal Proceedings Against Legal Persons]. In: *Advokátní deník online* [Lawyer's Journal Online] [online]. 28. 11. 2023 [cit. 2026-06-03]. Available at: https://advokatnidenik.cz/2023/11/28/konsenzualni-vyrizeni-veci-v-trestnim-rizeni-proti-pravnickym-osobam/.

[23] This is the case e.g., in France, Great Britain, Ireland, Canada, Australia, and, to a limited degree, the U.S. As for the latter, a closer look is taken in REILLY, P. R. Sweetheart Deal, Deferred Prosecution, and Making Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts. *Arizona State Law Journal*. 2018, Vol. 50, No. 4, pp. 1145–1148.

[24] Ibid., pp. 1164–1165.

the publicity requirement to be waived, or to redact or anonymize the content of DPAs before publication, unless publication is essential for public-interest considerations.[25] Czech law does not anticipate that the DPA will be published. To some extent, the call for an element of public control over the transparency, equity, and sufficiency of deferred prosecution may be answered, following the example of other countries, by drawing up guidelines[26] that would set out in more detail the terms on which a DPA may be concluded, including the conditions for imposing them (or, as the case may be, for refraining from imposing them). Whether these conditions were satisfied is then to be open to review within the context of appeal procedure.

One should add that in its basic manifestation the deferred prosecution agreement is of a similar nature to the existing institution of diversion, also as regards the conditions under which it may be applied. For this reason, the settled legal practice for assessing such conditions already exists, so the criminal-justice authorities can draw on substantial experience in examining the sufficient public-interest protection condition. The guidance noted above is also clearly needed given the formally unlimited range of offenses now covered by a DPA in the Czech Republic.

While the issue is highly complex, one may, in response to the experiences made with the DPAs in other jurisdictions, postulate basic propositions as follows:

i) The DPA has its place when the accused corporation has a clean criminal record. Prior criminal convictions ought to present an obstacle to its application.

ii) The DPA is not the appropriate tool to respond to large-scale cases of deviant corporate culture. As a rule, the purpose of criminal liability usually will *not* be achieved by diversion in those cases in which the corporation had no preventative measures in place at all, or in which such measures were largely dysfunctional.

iii) In the case of serious criminal offenses, the diversion assessment ought to take as its point of departure the degree to which governance failure occurred on the level of the corporation. Cases where senior management ("the tone of the top") was deeply involved in wrongdoing should not be diverted. An exception may be cases where a replacement of responsible management has taken place.

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[25] In Canada, this exception applies if there is a risk of compromising a fair trial or other criminal proceedings In the Netherlands, only so-called "high-value transactions" involving amounts exceeding 200,000 EUR are disclosed.

[26] Guidelines in connection with the implementation of DPAs have been passed on the level of public prosecution or the justice department (depending on how the prosecutorial system is structured), often in cooperation with additional entities, e.g., in Great Britain (see Crown Prosecution Service – Serious Fraud Office. *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* [online]. London: Crown Prosecution Service, 2014 [cit. 2026-06-03]. Available at: https://www.cps.gov.uk/publication/deferred-prosecution-agreements-code-practice), in France (see Agence française anticorruption – Parquet national financier. *Guidelines on the Implementation of the Convention Judiciaire d'Intérêt Public (Judicial Public Interest Agreement)* [online]. Paris: Agence française anticorruption, 2019 [cit. 2026-06-03]. Available at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf), alternatively, terms and requirements may be stipulated in more detail in the law itself, as is the case e.g., in Canada (see Criminal Code § 715.32 by Amendment to the Law in 2018. In: *Government of Canada* [online]. [cit. 2026-06-03]. Available at: https://laws-lois.justice.gc.ca/eng/acts/c-46/section-715.32.html).

iv) Diversion should be considered primarily in cases where the legal entity cooperates with the law enforcement authorities. Cooperation should include providing the results of its internal investigation or self-reporting. On the other hand, excluded from diversion should be the cases, where company refuses cooperation, conceals evidence, obstructs investigation, or protects culpable individuals.
v) The size or economic leverage of a legal entity ought not to be the sole justification for the DPA.
vi) The DPA is not the right choice where grave harm (loss of lives, harm to human health, harm to other interests of relevance for society as a whole) comes into play. Cases requiring a formal declaration of guilt or strong public denunciation through trial and where judicial prosecution is necessary for public interest or restoration of public confidence should be excluded.

II. FORMAL CONDITIONS OF DEFERRED PROSECUTION

The application of the DPA is contingent upon a conclusion based on the principle of substantive truth. A conditional waiver of criminal prosecution applies only where the results of the investigation sufficiently justify the conclusion that the crime has occurred and it was committed by a legal entity [Section 37b(1) CCL Act].

Deferred prosecution means that the accused corporation forfeits its right to have its case heard in a public court trial; hence, deferred prosecution requires the express consent of the corporation. A confession or guilty plea is not required.

Like other diversions, deferred prosecution has a reparatory function. It is therefore conditional upon compensation for damage and other harmful consequences of the crime, or – at a minimum – entering into an agreement on damages during the probation period. A breach of such agreement triggers the resumption of standard criminal proceedings.

The probation period is six months to two years for basic diversion [Sec. 37b(1) of the CCL Act] and up to five years in qualified cases [Sec. 37b(2) of the CCL Act].

III. (QUASI)PUNITIVE AND PREVENTATIVE MEASURES

The decision to impose (quasi-)punitive measures is an obligatory part of any DPA. It is through these agreements that the punitive role of criminal liability is consummated. Through its unique nature and its tangible impact, this procedure is meant to act preventatively and to guide the corporation toward avoiding criminal liability in the future based on the realization that (from the vantage point of the theory of rational choice) "crime doesn't pay". Finally, the thus imposed measures are also of decisive importance for determining whether public interest is sufficiently protected by diversion in the individual case.

Each DPA comes with the obligation for the legal entity to pay a certain amount at an account held by the state. In the Czech Republic these funds are earmarked for compensating the victims of criminal offenses [Sec. 37b(1)(d) of the CCL Act]. The law merely stipulates that the amount paid must not be manifestly disproportional to the nature of the criminal offense or to the financial standing of the corporate perpetrator. In this manner, a parallel should be drawn between the amount of the "fine" and that of the court-imposed penalty. In terms of procedural transparency, this is yet another area in which the criminal-justice authorities should be held to a rather stringent standard in terms of providing a compelling justification for the amount of such payment that is open to further review.

There also exists a qualified version of deferred prosecution, which may apply if justified by the nature and severity of the crime, the circumstances under which it was committed, or the standing of the legal entity. This qualified diversion entails the imposition of one or several measures set out in Sec. 37b(2)(a)–(c) of the CCL Act.

The obligation to refrain from certain activities within whose context the criminal offense was committed serves primarily a preventative purpose, whereas the CCL Act stipulates that the duration of this obligation may be shortened once the legal entity has adopted adequate measures so that continued restraint is no longer necessary (Sec. § 37e par. 3 CCL Act). That being said, this restriction also carries a punitive element, similar to a regular sentence banning a corporation from certain activities. It must therefore be taken into account when assessing whether diversion is a sufficient response to the case at hand.

By far the most fundamental change, in terms of accentuating the preventive function of corporate criminal liability, is the newly introduced option to oblige the legal entity to adopt a set of preventive and remedial measures, which the legal entity must put into operation during the probation period as a precondition for its rehabilitation under the DPA. In light of what has been said above, this obligation should relate to those areas of the entity's activity directly connected to the crime committed, rather than to the introduction of comprehensive compliance systems across all of its operations. In duly justified cases, this obligation may be coupled with a requirement that the legal entity submit to compliance monitoring exercised by an independent specialist – an attorney-at-law or chartered auditor (as regulated in more detail in Sec. 37d of the CCL Act).

Adding the criminal monitorship, as a remedial mechanism where an independent third-party professional is appointed to oversee the implementation of preventative and remedial measures by an independent person, is a step in the right direction. It reflects the limited capacity of law enforcement to exercise such oversight in a qualified manner. The lawmaker may, however, fairly be criticized for partly leaving the choice of that monitor to the indicted corporation. The law contemplates a contractual relationship between the legal entity and the monitor, with the entity paying for the monitor's services. At the same time, the CCL Act partly disrupts this client-provider relationship by relieving the monitor of any duty of secrecy toward the investigating authorities and requiring the monitor to follow their instructions. Given that the monitor is in fact conceived as the extended arm of criminal justice and supposed to warrant sufficient independence, one may consider the CCL Act defective in postulating a direct contractual relationship between the monitor and the corporation – a shortcoming which may compromise the public trust in the monitor's unbiased approach to their task, and in the objectiveness of the legal entity's rehabilitation during the probation period based on the monitor's report.

This shortcoming can largely be overcome by strictly enforcing the statutory requirement that the appointed monitors be specialists in their field. For now, there exists no official list of such experts and it will thus presumably be necessary to take recourse to testable references that would warrant a high standard of oversight. It will therefore be necessary to rely on verifiable references warranting a high standard of oversight. The monitor's report should specify the implemented measures, describe how they operate transparently, and provide evidence of their effectiveness. The report as such should be as well subjected to a review by the investigating authorities. Even so, the above-mentioned shortcoming should be remedied by an amendment to the law whereby the contractual relationship with the monitor is transferred from the legal person in question to the state. It should also be the state who pays for the monitoring services using the funds placed by the corporation into escrow for this purpose. The best long-term solution would be to establish a public body specializing in oversight of corporate compliance measures, as was done for example in France,[27] however, the creation of such a body has not even begun to be discussed in the Czech Republic as of yet.

CONCLUSION

It appears that a proper balance between punitive and preventive elements may be the royal road to effective corporate criminal liability. Following the amendments to the CCL Act, one can observe how the effort to reach such balance is reflected both in the realm of sentencing and enforcement (where preventative elements have been added) and in alternative procedural solutions for resolving criminal matters. The implementation of DPAs has created room for taking preventive influence on legal entities through a sufficient (quasi)punitive element. This new diversion has the novel and promising potential to steer the behavior of legal entities. Given that in this breadth and form it is as of yet untested in the Czech legal context, its roll-out is associated with a certain measure of distrust and uncertainty as to its application, not least with reference to the risks inherent in the way in which it has been laid out in the relevant provisions of the law. Even so, adopting this concept was unambiguously a step in the right direction, it must be taken in full awareness that its application in practice will need to be shaped further going forward. The criticism of DPAs, drawn mainly from U.S. experience indeed focuses on their practical application rather than on the specific wording of the underlying legislation. The legal framework leaves broad leeway for making use of the option of deferred prosecution, provided that the purpose of criminal liability is still fulfilled. In many ways, it thus depends on the approach taken toward the application of this concept in practice

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[27] The French Anti-Corruption Agency (AFA) is a government agency tasked with providing advisory and audit services to relevant authorities and persons to help them prevent and detect corruption, including supervision of the implementation of business entities' anti-corruption compliance programs, particularly in the case of judicial public-interest agreements. Cf. *Agence française anticorruption: accueil* [online]. [cit. 2026-06-04]. Available at: https://www.agence-francaise-anticorruption.gouv.fr/fr.

whether in spite of certain general risks associated with it will DPA become a fully functional tool in proceedings against legal entities, following the example of other countries and international recommendations.

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