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Master’s Thesis in Anti-Corruption
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Concurrent jurisdiction and parallel investigations and criminal proceedings in cases of foreign bribery

With focus on global settlement agreements

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Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries — big and small, rich and poor — but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

– Kofi Annan, the UN Secretary General from 1997 to 2006
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<td>OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions</td>
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<td>BrB</td>
<td>Swedish Penal Code (SFS 1962:700)</td>
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<td>Code of Business</td>
<td>Swedish Code of Gifts, Rewards and other Benefits in Business</td>
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<td>DOJ</td>
<td>Department of Justice</td>
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<td>DPA</td>
<td>Deferred prosecution agreement</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>FCPA</td>
<td>Foreign Corrupt Practice Act 2010</td>
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<td>Recommendation</td>
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1 Introduction

1.1 The Story of TeliaSonera

In September 2012, Swedish media exposed an association between TeliaSonera and the Uzbek dictator’s daughter, Gulnara Karimova. In exchange for 3G licenses and access to the Uzbek telecom market, Karimova had allegedly been paid a total of 2.2 billion SEK.¹ In addition, allegations of bribery were made against TeliaSonera’s affairs in Azerbaijan, Kazakhstan, Nepal, Georgia and Tajikistan.²

TeliaSonera announced in 2015 its decision to phase out its affairs and withdraw from the Eurasian region.³ The company’s decision is most likely linked to the bribery scandal in two ways. First, the Eurasian region is considered “high risk” from a corruption and bribery point of view. Second, TeliaSonera is in fear of a lawsuit from the United States (US) Department of Justice (DOJ) and Securities and Exchange Commission (SEC).⁴

This fear is not unfounded. In October 2015, Svenska Dagbladet published an article about the DOJ and SEC being prepared to sue TeliaSonera for billions, because of the company’s affairs in Uzbekistan.⁵ Moreover, another telecommunication company: VimpelCom Ltd and its Uzbek subsidiary, Unitel LLC, entered, in February 2016, into a global settlement agreement with the SEC, DOJ and Dutch authorities. According to the global settlement agreement, VimpelCom were to pay 795 million dollars for its affairs in Uzbekistan.⁶ The case of VimpelCom has been considered an indication of what the DOJ and SEC have in mind for TeliaSonera.⁷

¹ Hansson, TeliaSonera negotiated directly with the Karimov-regime, Uppdrag Granskning, 12/12 2012 (26/5 2016), http://www.svt.se/ug/teliasonera-negotiated-directly-with-the-karimov-regime
² Turerna i Telia Sonera-affären, SVT Nyheter 17/9 2016 (26/5 2016), http://www.svt.se/nyheter/ekonomi/turerna-i-telia-sonera-affaren
⁵ Hedelius, Alestig, USA kan kräva Telia på miljardskadestånd, Svenska Dagbladet 5/10 2015 (26/5 2016), http://www.svd.se/usa-hotar-telia-med-skadestand-pa-miljarder
The final report from the Swedish investigation of TeliaSonera’s affairs in Uzbekistan is anticipated in 2016. Meanwhile, parallel investigations are conducted in Norway, Switzerland, Netherlands and the US. This raises questions.

1.2 The long arm of UK and US authorities

The extra territorial reach of the Bribery Act 2010 and the Foreign Corrupt Practices Act 1977 (FCPA) is a powerful weapon against corruption, but “with great power comes great responsibility”. The list of the top ten largest monetary sanctions imposed by the DOJ and SEC includes companies from the following countries: France, Germany, Netherlands, United Kingdom (UK) and the US. However, out of the ten largest monetary sanctions only one is aimed at a US company. The number of DOJ and SEC enforcement actions peaked in 2010 and has since then started to drop off. In 2010, the total monetary sanctions imposed in FCPA-related actions were 2.65 billion dollars and so far this year 9 million dollars. The FCPA is older than the Bribery Act. Therefore, it is yet to be told if the UK will be as active as the US in pursuing foreign bribery.

For companies the implications of UK and US authorities showing an interest in their affairs can be significant. This is because the countries have different rules on self-reporting and privacy. Also, in many jurisdictions the legal status of settlement agreements in criminal proceedings is unclear. Moreover, for companies to be in legal uncertainty for a long period of time, because of parallel investigations and criminal proceedings, is likely to affect their possibility to conduct business as usual. Arguably, from a company’s point of view, the focus should not be on which jurisdiction is the most strategic to cooperate with: “the one who bite the hardest or the one closest to home”. The focus should rather be on discontinuing and preventing further foreign bribery.

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8 Turerna i Telia Sonera-affären, SVT Nyheter 17/9 2016 (26/5 2016), http://www.svt.se/nyheter/ekonomi/turerna-i-telia-sonera-affaren
The solution to concurrent jurisdiction has so far been international cooperation through consultation. Another way forward is possibly global settlement agreements, as the ones in Innospec, BAE Systems and Johnson & Johnson/De Puy. In the US, the DOJ and SEC use, on a regular basis, plea agreements, deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). In the UK, the Serious Fraud Office (SFO) uses negotiated settlements. As from 2014, SFO also uses DPAs.

However, agreements in criminal proceedings are foreign to the Swedish legal tradition. According to ch 20 s 6 of the Swedish Code of Judicial Procedure (Sw; Rättegångsbalken (1942:740) (RB)), the Swedish prosecutor adheres to a principle of mandatory prosecution. In addition, only natural persons and not legal entities can be held criminal liable in Sweden. Arguably, the use of agreements in criminal proceedings has led to a clash between different legal systems. In particular, it has led to a clash between civil law and common law countries. One example of this is the UK, although a common law country. In 2014, the UK legislator implemented legislation on DPAs. This was to some extent a forced decision. US authorities were on a recurring basis using DPAs in relation to UK companies and therefore, the UK legislator feared UK prosecutors and Courts were being outmanoeuvred. Another example is France, a civil law country. A recent ruling by a French Criminal Court implies that also France is struggling to adapt. The French Criminal Court granted a DPA the same status as a foreign judgment and by doing so, recognised it as a bar to further prosecution and criminal proceedings in France. From a civil law point of view and also, a Swedish point of view, plea agreements, negotiated settlements, DPAs and NPAs are foreign. Thus, it may be difficult to integrate them with our legal system, but at the same time it is important to give companies an equal and proportionate treatment and also, to ensure Swedish companies are not evading justice.

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14 Boister, An Introduction to Transnational Criminal Law, pg. 152; Article 4.3 of the Anti-Bribery Convention; Article 42.5 of the UNCHR.
17 Cf, Ch 1 s 2 BrB "Unless otherwise stated, an act shall be regarded as a crime only if it is committed intentionally". SOU 1997:127 del A, pg. 89, 95 and 203.
18 See, s 45 and Schedule 17 of the Crime and Courts Act 2013.
19 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p 38-40.
20 Davis, Kirry, FCPA Update – A Global Anti-Corruption Newsletter, pg. 1-13, 11.
1.3 Purpose and delimitation

The aim of this thesis is to investigate concurrent jurisdiction and parallel investigations and criminal proceedings in cases of foreign bribery. TeliaSonera's affairs in Uzbekistan and its aftermath will be used to illustrate why this question is of Swedish concern.

The key question to this thesis is:

- At present, from a Swedish standpoint, what are the available solution and limitations on concurrent jurisdiction and parallel investigations and criminal proceedings in cases of foreign bribery? Is it a viable solution?

The key question will be answered through the following subsidiary questions:

- Is the Swedish anti-bribery legislation and enforcement in line with its international commitments or is it an area of improvement? Also, does the answer to this question affect the issue of concurrent jurisdiction?
- How vast is the extra territorial reach of the Bribery Act and the FCPA? Does the Swedish legislator and companies need to worry?
- What is the available solution and limitations at an international level, i.e. the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and the United Nations Convention against Corruption (UNCAC)?
- Are global settlement agreements a possible way forward for solving the issue of concurrent jurisdiction? Or do they lead to basic legal principles being set aside? What are the alternatives? How should a Swedish prosecutor and Court approach a global settlement agreement? Are there any other qualities of the Swedish legislation that complicates the issue of concurrent jurisdiction?

The meaning of “limitations” on concurrent jurisdiction is for example, built in bars in the Bribery Act and the FCPA, e.g. prerequisites. Also, the presence of any built in bars at an international level, e.g. the Anti-Bribery Convention or the UNCHR, e.g. articles. Moreover, the presence of any built in bars in current Swedish law, e.g. international ne bis in idem.

The investigation on global settlement agreements is restricted to the UK and the US and then compared to current Swedish law. The choice of jurisdiction is made on the fact that, at present, the UK and the US are the two most likely jurisdictions to cooperate and enter
into a global settlement agreement. However, so far the UK has not shown an immediate interest in TeliaSonera’s affairs. Nonetheless, TeliaSonera is only used as an illustrative example and also, the aim of this thesis is to be of general interest. Hence, the choice of UK jurisdiction is not unfounded.

The UK is a member of the European Union (EU). European Union law (EU law) therefore applies to the UK, but it does not apply to the US. Thus, this thesis does not focus on EU law, e.g. the Eurojust Guidelines for deciding which jurisdiction should prosecute. Nonetheless, EU law is occasionally mentioned as a source of inspiration.

Also, this thesis does not claim to be complete when it comes to describing the US legal system, as the aim of this thesis is to give an overview of the main legal sources and also, set a frame for the discussion of concurrent jurisdiction and in particular, the use of global settlement agreements. In addition, this is because different criminal procedural rules may apply on federal and state level.

Normally, the first step is to establish Swedish jurisdiction. In this thesis, Swedish jurisdiction is presumed. Hence, ch 2 s 2 of the Swedish Penal Code (Sw; Bruttbalken (1962:700) (BrB)) is outside the scope of this thesis. Another natural question is also international litispendens. However, compared to many other jurisdictions, the Swedish criminal proceedings are initiated at a rather late stage. Therefore, the risk of other jurisdictions already having commenced criminal proceedings is imminent. Thus, in this thesis the question of international litispendens is left aside. Instead, focus is placed on what to do “once the damage is done” so to speak.

1.4 Method and material

First and foremost, a traditional legal dogmatic method is used in this thesis, i.e. legislation, preparatory work, case law and doctrine. A traditional legal dogmatic method is particularly used when describing and determining current Swedish law.

A comparative method is also used in this thesis. A comparison is made between the Swedish anti-bribery legislation, the Bribery Act and the FCPA. The use of negotiated settlements, plea agreements, DPAs and NPAs is also compared with current Swedish law.

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The comparison is made to get a deeper understanding for current Swedish law and the prevalent discussion on agreements in criminal proceedings. Also, this is to make visible the differences between the systems and why such differences may pose as a problem.

The topic of this thesis is to some extent cross-jurisdictional, as concurrent jurisdiction and global settlement agreements in cases of foreign bribery touches upon business, criminal and procedural law. However, the main focus is on criminal and procedural law, but allows for using a company’s perspective.

The case of TeliaSonera is used to illustrate why concurrent jurisdiction and global settlement agreements are of Swedish concern. The case material available on TeliaSonera’s affairs in Uzbekistan is limited. The Swedish investigation is yet to be finished and therefore, no legal documents have so far been made public. Thus, news articles and the Swedish journalist Patricia Hedelius book “Telia Alliansregeringen and korruptionen” have been used. The latter includes interviews with representatives of TeliaSonera and a timeline of important occasions. The news articles and book have only been used to gather data, e.g. dates and numbers. No value judgements have been used. The legal value of these sources is scarce. Hence, it should be kept in mind that these sources have only been used with a limited purpose: to shed some light on the situation.

In addition, websites have been used to gather information, e.g. the websites of DOJ, SEC and SFO. Websites can easily be amended and thus, is not a permanent source of information in comparison to legal sources such as legislation, case law, preparatory work and doctrine. However, the benefit of using websites is that they provide information that is up to date and encapsulate a moment in time. The traditional sources are limited, as the discussion on concurrent jurisdiction and global settlement agreements is rather new and also, has just about been attended to in Sweden.

1.5 Disposition

This thesis is divided in five main sections.

The first section (chapter 2) includes an overview of the TeliaSonera case. This section sets the frame for the thesis. However, the content of this section, e.g. different legal terms or criminal provisions, are further explained and elaborated on throughout the thesis.

The second section (chapter 3, 4 and 5) includes a short presentation of the Swedish anti-
bribery legislation, the Bribery Act and the FCPA. The Swedish part of the section is concentrated on the revisions made in 2012. This is to establish if Sweden nowadays has an anti-bribery legislation that meets the requirements of the Anti-Bribery Convention. The strength of the Swedish anti-bribery legislation and the effectiveness of its enforcement are crucial elements for further discussion on concurrent jurisdiction and possible limitations on parallel investigations and criminal proceedings. The UK and the US part of the section are centred on the provisions in the Bribery Act and the FCPA that establishes extra territorial application.

The third section (chapter 6) centres on concurrent jurisdiction, available solutions and limitations. This section also includes a presentation of two international anti-corruption instruments: the Anti-Bribery Convention and the UNCAC.

The fourth section (chapter 7) centres on global settlement agreements. The first part of the section includes definitions of plea agreements, negotiated settlements, DPAs and NPAs. Also, it presents the UK and US approach to these kinds of agreements. The main part of the section centres on the likely status of global settlement agreements according to current Swedish law. Arguably, there are two potential stages when Swedish prosecutors and Courts could try to harmonise a global settlement agreement with current Swedish law. The first stage is before prosecution: by referring to international litispendens, international ne bis in idem or using discretionary prosecution. The second stage is during criminal proceedings: by using ch 2 s 6 BrB or ch 36 s 9 BrB together with ch 36 s 10 BrB. Arguably, the object of such a venture is to ensure that companies, by entering into settlement agreements with foreign jurisdictions, do not evade Swedish legal proceedings and also, to ensure a fair and proportionate outcome. The third section is devoted to presenting, elaborating and discussing these two potential stages.

The fifth section (chapter 8) is a case study. First, Innospec is presented and then, BAE Systems PLC. The purpose of the case study is to exemplify some of the questions the UK Courts have struggled with, when entering into global settlement agreements. Furthermore, to give practical examples of the different problems that may arise because of concurrent jurisdiction and global settlement agreements. The lessons learned from the UK Courts may also be of value in a future Swedish debate on global settlement agreements. The main focus is on Innospec, as it was the first case of a UK and US global settlement agreement in a criminal proceeding.
2 TeliaSonera

2.1 About TeliaSonera

TeliaSonera is one of the largest telecommunication companies in the world. The company has a close connection to Sweden for several reasons. First, the company is a product of a merger between the former Swedish company Telia and the former Finnish company Sonera. Second, the company is headquartered in Stockholm. Third, the majority shareholder is the Swedish government, with a total of 37% of the voting rights. Fourth, the company is listed at Stockholm Stock Exchange and Helsinki Stock Exchange.22

As of now, TeliaSonera is present in 17 countries, but the company recently announced its plans to withdraw from its most profitable region, the Eurasian region.23

2.2 TeliaSonera’s affairs in Uzbekistan

In 2012, the chief prosecutor and head of the Swedish National Anti-Corruption Unit (Sw; Riksenheten mot korruption) initiated an investigation of TeliaSonera’s affairs in Uzbekistan. A Swedish report is anticipated in 2016.24

Arguably, because of TeliaSonera’s close connection to Sweden, Swedish authorities should preferably deal with the case. However, US and Dutch authorities have also indicated an interest in TeliaSonera’s affairs.25

TeliaSonera’s affairs in Uzbekistan are complex. The facts of what did take place in Uzbekistan are still somewhat unclear, as the Swedish investigation is not yet finished. In 2015, the Swedish journalist Patricia Hedelius published “Telia Alliansregeringen och korruptionen”. It includes interviews with representatives of TeliaSonera and also, a timeline of important occasions. Irrespective of if you are a fan or critic of the book, it

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24 Hedelius, Telia Alliansregeringen och korruptionen, pg. 308.
provides some facts. One thing that comes through clearly throughout the book is that neither of the representatives of TeliaSonera have owned up to knowing about the alleged bribes in Uzbekistan.

TeliaSonera has since 2012 put a lot of effort into making up for past behaviour and rebuild its reputation. As was said above, the company has decided to phase out its affairs and withdraw from the Eurasian region. The company has also installed an extensive compliance programme including its own policy document – the Code of Ethics and Business Conduct. Moreover, the company has launched an anti-bribery and corruption (ABC) program. The ABC program is based on the “adequate procedures” ascribed in the Bribery Act and the US Sentencing Guidelines.26

2.3 The Swedish anti-bribery legislation applied to the TeliaSonera case, before and after 2012

Only the representatives of TeliaSonera are at risk of prosecution, as Swedish law does not acknowledge corporate criminal liability.27 As was said above, neither of the representatives of TeliaSonera have owned up to knowing about the alleged bribes in Uzbekistan. Thus, the provision on negligent financing in ch 10 s 5d BrB is well suited for the TeliaSonera case, as it criminalizes “gross negligence”. However, ch 10 s 5d BrB is not applicable. Before 1 July 2012, it was not possible to hold a representative of a company criminal liable without proof of intent or knowledge about funds given to an agent was to be used as bribes.28 A revised Swedish anti-bribery legislation, with new criminal provisions on trading in influence and negligent financing of bribery, entered into force on 1 July 2012.29 Nonetheless, the accusations of bribery against TeliaSonera concern payments and occurrences prior to 1 July 2012. According to the principle of retroactivity, no one can be prosecuted for a crime that did not exist at the time of its occurrence.30

Because of the aforesaid there is an imminent risk that the representatives of TeliaSonera will not get prosecuted and thereby, evade legal justice. Many other jurisdictions most likely

27 Cf, ch 1 s 2 BrB “Unless otherwise stated, an act shall be regarded as a crime only if it is committed intentionally”. SOU 1997:127 del A, pg. 89, 95 and 203.
28 Cars, Mynthrott och korruptiv marknadsföring, pg. 28.
29 Ch 10 s 5 d and s 5e BrB; See also, SOU 2010:38; Prop 2011/12:79; 2011/12:JuU23.
30 See, ch 1 s 1 RF, principle of legality and ch 2 s 10 p 1 RF, principle of retroactivity.
regard the behaviour displayed by TeliaSonera in Uzbekistan as criminal. Before 2012, Sweden had not met the standards of the Anti-Bribery Convention and especially not vis-à-vis foreign bribery.\textsuperscript{31} Arguably, the Swedish legislator is in part responsible for foreign jurisdictions conducting investigations and possibly initiating criminal proceedings against TeliaSonera. This responsibility is based on the Swedish legislator not having implemented, on time, a satisfactory level of anti-bribery legislation and also, not ensured an effective enforcement. The pending risk of TeliaSonera’s representatives not being prosecuted is likely to justify other jurisdictions taking legal action. The very reason for the US authorities’ vigorous approach towards foreign bribery has been other jurisdictions not taking legal action.\textsuperscript{32} The situation had probably been different if the alleged bribes had occurred after 2012. The US and Dutch authorities had perhaps been more willing to show restraint, if the Swedish chief prosecutor and National Anti-Corruption Unit had had the opportunity to prosecute TeliaSonera for negligent financing of bribery. At the very least, the Swedish authorities had been in a better negotiable position.

It is important other jurisdictions can trust the Swedish legal system. Otherwise, other jurisdictions will most likely not allow bribery cases with a Swedish connection to be dealt with exclusively under Swedish jurisdiction. However, the situation is not the same as before 2012, as the Swedish anti-bribery legislation was revised. Nonetheless, the provisions on trading in influence and negligent financing of bribery have so far not been used in practice.\textsuperscript{33} It is likely too early to say whether other jurisdictions will consider the Swedish anti-bribery legislation adequate.

At present, neither the US nor Dutch authorities have taken the full step and initiated criminal proceedings. The best way to go for now is likely to try and hold off foreign jurisdictions, until the Swedish legal system has run its course. However, the question is how to act in case of a global settlement agreement. As will be further elaborated on, in chapter 7, the Swedish prosecutor and Court have to consider the following: is the global settlement agreement equivalent to a foreign judgment, i.e. international ne bis in idem, and is it possible not to prosecute, if no, then it is likely a question of mitigation.

\textsuperscript{31} Cf, OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden.
\textsuperscript{32} OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States, pg. 22.
\textsuperscript{33} OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden, pg. 6.
3 The Swedish anti-bribery legislation

3.1 The criminal offences

The Swedish anti-bribery legislation is established in ch 10 s 5-5e BrB and includes the following crimes; s 5 breach of trust, s 5a active bribery, s 5b passive bribery, s 5c gross active and passive bribery, s 5d trading in influence and s 5e negligent financing of bribery.

3.1.1 Trading in influence and negligent financing of bribery

According to ch 10 s 5d BrB, trading in influence is limited to public authority or public procurement. Hence, for the purpose of this thesis ch 10 s 5e BrB and negligent financing of bribery is of more general interest. According to ch 10 s 5e BrB:

A commercial organisation that provides financial or other assets to anyone representing it in a given matter and that thereby, through gross negligence, furthers the offences of giving of a bribe, gross giving of a bribe or trading in influence in that matter shall be sentenced for negligent financing of bribery.

According to the cited text, gross negligence is criminalised. Thus, companies’ representatives cannot excuse themselves with non-knowledge. As seen above, the provision comprises three prerequisites. First, a company must have entrusted financial or other assets to a person, e.g. local agent in a foreign country, whom represents the company by position or contract in a given matter. Second, this person must on behalf of the company have offered, promised or given another person financial or other assets. Third, the company’s representatives must have through their measures and gross negligence furthered the offence in that matter. The company at large does not have to be aware of the bribes, as the provision centres on if the company has taken appropriate measures to prevent the bribes from happening, e.g. internal control. Also, it is only necessary for the prosecutor to prove a crime has been committed and not by whom. According to SOU 2010:38, the Swedish Code of Gifts, Rewards and other Benefits in Business (Sw; Kod om gåvor, belöningar och andra förmåner i näringslivet (Code of Business Conduct)) is

34 SOU 2010:38, pg. 240 f.
36 Ibid, pg. 18.
to be used when establishing if a company has acted in a grossly negligent way.\footnote{SOU 2010:38, pg. 18, 165, 241.} For further presentation of the Code of Business Conduct see down below.

The provision on negligent financing of bribery opens up new possibilities for the Swedish prosecutor when it comes to prosecuting companies conducting business abroad. However, as the criminal provision is rather new there is no case law. Therefore, it is too early to say if the provision will be effective or not. However, according to the Swedish legislator, there have already been signs of the provision working preventively.\footnote{OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden, pg. 6.}

### 3.1.2 The Swedish Code of Gifts, Rewards and other Benefits in Business

At the time of the revision of the Penal Code, the Swedish investigator along with a working group of representatives from the business sector proposed a Code of Business Conduct.\footnote{Cars, Mutbrott och korruptiv marknadsföring, pg. 184; SOU 2010:38, pg. 205 ff.} The Swedish government accepted the proposal.

The Code of Business Conduct is a self-regulation with the legal status of soft law. It is to be used as a supplement to the Swedish anti-bribery legislation. Hence, the Code of Business Conduct is a legitimate source of interpretation.\footnote{Cf, Introduction Code of Business Conduct; Ch 10 s 5-5e BrB do not refer to the Code of Business Conduct or any self-regulation. However, the Code of Business Conduct’s legal status is confirmed in Prop 2011/12:79, pg. 21.} A company that has complied with the Code of Business Conduct have, in accordance with SOU 2010:38, not acted in a grossly negligent way.\footnote{SOU 2010:38, pg. 165.} Arguably, the Code of Business Conduct resembles the “adequate procedures” in the Bribery Act, although, without the same legal effect.\footnote{There are no defenses to the criminal offences under s 1, 2 or 6 of the Bribery Act, e.g. bribery of foreign officials. However, according to the Bribery Act 2010 s 7 p 2, it is a defense, ”… to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct”; See also, for further explanation of “adequate procedures”: The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010). No similar defense exists under the FCPA. However, the US prosecutor shall when determining whether to initiate criminal proceedings and negotiating agreements, in accordance with a Resource Guide to the U.S. Foreign Corrupt Practices Act pg. 53, consider “the existence and effectiveness of the corporation’s pre-existing compliance program”. Moreover, according to § 8B2. 1 of the US Federal Sentencing Guidelines Manual, an ”Effective Compliance and Ethics Program” may affect the level of fines.}

For a company conducting business abroad, C10 the Code of Business Conduct, is of particular importance. According to C10, a company needs to have a certain level of...
knowledge of its agents and other cooperation partners and also, if necessary to perform a due diligence to verify their integrity. The Code of Business Conduct also provides a list of red flags. The red flags indicate when the need to verify the integrity of a partner is particularly strong. For example if a company’s agent or cooperation partner operates in a geographical area known to be corrupt. In the TeliaSonera case, the company operated in Uzbekistan, a country known for its corruption, this should cautioned for being extra careful and take appropriate safety measures.

As the Code of Business Conduct is considered a supplement to the Swedish anti-bribery legislation it is also a part of the Swedish anti-corruption framework. The Swedish anti-corruption framework needs to be considered when establishing if the Swedish anti-bribery legislation and enforcement meets international commitments or if it is an area of improvement. The answer to this question is likely to affect the issue of concurrent jurisdiction and possible limitations to parallel investigations and criminal proceedings.

4 Bribery Act 2010

4.1 The criminal offences

The Bribery Act 2010 includes five offences: s 1 offences of bribing another person, s 2 offences related to being bribed, s 6 bribery of foreign public officials, s 7 failure of commercial organisations to prevent bribery and s 14 offences under 1, 2 and 6 by bodies corporate etc.

4.2 Extra territorial application

The extra territorial application of s 1, 2 and 6 is established in s 12 p 2. The latter has three prerequisites. First, “no act or omission that forms part of an offence under sections 1, 2 or 6 takes place in the United Kingdom”. Second, “a person’s acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom”. Third, “that person has a ‘close connection’ with the United Kingdom”.

According to s 12 p 4, a person has a “close connection” with the UK if the person is “a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas citizen, a person who under the British Nationality Act 1981 was a British subject, a British protected person within the meaning of that Act, an individual ordinarily
resident in the United Kingdom, a body incorporated under the law of any part of the United Kingdom or a Scottish partnership”. The list in s 12 p 4 is exhaustive.\(^43\) In addition, the person must have had a close connection “at the time the acts or omissions concerned were done or made”. The point to be made is that to invoke s 1, 2 and 6 no act or omission has had to take place in the UK. To exemplify, the acts and omissions can have taken place in Uzbekistan, as long as there is a close connection to the UK.\(^44\)

According to s 12 p 5, “An offence is committed under section 7 irrespective of whether the acts or omissions which forms part of the offence take place in the United Kingdom or elsewhere”. This means that the extra territorial application of s 7, failure of commercial organisations to prevent bribery, is even broader than for s 1, 2 and 6, as it does not require a “close connection”.

According to s 7, a “relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending to obtain or retain business for C, or to obtain or retain an advantage in the conduct of business for C”. The provision is similar to ch 10 s 5d BrB on trading in influence.

The keyword to the application of s 7 is ”associated person”. According to s 8 p 1, an “associated person” is “a person who performs services for or on behalf of C”, e.g. employee, agent or subsidiary.\(^45\) The latter “is to be determined by reference to all the relevant circumstance and not merely by reference to the nature of the relationship between A and C”, i.e. substance over form.

According to s 7 p 2, the only defence is “to prove that C had in place adequate procedures designed to prevent persons associated to C from undertaking such conduct”. These kinds of “adequate procedures” are often incorporated into companies’ compliance programs, e.g. TeliaSonera’s ABC program.\(^46\)

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\(^43\) According to s 12 p 4 of the Bribery Act, “if, and only if”.


\(^45\) See, s 8 p 2 of the Bribery Act.

5 Foreign Corrupt Practices Act 1977

5.1 The criminal offences
The FCPA includes the following offences: 15 U.S.C. § 78dd-1(a) Prohibited foreign trade practices by issuers, § 78dd-2(a) Prohibited foreign trade practices by domestic concerns and § 78dd-3(a) Prohibited foreign trade practices by persons other than issuers or domestic concerns. All of the three provision targets bribery of foreign officials. In contrast to the Bribery Act, the FCPA includes no provisions on other kinds of bribery, e.g. “being bribed”. However, according to 15 U.S.C. § 78m(b), issuers must keep sufficient books, records, accounts and also, a system of internal accounting controls.

5.2 Extra territorial application
According to 15 U.S.C. § 78dd-1, 78dd-2 and 78dd-3 of the FCPA, the FCPA applies to three categories: issuers, domestic concerns and certain persons and entities.47

An “issuer” is a company that “is listed on a national securities exchange in the United States… or the company’s stock trades in the over-the-counter market in the United States and the company is required to file SEC reports”.48 To exemplify, VimpelCom is an “issuer”, as the company before 2013 was registered and traded securities on the New York Stock Exchange and at present, is registered and trades securities on the NASDAQ Global Select Market.49 In contrast, TeliaSonera is not an ”issuer”, as the company is listed on the Stockholm Stock Exchange and the Helsinki Stock Exchange and has not been registered on the US stock market for the past ten years.50

A “domestic concern” is “any individual who is a citizen, national, or resident of the United States, or any corporation… that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States”.51

49 VimpelCom, History (27/5 2016), http://www.vimpelcom.com/Profile/History/
The last category is “certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the [United States]”.

All of the three categories also include “officers, directors, employees, agents, or stockholders acting on behalf of an [issuer, domestic concern or certain person or entity]”.

In addition, according to 18 U.S.C. § 2 of the United States Code, an individual or company who aids, abets or conspires to commit a crime is as guilty as the one who commits the crime and shall be punished in the same way. Hence, a foreign company may also be covered by the FCPA irrespective of if the company itself has any connection to the US. This was for example how the US Courts established its jurisdiction towards the Japanese company JCG Corporation.

In general, jurisdiction is determined through an assessment of “minimum contact” and “reasonableness”. The former means that there must be sufficient contact between the business and the forum state. The latter means that it must be “reasonable to do so under the circumstances of the particular case” and also, it must be in accordance with “fair play and substantial justice”. The US Courts have in relation to foreign bribery interpreted the two criteria broadly. According to A Resource Guide to the U.S. Foreign Corrupt Practice Act (Guidance), the following is enough for establishing US jurisdiction:

Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce – as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.

In accordance with the cited text a telephone call from, to, or through the US is considered “enough” to establish US jurisdiction. Arguably, whether the US has jurisdiction or not, almost becomes a “non-issue”. At the very least, Swedish companies must be aware of the risk.

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55 A Resource Guide to the U.S. Foreign Corrupt Practice Act, pg. 34.
5.3 In summary

Before 2012, Sweden had not met the standards of the Anti-Bribery Convention and especially not vis-à-vis foreign bribery. The Swedish anti-bribery framework consists of ch 10 s 5 to 5e BrB and the Code of Business Conduct. The new criminal provisions on trading in influence and negligent financing of bribery have opened up for new possibilities, for example is gross negligence now criminalised. However, as the two provisions so far remain untested it is too early to say whether they truly are efficient.

The extra territorial application of the Bribery Act and the FCPA is far-reaching. The question of whether the US has jurisdiction or not, almost becomes a “non-issue”, as a telephone call from, to, or through the US is considered enough to establish US jurisdiction. The same can probably be said about the UK jurisdiction, as the Bribery Act is by most considered to be tougher than the FCPA. From a Swedish company’s point of view, it is important to account for the possibility of a UK or US claim. As the Bribery Act and the FCPA, because of their far-reaching extra territorial application, are not a limitation in themselves to concurrent jurisdiction – a relevant question to ask is whether there are any other limitations, e.g. at an international level.

6 Concurrent jurisdiction and limitations

6.1 Introduction

From a company’s point of view, it may be hard to navigate through the jungle of different jurisdictions and their different rules. At present, the safest protection against parallel investigations and criminal proceedings is for a company to incorporate an efficient compliance programme and to ensure it corresponds with the “adequate procedures” in the Bribery Act and the similar provisions in the FCPA Guidance and the US Sentencing Guidelines.

The implications are significant for a company accused by the SFO, DOJ or SEC of foreign bribery. This is for several reasons. First, the UK and the US have different rules

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on self-reporting and privacy.\textsuperscript{62} Second, in many jurisdictions the legal status of settlement agreements in criminal proceedings is unclear. Third, to be in legal uncertainty for a long period of time, because of parallel investigations and criminal proceedings, will most likely affect a company’s possibility to conduct business as usual and thus, result in economic losses.

Arguably companies’ focus should not be on which jurisdiction is the most strategic to cooperate with: “the one who bite the hardest or the one closest to home”, but rather on discontinuing and preventing foreign bribery. To ensure legal certainty and to focus on what is important: the issue of concurrent jurisdiction needs to be clarified and coordinated. The OECD supports the view. On the Expert Meeting on “The OECD Anti-Bribery Convention: the Road Ahead” in 2007, the question of international coordination was said to have received “too little attention to date”.\textsuperscript{63}

### 6.2 International comity

According to Neil Boister, the only limitation to concurrent jurisdiction is international comity. Concurrent jurisdiction is as much a political as a legal problem. This is because states often wish to protect their sovereignty. Also, many states have mistrust towards other states’ criminal justice system.\textsuperscript{64} Comity can be defined as reciprocity and courtesies from one jurisdiction to another in cases of concurrent jurisdiction. The Anti-Bribery Convention and the UNCAC support a solution based on international comity.\textsuperscript{65}

### 6.3 The UK and the US coordination

The UK and the US have drawn up their own documents to deal with concurrent jurisdiction. For example, the Crown Prosecution Service (CPS) has issued the CPS: Director’s Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas (17 July 2013). Also, another document is the

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\textsuperscript{62} Proudlock, David, Bribery and corruption: negotiated settlements in a global enforcement environment, Practical Law Thomson Reuters, Legal UK & Ireland 1/10 2014 (25/5 2016), http://uk.practicallaw.com/9-586-2485

\textsuperscript{63} Lelieur, Pieth, Strengthening International Coordination and Cooperation, pg. 2 and 5.

\textsuperscript{64} Boister, An Introduction to Transnational Criminal Law, pg. 152-153.

\textsuperscript{65} Ferguson, Global Corruption: Law, Theory and Practice An Open Access Coursebook on Legal Regulation of Global Corruption under International Conventions and under US, UK and Canadian Law, pg. 74; For EU member states the issue is also solved through the Eurojust, Guidelines for Deciding “Which Jurisdiction Should Prosecute?” in Eurojust Annual Report 2003.
Attorney General: Domestic Guidance for handling criminal cases affecting both England, Wales or Northern Ireland and the United States of America. Moreover, according to § 9-27.240 of the U.S. Attorneys’ Manual (USAM), the US prosecutors are to “weigh all relevant considerations” when determining on whether prosecution should be initiated or declined, i.e. the issue of concurrent jurisdiction is solved on a case-by-case basis.66 Furthermore, the US prosecutors are to consider the following factors:

…the strength of the relative interests of the U.S. and the foreign state; the ability and willingness of the foreign state to prosecute effectively; the probable sentence upon conviction; and whether the foreign state will decide whether to prosecute before the U.S. statute of limitations expires.

…the location of the misconduct; nationality and location of the defendants and victims; location of evidence and witnesses; the possibility of dividing the prosecution among the states; delay in prosecution; and investment of investigative resources. A decision to prosecute is generally made only after extensive consultation with the foreign state.67

In practice it is arguable whether the issue of concurrent jurisdiction is as straightforward as can be inferred from the listed factors. For example, VimpelCom is, according to the FCPA, an “issuer”. Thus, the US has a certain interest. However, TeliaSonera is not an “issuer”, as it has not been listed on the US stock market for almost ten years and also, has a strong connection to Sweden. This is crucial, as the US interest68 when weighed against the Swedish interest is rather weak. Arguably the natural choice should be Swedish jurisdiction. However, the US Courts have proved to be most creative when it comes to establish US jurisdiction. Where there is a will there is a way.

When it comes to the ability and willingness to prosecute effectively: the Swedish prosecutor has indicated willingness to prosecute TeliaSonera. This is however dependent on the final result of the Swedish investigation. The Swedish investigation is restricted to

68 However, the US interest is most likely based on either the fact that TeliaSonera purchased a US company to establish itself on the Uzbek telecom market or the fact that TeliaSonera bought licenses from Takilant and the dubious transactions were made through the US banking system. Nonetheless, the Swedish interest is strong. See, Alestig, Hedelius, Korruptionsexpert: Därför ger sig USA på Telia, Svenska Dagbladet 8/10 2016 (31/5 2016), http://www.svd.se/korruptionsexpert-sverige-extremit-mesigt
the former version of the Swedish anti-bribery legislation. Thus, the ability of the Swedish prosecutor to prosecute can be put in question. Nonetheless, if the revised Swedish anti-bribery legislation proves effective it is likely to mean a smaller scope for the US prosecutors to initiate criminal proceedings against Swedish companies. However, with the uncertainty of the practical significance of the aforesaid factors, the issue of concurrent jurisdiction should preferably be solved at a higher level.

6.4 The OECD Anti-Bribery Convention

6.4.1 The members of the OECD Anti-Bribery convention

On 15 February 1999, the Anti-Bribery Convention entered into force. The Anti-Bribery Convention has been signed and ratified by all of the 34 OECD member countries and also, seven non-member countries. In 2009, an OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business was also adopted (Recommendation).

6.4.2 The preamble and articles of the OECD Anti-Bribery Convention

The preamble of the Anti-Bribery Convention accentuates the nature of foreign bribery, as it is a transnational crime. Because of foreign bribery’s very nature all the OECD members share a responsibility to combat it. This “shared responsibility” and international cooperation runs like a silver thread through the Anti-Bribery Convention, e.g. with articles on mutual legal assistance and extradition. In addition, the preamble encourages companies to participate in the work against foreign bribery.

However, the purpose of the Anti-Bribery Convention is to be accomplished while having regard to “jurisdictional and other basic legal principles of each country”. Settlement agreements in criminal proceedings are in general foreign to civil law countries. The same can be said for the Swedish judicial system. It can therefore be put in question; with reference to the US authorities frequent use of DPAs, whether basic legal principles are truly being respected.

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70 Article 9 and 10 of the Anti-Bribery Convention.
Article 1 establishes the offence of bribing a foreign public official. According to article 3, criminal penalties shall be “effective, proportionate and dissuasive”.

The Anti-Bribery Convention only provides a vague answer on the issue of concurrent jurisdiction. The article of interest is article 4 titled “Jurisdiction”. Article 4.1 and 4.2 emphasises each country’s responsibility to establish jurisdiction, both with respect to offences committed within the country’s territory and abroad. Also, according to article 4.3, each country has a responsibility to ensure the latter being effective. In conclusion, the Anti-bribery Convention supports and encourages its members to establish a broad and effective jurisdiction. The issue of concurrent jurisdiction is addressed in article 4.3. It states the following:

When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

According to the cited text, countries are to consult with each other to find the most appropriate jurisdiction for prosecution. Arguably article 4.3 follows the general approach of the Anti-Bribery Convention, i.e. to combat foreign bribery through international cooperation. However, it is for several reasons, not clear whether this is a viable solution. First, as foreign bribery often stretches across international borders, it is common with more than two jurisdictions that need to be agreed. Second, as concluded in 5.3, the extra territorial application of the Bribery Act and FCPA is vast. Third, international cooperation generally requires mutual trust.71

The third reason needs to be further elaborated on, as it is of significant importance. It is only reasonable that a jurisdiction with a tough anti-bribery legislation on a national level also wishes to ensure the same applies on an international level. A though national anti-bribery legislation would otherwise lead to a competitive disadvantage for their companies.72 Ultimately, it would have a negative impact on the country’s national economy. Arguably, to ensure the same applies on an international level is a matter of protecting the state’s interest. However, article 5 explicitly prohibits considerations of national economic interest. According to article 5:

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71 Cf, Boister, An Introduction to Transnational Criminal Law, pg. 152; Cf, ”the EU experience” as discussed down below in 7.4.3.
72 Cars, Mutbrott och korruptiv marknadsföring, pg. 178.
Investigations and criminal proceedings shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Hence, states are only allowed to protect their interest to a certain degree. Nonetheless, the US is in the lead when it comes to pursuing foreign bribery. Also, the US Courts do not consider foreign judgements to bar criminal proceedings, i.e. double jeopardy is not applicable outside of the US. Moreover, the US authorities have defended their vigorous approach to foreign bribery with the lack of legal action by other jurisdictions. Herein lays the problem: The fear of foreign companies not being sufficiently remedied and subsequently, the fear of national companies becoming competitive disadvantaged on the international market. Without mutual trust, foreign jurisdictions are likely to continue conducting investigations and initiating criminal proceedings.

### 6.4.3 The monitoring system of the OECD Anti-Bribery Convention

Sweden, the UK and the US have all signed and ratified the Anti-Bribery Convention. The implementation and enforcement of the Anti-Bribery Convention is monitored by the OECD Working Group on Bribery in International Business Transactions (Working Group). The Working Group works through a system of peer-reviews, divided in three phases.

### 6.4.4 The OECD Working Group and Sweden

In June 2012, the OECD released its Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden. The OECD Working Group criticised Swedish anti-bribery legislation and made 22 recommendations for improvement.

The Working Group stressed that Sweden so far only once has prosecuted a company for bribery related to foreign officials. In addition, the Swedish authorities have on numerous occasions decided to terminate investigations and pre-investigations of bribery related to

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75 OECD, Country monitoring of the OECD Anti-Bribery Convention, (27/5 2016), http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdbriberyconvention.htm; A fourth phase is under construction and will most likely be introduced in 2016.
77 Ibid, pg. 5 and 8; Svea HovR mål 831-04/2005.
foreign officials. According to the Working Group, ”the absence of cases… signals that something is not working in Sweden’s framework for detecting, investigating and prosecuting foreign bribery”. In particular, this was said to be unsettling by reason of the Swedish economic background. For example, ”the size of Swedish companies, their international scope and sectors of business, including defence, telecommunication and energy”. In addition, the Swedish economy is reliant on export, including export to emerging markets.

Nonetheless, the Working Group commended the revised Swedish anti-bribery legislation and also, the National Anti-Corruption Police Unit and National Anti-Corruption Unit. Yet, the Working Group concluded that it was too early to assess the new legislation and therefore, suggested a later Phase 3 bis evaluation and on-site visit. The Working Group also commended the Code of Business Conduct.

Amongst other things the Working Group recommended that Sweden revised the framework on corporate fines and also, increased the maximum level of fines for legal persons. Sweden has no corporate criminal liability. According to the Working Group, the main problem with the framework on corporate fines was the link between an individual and corporate liability. At present, for imposing corporate fines the Swedish authorities needs to assert the necessary intent within an individual. Furthermore, the size of Swedish corporate fines was, in contrast to the Swedish economy, insufficient and not ”effective, proportionate and dissuasive”. Also, the Swedish authorities hardly ever imposed confiscation on legal persons in cases of bribery or excluded legal persons from government contracting. The Working Group was clearly troubled with all of this.

78 OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden, pg. 8-10.
79 Ibid, pg. 5
80 Ibid, pg. 8.
81 Ibid, pg. 5 and 45.
82 Ibid, pg. 12 and 45.
83 Ibid, pg. 36-38.
84 Ibid, pg. 5, 22, 46 and 51.
85 Ibid, pg. 18-20 and 50-51.
86 Ibid, pg. 5 and 56-59; Article 3.1 and 3.2 of the Anti-Bribery Convention.
6.4.5 The OECD Working Group and the US

In the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States, the Working Group addressed the question of multiple jurisdictions conducting parallel investigations and criminal proceedings.\(^{88}\) The Working Group started with accentuating the nature of foreign bribery, as foreign bribery is a transnational crime. According to the Working Group, the crime's very nature made it inevitable that multiple jurisdictions at times would conduct parallel investigations and initiate criminal proceedings.\(^{89}\) While, the nature of foreign bribery is a reasonable explanation, it only answers the question in part. The US is in the forefront when it comes to initiate investigations and criminal proceedings in cases of foreign bribery.\(^{90}\) Also, the result of foreign bribery being a transnational crime does not necessarily need to be the final halt. The law often interferes with different results to reach a more satisfying one. Arguably, a solution would be to coordinate the issue of concurrent jurisdiction at an international level. The Anti-Bribery Convention is for example practically silent on the issue; this is not impossible to change.

Additional reasons, besides the nature of foreign bribery, are needed for justifying the US authorities' vigorous approach. In the Phase 3 Report, the US authorities justified themselves with the lack of legal action from other jurisdictions.\(^{91}\) According to the US authorities, their frustration was based on numerous occasions when they had provided evidence, but foreign jurisdictions still had decided not to take action.\(^{92}\) Arguably, the US justification is derived from the importance of mutual trust, as discussed in 6.4.2. For mutual trust each jurisdiction has to take responsibility and implement a sufficient anti-bribery legislation and ensure an effective enforcement. From a US point of view, the FCPA is a though anti-bribery legislation. Thus, the US authorities need to guarantee that whatever applies on a national level also applies on an international level. Ultimately, it is a question of levelling the playing field, as the FCPA otherwise would be a competitive disadvantage on the international market.

\(^{88}\) OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States, pg. 22.
\(^{89}\) Ibid.
\(^{90}\) Ibid.
\(^{91}\) Ibid.
\(^{92}\) Ibid.
The Working Group commented on the defence put forward by the US authorities. However, the comment was short and provided no added value, as it nothing but credited the US authorities’ vigorous approach and encouraged further international cooperation.93

6.5 The United Nations Convention against Corruption (UNCAC)

6.5.1 The preamble and articles of the UNCAC

The UNCAC and the Anti-Bribery Convention have a similar purpose and similar provisions. The presentation of the UNCAC will therefore be brief.

The purpose of the UNCAC is, according to article 1 (b), to promote international cooperation in the fight against corruption. For example, the UNCAC provides detailed chapters on international cooperation, asset recovery and technical assistance and information exchange.94 Moreover, according to article 12.1, members are to "provide effective, proportionate and dissuasive civil, administrative or criminal penalties”.95

The solution provided by the UNCAC on concurrent jurisdiction is similar to article 4.3 of the Anti-Bribery Convention. According to article 42.5, members are to, “as appropriate, consult one another with a view to coordinating their actions”. In contrast to the Anti-Bribery Convention, the UNCAC does however also provide a detailed list on different ways to establish jurisdiction, e.g. the principle of territoriality, active and passive nationality, preparatory money-laundering offences, protected interest and aut dedere aut judicare.96 Also, according to article 47, members are to transfer criminal proceedings:

…where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

94 Ch IV articles 43-50; ch V articles 51-59; ch VI articles 60-62 UNCAC.
95 See also, article 26 "Liability of legal persons”; According to article 26.4, “Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions”.
The provision is of particular interest as it explicitly refers to "the interest of the proper administration of justice". This seems to bring something more to the table than mere consultation, as it places focus on the jurisdiction that is most suitable to deal with the case.

According to article 4.1, "States Parties shall carry out their obligations… in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States". Moreover, according to article 4.2, “Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law”. Article 4 is similar, yet more detailed, to the preamble of the Anti-Bribery Convention, which states that basic legal principles of each jurisdiction are to be respected. As said previously, the frequent use of settlement agreements in criminal proceedings is making it uncertain whether each country’s legal system are truly being respected.

### 6.6 In summary

At present, companies are faced with legal uncertainty. The focus should not be on the risk of concurrent jurisdiction, but rather on combating foreign bribery. Also, the US Courts do not recognise international double jeopardy. In addition, the UK and the US have different rules on self-reporting and privacy. Ultimately, all of this leads to a fear of conducting business abroad, for the wrong reasons. In the long run, it may have a harmful impact on trade. Also, it is likely to undermine public confidence, as it raises questions of the true purpose behind foreign investigations and criminal proceedings: to deter companies from foreign bribery or to get a piece of the cake.

The OECD Anti-Bribery Convention and the UNCAC provide nothing of real value to the issue of concurrent jurisdiction. According to article 4, the jurisdictions are to consult each other to determine the most appropriate jurisdiction for prosecution. Neither of the Conventions mentions the principle of ne bis in idem or double jeopardy. The Working Group has explained the occurrence of concurrent jurisdiction by virtue of the nature of foreign bribery. Also, during the OECD peer review the US authorities defended their vigorous approach to foreign bribery by referring to the lack of legal action from other jurisdictions.

On the question of using settlement agreements in criminal proceedings the following can be said: On the one hand, using settlement agreements gives companies an incentive to
This is in line with the preamble of the Anti-Bribery Convention and UNCAC, which encourages companies to assist in the fight against foreign bribery. Also, global settlement agreements are in line with the two Conventions’ policy of international cooperation. On the other hand, according to the two Conventions, basic legal principles of each jurisdiction are to be respected. In most civil law countries and Sweden, agreements in criminal proceedings are foreign.

Businesses would benefit from clarity on this issue. Companies that have been sentenced or entered into a settlement agreement with foreign jurisdictions and paid a substantial amount of money should not be subject of new investigations and criminal proceedings for the same matter, as it neither is fair nor proportionate. Also, it contributes to legal uncertainty, which is likely to restrain trade. International Conventions, such as the Anti-Bribery Convention and UNCAC should be more specific and set out clear rules.

International ne bis in idem requires mutual trust. At present, international ne bis in idem is not conceivable, at least not until all countries have the same level of anti-bribery legislation and effective enforcement. To realise this, there is no need to look far, as the Swedish anti-bribery legislation and enforcement were heavily criticised for being too weak and also, the revised version of it has only been in force for four years. The Anti-Bribery Convention and the system of peer reviews contribute to level out the playing field. Arguably in the future a principle of international ne bis idem at an international level may be an option. However, as of now the focus should be on coordinating concurrent jurisdiction and set out clear limitations. Another possible way forward could be to allow global settlement agreements. This option will now be further discussed.

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98 Cf, article 3.1 of the Anti-Bribery Convention.
99 Cf, Boister, An Introduction to Transnational Criminal Law, pg. 152; Cf, ”the EU experience” as discussed down below in 7.4.3.
7 Global settlement agreements

7.1 Introduction

On 18 February 2016, the SEC announced a global settlement agreement had been reached between VimpelCom Ltd, its Uzbek subsidiary Unitel LLC and the US and Dutch authorities. The background was that VimpelCom and its subsidiary had paid government officials in Uzbekistan and hence, violated the FCPA. It was agreed that VimpelCom, because of these violations, were to pay 795 million dollars to the US and Dutch authorities. As was said in the introduction, the case of VimpelCom is considered a foresight of what awaits TeliaSonera.

However, settlement agreements in criminal proceedings are foreign to the Swedish judicial system. According to ch 20 s 6 RB, the Swedish prosecutors adhere to a principle of mandatory prosecution. Hence, global settlement agreements raise two questions. The first question: is a global settlement agreement compatible with current Swedish law? Suppose a global settlement agreement has been reached between a Swedish company and the SFO, DOJ or SEC, i.e. foreign jurisdictions. Meanwhile, the Swedish prosecutor has conducted an investigation. Because of the principle of mandatory prosecution, representatives of the company are prosecuted and the case is brought to Swedish Court. The second question: in what way should a Swedish Court approach a global settlement agreement?

To answer the two questions, a comparison will be made between the UK and the US approach to negotiated settlements/plea bargain and DPAs/NPAs and current Swedish law, i.e. legislation, case law and preparatory work. A case study will also be carried out.

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7.2 Agreements between prosecutor and defendant

7.2.1 The UK and the US approach to negotiated settlement and plea bargain

The US has an established tradition of using plea bargain in criminal proceedings. Plea bargain means that by confessing to a criminal offence a court trial is deemed unnecessary. Hence, plea bargain does not aim at shorten the time of investigation.\(^\text{102}\)

The UK has a similar tradition, as it is possible to use negotiated settlements in criminal proceedings.\(^\text{103}\) However, as the UK judge pointed out in Innospec, the procedures surrounding the UK negotiated settlement and the US plea bargain are rather different.\(^\text{104}\)

In general, UK prosecutors and Courts view the US plea bargain as rather aggressive. Nonetheless, it can be submitted that the UK in comparison to Sweden has more of a legal tradition when it comes to using agreements in criminal proceedings.

7.2.2 The UK and the US approach to settlement agreements in criminal proceedings

Examples of settlement agreements are the deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) used by the DOJ and SEC.\(^\text{105}\) As from 2014, DPAs, but not NPAs, are also used by the SFO.\(^\text{106}\)

A NPA essentially means that a company agrees to comply with certain conditions, e.g. financial penalties, and by doing so the prosecutor decides not to prosecute. A NPA is not subject of any judicial review and is a private agreement between the prosecutor and defendant; as such the US prosecutors are entrusted with significant discretionary powers.\(^\text{107}\)

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\(^\text{102}\) Processuell avtal i brottmål, pg. 62-64; Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 48; SOU 2005:117, pg. 52-54.
\(^\text{103}\) Lundqvist, Processuella avtal i brottmål, pg. 48-51.
\(^\text{104}\) R v Innospec, p 23 i). In p 25 iii) the UK judge, when reasoning on the basis of a plea, referred to "the principles set out in paragraphs 1V.45.10-45.15 of the Consolidated Criminal Practice Direction... [and] the well known decision in R v Underwood [2005] 1 Cr App R (S) 90".
\(^\text{107}\) Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p. 64; https://www.sec.gov/spotlight/enfcoopinitiative.shtml
NPAs and DPAs do not have a legislative basis in the US. Instead, the US prosecutors rely on the United States Attorney’s Manual. In contrast, the UK legislator deemed it necessary to implement DPAs through legislation. In the UK, the provisions on DPAs are found in s 45 and Schedule 17 of the Crime and Courts Act 2013. However, the SFO provides a more summing-up definition:

A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation, which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified condition. DPAs can be used for fraud, bribery and other economic crime.

In accordance with the cited text, DPAs can be said to have five distinctive features. First, only legal entities can be subject to DPAs. Second, it is also only possible to use DPAs for certain crimes and bribery is one of them. Third, the use of DPAs requires supervision of a judge and thus, is not left to the prosecutor’s discretion. The supervising judge has to consider if a DPA is “in the interest of justice” and also, “fair, reasonable and proportionate”. Fourth, the company has to agree to certain specified conditions, e.g. financial penalties, restitution for victims, disgorgement of the profits of wrongdoing and measures to prevent future offending. Fifth, a company that fails to meet the conditions set out in the DPA will be prosecuted. The prosecutor will then be able to present an admission of guilt and also, all of the collected evidence. Therefore, such a case is most likely to result in conviction.

The US prosecutors have used NPAs and DPAs for the last 20 years. The use of NPAs and DPAs has been both criticized and praised. On the one hand, it has been said, ”Justice Deferred Is Justice Denied”. On the other hand, the use of DPAs has been said, ”…to

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110 Ibid.

111 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p. 15.

112 Mazzacuva, Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice, pg. 250.

113 Ibid, pg. 257.

have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe”. It can be submitted that DPAs therefore are controversial also in the state where they originate.

From the beginning, DPAs were used by the US prosecutors for juvenile and drug offenders, i.e. minor offences. The aim was to avoid the reputational damage that follows from criminal proceedings and also, different negative effects on a person due to societal negative reactions. The intended purpose of DPAs has to some extent been maintained, as DPAs help avoiding detrimental effects for companies. However, it is rather surprising that DPAs today are used in cases of corruption including foreign bribery. Foreign bribery in comparison to juvenile and drug offences is a particularly serious crime, as it causes great harm to society. In this thesis, this is illustrated in the initial quote from Kofi Annan, about the harmful consequences of corruption. Arguably, corruption and bribery is at the very top of crimes.

Before 2014, the UK Courts looked upon settlement agreements in criminal proceedings with reluctance. In R v Innospec, the UK Judge made some highly critical remarks, yet yielded to the pressure of the US Courts and authorities. In 2014, the UK legislator implemented DPAs into the UK criminal procedural law. Thus, the use of DPAs is a relative new phenomenon in the UK. One reason for implementing DPAs was to find a way to deal with corporate economic crimes, e.g. foreign bribery. This reason can be divided into two subcategories. The first category included considerations of ensuring an effective justice system. The second category included considerations of limiting the detrimental effects following criminal proceedings and a possible conviction.

Before 2014, to successfully prosecute corporate economic offenders was difficult. All of the previous attempts to solve this had failed. In part, this was because of corporate economic crimes being transnational and therefore, often involved multiple jurisdictions. Its transnational nature was often the cause of long, expensive and complicated

116 Mazzacuva, Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US systems of Criminal Justice, pg. 255.
117 Ibid, pg. 257.
118 See, down below 8.1.3.
119 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p. 72.
121 Ibid, p. 2.
investigations and criminal proceedings. It was also hard to prove criminal liability, as companies’ decision-making often is spread out. The UK legislator considered DPAs to be a practical solution to aforesaid problems. On the one hand, implementing DPAs was in the interest of an effective justice system. On the other hand, implementing DPAs was in the interest of companies, as it led to companies not being in legal uncertainty for long periods of time.

In addition, the use of DPAs limited the detrimental effects for companies following from criminal proceedings and possible conviction. This is because stocks that fall and companies that go bankrupt not only affect companies but also innocent employees, customers, pensioners, suppliers and investors. Companies may also be excluded from EU and US public procurement tenders. The UK legislator considered DPAs to be a fairer and more proportionate reaction, as it can be hard to foresee and calculate on aforesaid effects.

Another reason behind implementing DPAs was the risk of multiple jurisdictions investigating UK companies for the same or similar wrongdoing. According to the UK legislator, the only solution to concurrent jurisdiction was to pave the way for international cooperation. In particular, implementing DPAs aimed at guaranteeing cooperation and negotiations taking place with the US authorities. Without implementing DPAs, the Ministry of Justice feared two things would happen. First, it would limit the UK prosecutors’ ability to prosecute. Many jurisdictions have responded to foreign bribery with an anti-bribery legislation with an extensive extra territorial application, e.g. the FCPA. Extra territorial application leads to an increased risk of other jurisdictions already having initiated investigations and criminal proceedings. The UK legislator explicitly referred to the principle of double jeopardy, i.e. it is not possible to prosecute someone who has already been convicted or acquitted of the same offense. Hence, a foreign conviction or acquittal was said to limit the UK prosecutors’ ability to prosecute, also known as international double jeopardy. In addition, the US Courts do not recognise international double jeopardy. Therefore, without DPAs and simultaneously adhering to international

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122 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p. 3.
126 Ibid, p. 38.
double jeopardy, the UK prosecutors would become disadvantaged. It can be submitted
that the UK legislators must have considered DPAs to be equivalent to judgements, as
DPAs were said to trigger international double jeopardy. Secondly, the UK legislator feared
companies would consider it more attractive to strike deals with US authorities, as neither
DPAs nor NPAs leads to conviction and also, bar further prosecution and criminal
proceedings in the UK, also known as forum shopping. All of this is rather interesting
from a Swedish point of view. Arguably, the UK legislator was almost forced to implement
DPAs into its criminal procedural law. Nevertheless, the UK legislator decided not to
implement NPAs. NPAs were, because of their lack of transparency and judicial oversight,
considered to be unconstitutional and not in accordance with the UK legal tradition.

7.2.3 Current Swedish law and negotiated settlements/plea bargain

In 2008, a Nordic seminar was held in Stockholm about efficient management of large and
complex criminal cases. According to the Swedish president of the Court of Appeal, the
Swedish legislator had neglected the question of agreements between prosecutor and
defendant. The legislator was requested to show a greater interest also for the procedural
law applicable prior to Court proceedings.

The premise at the Nordic seminar was legal policy, i.e. de lege ferenda. Arguably, the
predominant view must have been that plea bargain is not in accordance with current
Swedish law. The questions of guilt and reduction of penalties was said to be reserved for
the Courts. This could only be changed through legislation. This was for two main
reasons. First, legislation is necessary because of the principle of legality. Second, a
prosecution system based on agreements must be transparent and public. However,
according to one of the participants at the Nordic seminar, “…on a principal level it would
lead to radical changes, but on a technical level the step would be rather small”. Perhaps
the prosecution system that exists today is not as far from a prosecution system based on
agreements, as it first may seem. This will be further discussed in 7.4.4.1.

128 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed
129 Ibid, p. 69.
130 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål.
131 Ibid, pg. 43.
132 Ibid; See also, SOU 2005:117, pg. 49-64.
133 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 44.
134 Ibid, pg. 45-46.
135 Ibid, pg. 46; My own translation.
The differences are however substantial between the criminal justice systems based on agreements, e.g. the US, and the criminal justice systems without agreements, e.g. Sweden. For example in Sweden, according to ch 23 s 1 and ch 20 s 6 RB, preliminary investigation and prosecution are mandatory. This is not the case in the US, where prosecution is at the suspects’ disposal. Also, the Swedish Courts are, in accordance with ch 30 s 3 RB, not bound by the legal classification of an offence. It is the opposite for the US Courts. At the Nordic seminar, the US plea bargain institute was said to have no resemblance to prevalent discussions in the Nordic countries and because of this should not be used as a model. Instead, plea bargain should be discussed from a Nordic and European context and focus on how to bridge together criminal and civil proceedings. The Nordic seminar ended with great hesitation towards using a civil procedure institute in criminal proceedings.136

Nonetheless, in SvJt 2009 s 353 the author used NJA 1981 s 1035 to illustrate that plea agreements occur in Sweden, at least in practice.137 In NJA 1981 s 1035 a public defence counsel had in close cooperation with prosecutor and police made arrangements for his client to hand over a large batch of drugs. The question of the case was whether the defence counsel could receive compensation for his work and time made in connection with aforesaid arrangements. However, the case also tells us something about plea agreements in Sweden. The Swedish Supreme Court emphasized three things: First, the defence counsel had had reason to believe his actions would have positive implications for his client. According to the defence counsel, the aim had been to serve in the interest of his client and possibly also to achieve mitigation of a sentence. Second, the measures had been taken in close cooperation with the prosecution authority and had been preceded by long negotiations between the parties. Third, without these measures the drugs would probably never have been procured. In conclusion, similar to plea bargain or settlement agreements it was a question of efficiency and reaching result.

In 2014, the Swedish government proposed legislation on mitigation of a sentence for defendants being complicit during the investigation of their own crime.138 The purpose of the reform was to attain more effective and faster legal proceedings. This was to be accomplished through an amendment of the mitigating circumstances in ch 29 s 5 BrB.139 The Swedish bodies of consultation emphasised the risk of the proposal leading to a

136 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 43 and 48.
137 Lundqvist SvJt 2009 s 355-356.
139 Ibid, pg. 1 and 7-15.
system similar to plea bargain. It was further argued that mitigation of a sentence should not be proportionate to the effect the admission had had on the investigation.\textsuperscript{140} According to the Government’s reply to the bodies of consultation, mitigation of a sentence was a question reserved for the Courts and it was not to be confused with plea bargain. The proposal also meant no changes to preliminary investigations and prosecution being mandatory. Moreover, defendants were not obliged to contribute to their own investigation. Furthermore, defendants were never to be placed in a negotiating situation with neither prosecutor nor police. However, defendants were to receive information about the possibility of mitigation of a sentence, but it had to be clarified that the decision rested at the Court.\textsuperscript{141} Arguably, the Swedish legislator chose to revise the mitigating circumstances in ch 29 s 5 BrB instead of implementing a system with agreements. By doing so some of the benefits from a system with agreements were achieved, but this without eroding the Swedish legal tradition.

\textbf{7.2.4 Current Swedish law and DPAs/NPAs}

On the question of using DPAs and NPAs in Sweden, no equivalents are available in current Swedish law. It can be submitted that DPAs and NPAs compared to plea agreements are one step further away from current Swedish law. On a scale ranging from closest to furthest away from current Swedish law: plea agreements are arguably closest, and then DPAs followed by NPAs.

The considerations made by the UK legislator before implementing DPAs are a possible source of inspiration, as part of their reasoning and fears may be useful in a Swedish debate. However, at the time of the UK legislator’s considerations, negotiated settlements were already an established part of their legal system.\textsuperscript{142} Arguably, the step to implementing DPAs into the UK legal system was not as far as it would be in Sweden. The Swedish legislator has so far decided not to implement a system with agreements. During the revision of ch 29 s 5 BrB it was emphasised that the reform was different from a prosecution system with agreements.\textsuperscript{143} It is highly likely the Swedish legislator would be even more hesitant towards allowing DPAs and undoubtedly NPAs. Such changes would also require, in accordance with the principle of legality, a significant reform of the Swedish

\textsuperscript{140} Prop 2014/15:37, pg. 16-17.
\textsuperscript{141} Ibid, pg. 25.
\textsuperscript{142} See, above 7.2.1.
\textsuperscript{143} Prop 2014/15:37, pg. 16-17.
criminal procedural law. The question is if this means that the fears of the UK legislator will become reality in Sweden.

7.2.5 Arguments in favour of a prosecution system based on agreements

Agreements between prosecutor and defendant help to achieve a concentrated main hearing, as it places focus on the main issues. For example in the UK, agreements are used to narrow down cases; this is to ensure expedited criminal proceedings. Also, agreements spare witnesses from the exertion of being examined. Moreover, expedited proceedings help to remove concerns of legal uncertainty. Furthermore, agreements have many economic benefits. As has been said previously, investigations and criminal proceedings of corporate economic crimes are often long, expensive and complex and therefore, claim legal resources. A lack of resources may result in cases not being prioritised and thus, wrongdoers evading justice. Agreements help to free up and allocate legal resources. Investigations and criminal proceedings being unreasonably long may also be a breach of article 6 ECHR. Besides, agreements motivate companies and individuals to cooperate and provide evidence, which is something that is beneficial on all levels.

7.2.6 Arguments against a prosecution system based on agreements

The exercise of assessing guilt and meting out appropriate punishment shall be reserved for the Court. This is because of the importance of maintaining the rule of law. Also, through extensive bargaining there is a risk of losing the public confidence in the legal system. In addition, plea agreements involve a risk of reprisals and false statements. Allowing this kind of bargaining might be self-defeating, as there is a possibility of certain calculations, e.g. profits from criminal activities. Moreover, there is a risk of extortion. Defendants may find it more appealing to get fast and reduced sentences instead of being in legal uncertainty. This would undermine the right to a fair trial and the presumption of innocence. Furthermore, some of the benefits from using agreements can be achieved in

144 Lundqvist, Processuella avtal i brottmål, pg. 120.
145 Ibid, pg. 50.
146 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 9 f, 18, 35, 44.
147 Ibid, pg. 44.
148 Ibid.
149 Ibid, pg. 44 and 46.
150 Ibid, pg. 46.
151 Ibid, pg. 47.
152 Ibid.
other ways. For example, the Swedish criminal procedure was recently revised. The overall purpose of the reform was to achieve a more modern judicial process that would fulfil the requirements of the rule of law and efficiency. Amongst other things the reform included a revision of ch 45 s 13 RB that led to an extended possibility of oral preparation in criminal proceedings. This meant that in cases involving economic crimes, the defendant is now able to declare his attitude. The purpose with the revision of ch 45 s 13 RB was to achieve a more concentrated main hearing, which is also one of the arguments in favour of agreements between prosecutor and defender. This suggests it is possible to use other alternatives and reach the same result, alternatives more suitable to the Swedish criminal justice system.

7.3 In summary
The UK and the US have a legal tradition of using agreements, i.e. negotiated settlements and plea bargain. However, the procedures surrounding the use of agreements differ and the UK has traditionally had a more restrictive approach towards using agreements in criminal proceedings. The US prosecutors have used DPAs for the past 20 years. In contrast, DPAs were implemented into the UK criminal justice system as late as 2014. In main part, this was for the three following reasons: to ensure an effective justice system, to limit the detrimental effects for companies and to ensure the UK prosecutors and Courts were not being outmanoeuvred by its US counterparts.

Current Swedish law allows neither negotiated settlements nor plea bargain. However, it has been up for debate. It has also been argued by some that plea agreements are used in practice. Nevertheless, the Swedish legislator have so far used the mitigating circumstances in ch 29 and 36 BrB to achieve a similar result, but without eroding the Swedish legal tradition.

The arguments in favour and against a system based on agreements can be summed up in efficiency versus the rule of law.

To implement DPAs is a pragmatic approach to a new legal trend. However, the UK criminal justice system already included negotiated settlements and thus, in contrast to Sweden, the step was not so far.

153 Prop 2004/05:131; See also Prop 2015/16:39.
154 Prop 2004/05:131, pg. 1.
155 Ibid, pg. 134.
7.4 The Swedish Criminal Justice System

7.4.1 In what way should Swedish prosecutors and Courts approach a global settlement agreement

A first requirement is of course, in accordance with ch 2 s 2 BrB, to establish Swedish jurisdiction. In this thesis, Swedish jurisdiction is assumed. This is because otherwise the issue of concurrent jurisdiction and global settlement agreements would not arise.

Arguably, there are two potential stages during which the Swedish prosecutors and Courts could try to harmonise a global settlement agreement with current Swedish law. The first stage is before prosecution: by referring to international litispendens, international ne bis in idem or using discretionary prosecution. The second stage is during criminal proceedings: by using ch 2 s 6 BrB or ch 36 s 9 BrB together with ch 36 s 10 BrB. Arguably, the object of such a venture is to ensure that companies, by entering into agreements with foreign jurisdictions, not are evading Swedish legal proceedings and also, to ensure a fair and proportionate outcome.

For further discussion of the two potential stages it is important to recall that only natural persons and not legal entities can commit crimes and be sentenced in Sweden, i.e. no corporate criminal liability. Hence, the mitigating circumstances in ch 29 s 5 BrB and the remitting of a sentence in ch 29 s 6 BrB will not be discussed further. However, according to ch 1 s 8 BrB, a crime may also result in forfeiture of property, corporate fines and other special legal effects. The provisions on forfeiture of property are found in ch 36 s 1 to 6 BrB. The provisions on corporate fines are found in ch 36 s 7 to 10 BrB. Ch 36 s 10 BrB is similar to ch 29 s 5 and 6 BrB and will therefore be discussed.

7.4.2 Basic principles and frame for discussion

The Swedish criminal justice system is based on the principle of legality. The Swedish criminal procedure is accusatory; this means that the parties are equal. The role of the prosecutor is to set the frame of the trial by describing the offence. The role of the Court is

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156 Cf, according to ch 1 s 2 BrB, "Unless otherwise stated, an act shall be regarded as a crime only if it is committed intentionally" and also ch 1 s 3 BrB “… a sanction for a crime means the punishments of fines and imprisonment, and conditional sentence, probation and committal for special care”.
157 According to ch 36 s 7 BrB, it is only possible to impose corporate fines “…for a crime committed in the exercise of business activities”.
158 See, ch 1 s 1 p 3 RF.
to evaluate evidence, decide on the applicable provisions and legal classification of the crime and impose a sentence. In most part, the Court is to act as an observer throughout the proceeding and at the end delivers its judgment.\textsuperscript{160} Moreover, the criminal trial is contradictory\textsuperscript{161} and is conducted on the basis of the principles of immediacy\textsuperscript{162}, oral presentation\textsuperscript{163} and free evaluation of evidence.\textsuperscript{164}

The European Convention on Human Rights (ECHR) constitutes Swedish law. According to ch 2 s 19 the Instrument of Government (Sw: Regeringsformen (RF)), Swedish legislation and Government regulations have to be coherent with the ECHR. Thus, article 6 ECHR and the right to a fair trial is also an important element when discussing the Swedish criminal justice system.\textsuperscript{165}

\section*{7.4.3 International ne bis in idem}

Ne bis in idem is Latin and means “not twice for the same”. In common law countries the principle is often referred to as double jeopardy. Ne bis in idem is fundamental for the rule of law and also, human rights. As aforesaid, the ECHR constitutes Swedish law and also, Swedish law has to be coherent with the ECHR. According to article 4.1 protocol no. 7 ECHR, ne bis in idem means the following:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.\textsuperscript{166}

However, the provision only applies to criminal proceedings within the same state. Thus, Sweden has, according to the ECHR, no obligation to account for neither criminal proceedings conducted by other jurisdictions nor foreign judgements.\textsuperscript{167}

\begin{flushright}
\textsuperscript{160} Lundqvist, Processuella avtal i brottmål, pg. 12.
\textsuperscript{161} Cf, “Audiatur et altera pars” is Latin and means “Let the other side be heard too”. Ekelöf, pg. 30-32.
\textsuperscript{162} See, ch 30 s 2 RB; Ekelöf, Rättegång. Fjärde häftet, pg. 27-30.
\textsuperscript{163} See, ch 46 s 5 RB; Ekelöf, Rättegång. Fjärde häftet, pg. 307.
\textsuperscript{164} See, ch 35 s 1 RB; Ekelöf, Rättegång. Fjärde häftet, pg. 26-27.
\textsuperscript{165} See, lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna and ch 2 s 19 RF.
\textsuperscript{166} See also, article 50 the EU Charter of Fundamental Rights.
\textsuperscript{167} Danelius, Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna, pg. 644-645.
\end{flushright}
Besides article 4.1 protocol no. 7 ECHR, the legal doctrine of res judicata including ne bis in idem is established in ch 30 s 9 RB. Res judicata is Latin and means ”a matter judged”. In ch 30 s 9 RB the following is stated:

Once the time for ordinary means of appeal has expired, the issue of the defendant's criminal liability for the act, which was determined by the judgment, may not be taken up again for adjudication.

Similar to article 4.1 protocol no. 7 ECHR, ch 30 s 9 RB only applies to Swedish judgments. For a long period of time the general rule was that foreign judgments were not legally binding for the Swedish Courts. However, nowadays a principle of international ne bis in idem is established in ch 2 s 5a BrB. Even so, the provision is not comprehensive, as it does not include all foreign judgments. The provision is also rather complex. In ch 2 s 5a BrB the following is stated:

[T]he question of responsibility for an act has been determined by a judgment which has entered into legal force pronounced in a foreign state where the act was committed, or by a foreign state [which has acceded to any of the agreements listed in the provision].

And also:

…has been acquitted …declared guilty of the crime without a sanction being imposed …the sanction imposed has been enforced in its entirety or enforcement is in process …the sanction imposed has lapsed under the law of the foreign state.

As recited, applicability requires “a judgment which has entered into legal force”. One question is therefore whether a settlement agreement with a foreign jurisdiction, e.g. DPA, fulfils the prerequisite of “legally binding judgement”? Another question is whether the UK and the US “have acceded to any of the agreements listed in the provision”?

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169 Asp, Internationell Straffrätt, pg. 40-42.
However, before assessing the two prerequisites, the first question is whether ch 2 s 5a BrB applies to foreign judgments whereby a company has been held criminal liable and not an individual. According to the Government bill Prop 2005/06:59, the answer is yes. The reason for not explicitly inserting this into the provision was to avoid later arguments based on the contrary, also known as e contrario, for example in relation to foreign decisions on forfeiture of property.\textsuperscript{171}

On the question of “legally binding judgement” – res judicata and what constitutes a Swedish legally binding judgment is established in ch 30 s 1 and s 9 RB. Arguably, ch 30 s 1 and s 9 RB are possible sources of interpretation for determining the meaning of “legally binding judgment”. The wording of ch 30 s 1 RB distinguishes between “judgment” and “decision”. In general, for a judgement to have legal force requires a judicial review of the act described in the summon application.\textsuperscript{172}

However, the general rule has some exceptions. Both approved summary penalty orders and summary orders for breach of regulations are equivalent to legally binding judgments and thus, bar further prosecution and criminal proceedings.\textsuperscript{173} Another exception is ch 20 s 12 RB. The provision is one of a kind as it recognises the use of settlement agreements in Swedish criminal proceedings. According to ch 20 s 12 RB, in cases not falling under public prosecution, i.e. private prosecution, the aggrieved person and defendant have the possibility to settle. According to ch 20 s 12 RB, the aggrieved person, “…may thereafter neither report the offence nor institute a prosecution”. However, as the provision only applies to private prosecution it is of limited importance. An analogy to ch 20 s 12 RB would suggest that a settlement agreement in criminal proceedings is likely to be granted the status of a legally binding judgment. However, the situations are rather different. Foreign bribery is a very serious crime, as it causes great harm to the society and thus, prosecuting foreign bribery should always be of public interest.\textsuperscript{174}

From the beginning, ch 2 s 5a BrB was enacted to implement Swedish commitments due to the European Convention of 28 May 1970 on the International Validity of Criminal Judgements and the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters. Since then a number of international agreements have been added to

\begin{footnotesize}
\textsuperscript{171} Prop 2005/06:59, pg. 55-56.
\textsuperscript{172} Lundqvist, Processuellavtal, pg. 72.
\textsuperscript{173} According to ch 48 s 3 p 2 RB, “Orders approved shall have the same effect as a judgment that has entered into final force”.
\textsuperscript{174} OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden, pg. 30.
\end{footnotesize}
Another possible source of interpretation for determining “legally binding judgement” is for that reason the European Court of Justice (ECJ).

According to the ECJ, in the joined cases of Gözütok and Brügge, an agreement between prosecutor and defendant, where the defendant has pleaded guilty and also, paid a sum of money, bars prosecution and criminal proceedings in other Member States. However, the provision at hand was a provision from the Schengen Agreement. It is therefore uncertain if the judgment is of general application or not. Still, the principle of conform interpretation may affect a Swedish interpretation of “legally binding judgment”. The rationale for the ECJs decision may also be of general interest, as the ECJ justified its decision with the principle of mutual recognition and also, the object and purpose of the provision at hand, to guarantee the principle of ne bis in idem was given the effect intended. Hence, the ECJ approach, i.e. the principle of mutual recognition and object and purpose of ch 2 s 5a BrB, is possible to use as a source of inspiration when determining the meaning of “legally binding judgment”.

On the application of the principle of mutual recognition the ECJ said the following:

…Member States are required to have mutual trust in their criminal justice systems and …each of them [are required to] recognise the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

The EU principle of mutual recognition resembles the dilemma of mutual trust presented in 6.4.2. The road to EU competence over criminal and procedural law has been fraught with challenges and tensions. The problem is within the concept of sovereignty. It has often been easy to agree on general principles, but not as easy to reach consensus on their later application. Arguably, this is true also for the Anti-Bribery Convention and the UNCAC. However, the principle of mutual recognition is not suitable for traditional judicial cooperation, e.g. the Anti-Bribery Convention and the UNCAC, as it interfere with the traditional notion of sovereignty. Nonetheless, the EU experience tells us the following: the principle of mutual recognition requires a minimum level of harmonisation. For

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175 Joined Cases C-187/01 and C-385/01 Gözütok and Brügge, p. 48.
176 Ibid, p. 33 and 35.
177 Ibid, p. 33.
178 Article 4(2)(j) TFEU and article 67 TFEU.
179 Craig, De Burca, EU Law Text, Cases and Materials, pg. 926 and 946.
180 Ibid, pg. 947.
entrusting these kinds of matters to be solely dealt with under one jurisdiction, the international community needs to be guaranteed that the state in question has implemented a satisfactory level of anti-bribery legislation and also, is effectively enforcing it. Sweden has come a long way, but is most likely not there yet. This is for two reasons: the lack of corporate criminal liability or something closely similar to corporate criminal liability and the size of Swedish corporate fines. The latter will be further discussed in 7.4.6.

The object and purpose of ch 2 s 5a BrB and also, ne bis in idem in general, is to protect the accused from being tried for the same matter twice. A DPA allows a prosecution to be suspended for a defined period provided the company meets certain specified condition, e.g. financial penalties, restitution for victims, disgorgement of the profits of wrongdoing and measures to prevent future offending: monitoring or reporting systems. Thus, the implications of DPAs can be significant for companies. It can be submitted that DPAs because of this resembles judgments. By not recognising them as judgements and consequently, not hindering further prosecution and criminal proceedings, the purpose of ne bis in idem may be lost in the process.

On the second question: the UK is a member of the EU and therefore, more than one of the agreements in ch 2 s 5a BrB applies. The US is not a member of the EU and thus, does not adhere to EU law including the principle of mutual recognition. However, to some degree ch 2 s 5a BrB also applies to US judgements. According to ch 2 s 5 p 3 BrB, in case of a judgment from a foreign state that has not acceded to any of the listed agreements, Swedish prosecution requires approval from the Government or a person authorised by the Government. Nonetheless, also this part of the provision requires a “legally binding judgment”. Thus, the status of DPAs still needs to be determined.

International ne bis in idem vis-à-vis DPAs has been up for debate in both the UK and France. In R v Innospec, the UK judge made some highly critical remarks towards settlement agreements in criminal proceedings. Four years later, the UK legislator implemented legislation on DPAs. In a recent judgment from a French Criminal Court,

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181 See, ch 36 s 8 BrB; Dir. 2015:58, pg. 1; OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Sweden, pg. 5.
182 Ministry of Justice, Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements, p. 15.
183 However, the legal framework in Gözütok and Brügge was article 54, 55 and 58 of the Convention on implementing the Schengen Agreement and the UK is not a member of the Schengen agreement.
184 See, above 7.2.2.
DPAs were considered to bar prosecution and criminal proceedings in France.\(^{185}\) From a Swedish point of view, the French judgment is of particular interest, as France is a civil law country and also, similar to Sweden has no legal tradition of plea agreements.

The French Criminal Court justified the judgement on two grounds. First, the DPA and French accusations were based on the same general facts. Second, the French Criminal Court stated, “DPAs ha[.]s the essential qualities of a judgment”.\(^{186}\) Arguably, DPAs can be said to share some qualities with a judgment. For example the imposing of certain specified condition, e.g. financial penalties. However, the threshold for using a DPA and imposing a sentence is different. The standard of proof in Swedish criminal trials is “beyond reasonable doubt”.\(^{187}\) In contrast, DPAs are just agreements. In case of evidence being presented, merely the fear of a US prosecution may be sufficient for a company to consider a DPA a more attractive alternative. DPAs were introduced to the UK criminal justice system to ensure corporate economic offenders being brought to justice. In part, the previous problems arise from it being hard to prove criminal liability, as companies’ decision-making is often spread out.\(^{188}\) Possibly, the UK legislator implemented DPAs to circumvent the standard of proof in criminal trials. However, setting aside the standard of proof is likely not a problem, as long as DPAs not equals judgments. Still, this is exactly what the argument put forward by the French Criminal Court stated, i.e. DPAs have the essential qualities of judgements. This raises questions. A more direct and transparent approach would be to lower the standard of proof for corporate economic crimes. However, such a solution is most likely too controversial. It can be submitted that a lower threshold is at the expense of companies and their rights. Hence, the flaws of DPAs are not to be taken out on companies twice, by not allowing DPAs to bar prosecution and criminal proceedings in other states.

Nevertheless, the French judgement is asymmetric. The US Courts are not going to grant French judgements the same treatment.\(^{189}\) Another alternative is to do as the UK legislator and enact legislation on DPAs. By doing so, the UK prosecutors and Courts did not become limited vis-à-vis their US counterparts and also, it did not become more attractive to strike deals with the US authorities, also known as forum shopping.

\(^{185}\) Davis, Kirry, FCPA Update – A Global Anti-Corruption Newsletter, pg. 1.
\(^{186}\) Ibid, pg. 11.
\(^{188}\) See, above 7.2.2.
\(^{189}\) Davis, Kirry, FCPA Update – A Global Anti-Corruption Newsletter, pg. 11-12.
Arguably, at this stage, i.e. prior to prosecution, there are two alternatives. This is beside the alternative of cooperating and negotiating with foreign authorities with the purpose of convincing them to wait, until the Swedish legal system has run its course. One alternative is to grant DPAs the status of foreign judgments and thus, in accordance with ch 2 s 5a BrB, bar further prosecution and criminal proceedings in Sweden. Another alternative is to implement DPAs into the Swedish criminal justice system. The former alternative is likely the better and this for several reasons. First, Sweden has no legal tradition of plea agreements. Second, yes DPAs provide a practical solution to a real problem, namely the difficulties of bringing corporate economic offenders to justice and also, the problems arising from other jurisdictions using them. However, the legal instrument has also been heavily criticised in the US.\textsuperscript{190} Thus, DPAs are not even firmly rooted in the US criminal justice system, the state where it originates. To grant DPAs the status of foreign judgements may also seem less appealing when considering: their unclear legal status added to the fact that the US Courts are not going to account for Swedish judgments and also, the significant differences\textsuperscript{191} between the US and Swedish criminal justice system.

However, by not implementing DPAs, the UK legislator’s predictions may become reality in Sweden. Nonetheless, the number of bribery cases with foreign connection in Sweden is, in contrast to the UK, low. Thus, also the number of cases the US authorities may show an interest in is low. According to a rapport from the Swedish National Council for Crime Prevention (Sw; Bröttsförebyggande Rådet (Brå)), only 43 out of 684 reported cases of corruption had a foreign connection. This is 6 %.\textsuperscript{192} The number of investigations is also low. Only one case of bribing a foreign recipient has so far resulted in a conviction.\textsuperscript{193} Thus, the UK legislator most likely had more to fear from the US authorities and therefore, necessitated a more permanent solution. The situation in Sweden may however change, as the US authorities have shown clear signs of increasing their efforts in relation to foreign bribery. Arguably, the Swedish legislator and companies needs to raise their awareness and also, take appropriate measures. For the Swedish legislator the latter means to update the Swedish anti-corruption framework and adapt it to an international togetherness.

\textsuperscript{191} Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 48.
\textsuperscript{193} Cars, Murbrott och korruptiv marknadsföring, pg. 144 and 170; Svea HovR mål 831-04/2005.
However, the question of whether to grant DPAs the status of foreign judgments or implement them into the Swedish legal system would never arise if concurrent jurisdiction were solved at an earlier stage. For example by explicitly coordinating: who trumps whom, in the Anti-Bribery Convention. It can be submitted that without international coordination, the UK and US authorities using DPAs combined with other jurisdictions struggling to adapt is likely to set off a chain of reactions. In case the Swedish legislator and Courts do not recognise DPAs as foreign judgments and consequently, no bar to Swedish prosecution and criminal proceedings: a less permanent alternative could possibly be to use discretionary prosecution.

7.4.4 The role of Swedish Prosecutors

7.4.4.1 Principle of legality and opportunity

There are two different criminal prosecution systems in the world: systems based on the principle of legality and systems based on the principle of opportunity. The Swedish prosecutors adhere to the former. The principle of legality means that prosecutors are obliged to prosecute if there is a criminal offence and enough evidence for conviction, also known as mandatory prosecution. The principle of opportunity means that prosecutors have certain discretion as to whether or not to prosecute. The decision is based on considerations of opportunity.

In early Swedish preparatory work, the Swedish legislator put three reasons forward against discretionary prosecution. The first reason was the risk of equal cases not being treated the same. The second reason was scepticism towards entrusting Swedish prosecutors with discretionary powers. The Swedish legislator was also confident in that the purposes behind discretionary prosecution could be reached in other ways.

Arguments in favour of discretionary prosecution are flexibility and proportionality. The law is to some extent rigid, as it is not possible to foresee all situations. For example DPAs

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194 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 21
195 Ibid, pg. 21; Ch 20 s 6 RB.
196 Ekelöf, Rättegång. Andra häftet, pg. 60; Ekelöf, Rättegång. Femte häftet, pg. 154 ff and note 2 - Ekelöf is of the opinion that the terms mandatory and discretionary prosecution is more adequate; Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 21.
197 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 21.
198 SOU 1926:32, pg. 36-38; SOU 1938:43 och 44, pg. 30, 256 f; Lundqvist, Processuella avtal, pg. 27 and 30; See also, Prop 1984/85:3, pg. 17.
are foreign to the Swedish legal system; even so the Swedish prosecutors and Courts may be placed in a situation where current Swedish law neither provides guidance nor legal support. The Swedish legislator did probably not foresee the development of transnational crimes and international cooperation nor that what is seen as common practice in other states may indirectly affect our legal system. Even so, the Courts are obliged to apply current Swedish law to the situation at hand and deliver a judgment. A more fair and proportionate outcome for a Swedish company faced with a DPA is likely to be achieved by allowing the Swedish prosecutor to make a discretionary decision.\textsuperscript{199}

\textbf{7.4.4.2 Mandatory prosecution}

The right to plead in cases falling under public prosecution is reserved for the Swedish prosecutor.\textsuperscript{200} According to ch 20 s 6 RB, the Swedish prosecutor has, unless otherwise is prescribed by law, an obligation to prosecute crimes falling under public prosecution, also known as mandatory prosecution.

The status of mandatory prosecution has however swayed from being a strong and general rule to a rule with several exceptions, e.g. special considerations of charges and waiving of prosecution.\textsuperscript{201} It has been argued whether or not there still is a need to confront the two different prosecution system against each other, as no system today is purely based on either the principle of legality or opportunity.\textsuperscript{202} For example Ekelöf explains public prosecution by distinguishing between mandatory and discretionary prosecution. According to Ekelöf, the level of fixed conditions for public prosecution defines mandatory and discretionary prosecution.\textsuperscript{203} Mandatory prosecution simply means the conditions are more fixed. Discretionary prosecution means the legislator has not set out all of the conditions. At most the law provides a vague standard and further guidance is provided by case law and doctrine.\textsuperscript{204} From Ekelöf’s explanation of public prosecution it is evident that both principles are used in the Swedish legal system.\textsuperscript{205} Also, it tells us that

\textsuperscript{199} SOU 1926:32, pg. 32 and 35; Lundqvist, Processuella avtal, pg. 27.
\textsuperscript{200} Ch 20 s 2 RB; According to ch 20 s 3 RB, a criminal offence, unless otherwise is prescribed by law, falls under public prosecution.
\textsuperscript{201} SOU 1926:32, pg. 36-38; SOU 1938:43 och 44, pg. 36 and 256-257; Ekelöf, Rättegång. Femte häftet, pg. 156; Lundqvist, Processuella avtal i brottmål, pg. 33; Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 21.
\textsuperscript{202} Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 22.
\textsuperscript{203} Ekelöf, Rättegång. Femte häftet, pg. 154.
\textsuperscript{204} Ibid, pg. 155.
\textsuperscript{205} Ibid, pg. 154.
even in cases of discretionary prosecution, it has not just been left for the prosecutor to decide. In addition, the prosecutor always has a responsibility to make a balanced decision, as an inadequate decision may be deemed as malpractice and result in a penalty or disciplinary action.\(^{206}\)

### 7.4.4.1 Special consideration of charges

According to ch 10 s 10 p 3 BrB, a prosecution of negligent financing of bribery has to be of public interest.\(^{207}\) The provisions in BrB on special considerations of charges can be likened with presumptions against prosecution. Their main purpose is to ensure only the most serious crimes are prosecuted.\(^{208}\) A case of negligent financing of bribery committed at a global scale is because of its seriousness most likely considered of public interest.

The provisions in BrB on special considerations of charges are to be separated from ch 20 s 7 RB.\(^{209}\) The former is a form of discretionary prosecution; as for example ch 10 s 10 p 3 BrB includes an assessment of opportunity. The latter is an exception from the general rule of mandatory prosecution.\(^{210}\) The prosecutor is always to start with assessing any special consideration of charges before considering waiver of prosecution. If a crime when assessing special considerations of charges is deemed of public interest, the room for waiver of prosecution, at a later stage, is limited.\(^{211}\)

In conclusion, it is most likely not possible for a Swedish prosecutor, faced with a global settlement agreement, to use ch 10 s 10 BrB. Hence, the same goes for ch 20 s 7 RB. For the sake of completeness and also, as the room for waiver of prosecution is said to be limited and not non-existent, ch 20 s 7 RB will now be presented.

### 7.4.4.2 Waiver of prosecution

Application of ch 20 s 7 p 1 RB requires no compelling public interest or private interest being set aside. For example, it is of public interest that similar cases are treated equally.\(^{212}\) Prosecution is at times also necessary for maintaining public confidence in the justice

\(^{206}\) Ekelöf, Rättegång. Femte häftet, pg. 154-155; Ch 15 s 5 and ch 20 s 2 BrB.
\(^{207}\) With exception for ch 20 s 5 BrB, e.g. state officials.
\(^{208}\) Ekelöf, Rättegång. Femte häftet, pg. 166; RåR 2008:2, pg. 6.
\(^{209}\) Prop 1984/85:3, pg. 22.
\(^{210}\) Ekelöf, Rättegång. Femte häftet, pg. 166; RåR 2008:2, pg. 6.
\(^{211}\) RåR 2008:2, pg. 6.
\(^{212}\) Prop 1984/85:3, pg. 22.
system and its impartiality. Important aspects when assessing “public interest” are the seriousness of the crime and its surrounding circumstances. For reasons of general prevention it may however be necessary to prosecute minor offences. This to make it clear that certain criminal behaviour is not accepted by the society.\textsuperscript{213} Arguably, with aforesaid in mind, it is almost always in the public interest to prosecute serious crimes. However, it is one thing to prosecute and initiate a criminal proceeding and by doing so making it clear that bribery is not accepted by the society. It is another thing to later mitigate a sentence or remit a sanction. This will be further discussed in 7.4.5 and 7.4.6.

Application of ch 20 s 7 RB further requires one out of the four situations listed in the provision to be at hand. The purpose of the provision is amongst other things to allocate resources to combat serious criminal misconduct, e.g. economic crimes.\textsuperscript{214} None of the four situations listed in the provision however befits serious criminal misconduct, e.g. foreign bribery. This is further support of ch 20 s 7 RB not being an option in cases of foreign bribery. Nonetheless, according to ch 20 s 7 p 2 RB, waiver of prosecution is also possible due to special circumstances. Lundqvist has proposed that ch 23 s 4a RB together with ch 20 s 7 p 2 is a possible legal support for agreements between prosecutor and defender. The wordings of the provisions do not exclude this and also, together the provisions constitute a safety vault for other situations than those listed in ch 2 s 7 p 1.\textsuperscript{215} In Lundqvist’s opinion agreements between prosecutor and defendants are at least compatible with the fundamentals of Swedish criminal procedural law and also, Sweden’s international commitments.\textsuperscript{216}

Besides the prerequisites of ch 2 s 5a BrB, waiver of prosecution basically requires a completed investigation and also, certainty that the suspect is the offender. Normally this necessitates a confession from the suspect.\textsuperscript{217} Waiver of prosecution is to be separated from drop of prosecution, as waiver of prosecution is considered a “successful prosecution” and is therefore recorded in the criminal register.\textsuperscript{218}

\begin{flushright}
\textsuperscript{213} Prop 1984/85:3, pg. 22.
\textsuperscript{214} Ibid, pg. 1.
\textsuperscript{215} Lundqvist, Processuella avtal, pg. 93.
\textsuperscript{216} Ibid, pg. 96.
\textsuperscript{217} Prop 1984/85:3, pg. 11.
\end{flushright}
To some degree waiver of prosecution resembles an agreement between a prosecutor and defender. As was said in 7.2.2, DPAs were initially also used only for minor offences. However, this is not the case anymore.

The main purpose behind special consideration of charges and waiver of prosecution is to increase effectivity, by not allocating resources to cases where the resources only will have limited effects on the sanction, also known as economic process.\(^{219}\) At a later stage, a foreign settlement agreement may be deemed as a mitigating circumstance and thus, lead to a mitigation of a sentence or remitting of sanction. Arguably, to allow the prosecutor to not prosecute would be in accordance with the intended purpose, as it is most likely the foreign settlement agreement in the end will lead to the Swedish Courts imposing a reduced corporate fine.

Arguably, according to current Swedish law, neither special considerations of charges nor waiver of prosecution are viable options. However, the provisions on special considerations of charges and waiver of prosecution imply two things. First, the Swedish prosecutor has some room for making an opportune decision. Second, agreements between prosecutor and defender are not unfeasible. Arguably, de lege ferenda, the provisions on special considerations of charges and waiver of prosecution offers two alternative ways to resolve the problem of concurrent jurisdiction and joinder of sanctions (Sw; sanktionskumulation). Even so, it is, also in cases of concurrent jurisdiction and with the risk of joinder of sanctions, a good idea to prosecute. This is because it sends out a strong signal and in addition, does not leave the matter solely in the hands of foreign jurisdictions. Preferably the Swedish Courts should resolve the problems with concurrent jurisdiction and joinder of sanctions at a later stage, e.g. ch 2 s 6 BrB or ch 36 s 9 BrB together with ch 36 s 10 BrB.

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\(^{219}\) RåR 2008:2, pg. 4.
7.4.5 Ch 2 s 6 BrB

In case a company, despite ch 2 s 5a BrB, is prosecuted and sentenced for the same matter, i.e. a DPA is not considered a “legally binding judgment”, the Swedish Courts have, in accordance with ch 2 s 6 BrB, a possibility to make a deduction of a sentence. According to ch 2 s 6 BrB:

If a person is sentenced in the Realm for an act for which he has been subjected to a sanction outside the Realm, the sanction shall be determined with due consideration for what he has undergone outside the Realm. If he should be sentenced to a fine or imprisonment and he has been sentenced to a sanction of deprivation of liberty outside the Realm, what he has undergone therewith shall be taken fully into consideration when determining the sanction.

In cases referred to in the first, paragraph a less severe punishment than that provided for the act may be imposed or a sanction completely waived.

Arguably, the prerequisite of interest is “sanction”. The definition of “sanction” is important, as only companies’ representatives can be held criminal liable and thus, sanctioned. A sanction for a crime means, in accordance with ch 1 s 3 BrB, the punishments of fines and imprisonment. Forfeiture of property and corporate fines are, in accordance with ch 1 s 8 BrB, special legal effects of a crime. However, a corporate fine has, in contrast to forfeiture of property, some resemblance to a sentence, as it has a punitive element. In contrast, forfeiture of property is used to eliminate potential profit from a crime. Thus, the purpose of forfeiture of property is not punitive, but rather preventive and reparative.220 Nevertheless, the status of forfeiture of property has been up for debate. According to the ECHR in Welch v. the United Kingdom, it is important “to go behind appearances and assess… whether a particular measure amounts in substance to a ‘penalty’”.221 When assessing the existence of a penalty the following factors may be taken into account: “the wording of the provision… nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure and its severity”.222 Moreover, the Swedish legislator has contemplated over whether to label corporate fines as a sanction or a special legal effect. However, according to current Swedish law, forfeiture of property and corporate fines are

221 Welch v. the United Kingdom, p. 27.
222 Welch v. the United Kingdom, p. 28
special legal effects of a crime. Nonetheless, the Swedish legislator underlined that from an international point of view, the Swedish system, with corporate fines being classified as a special legal effect, is unique. Also, a change to this would most likely facilitate international cooperation.\textsuperscript{223} In addition, a Swedish investigator has been assigned with the task of reviewing amongst other things whether the corporate fine is to be constructed as a sanction or as a special legal effect of a crime.\textsuperscript{224} Thus, the classification of corporate fines may be changed in a nearby future and thereby, open up for new possibilities of using ch 2 s 6 BrB.

As of now, the purpose of ch 2 s 6 BrB and its prerequisite “sanction” is to deduct fines and imprisonment. The provision is therefore not likely to be applicable on corporate fines. Arguably, the classification of corporate fines as a special legal effect of a crime, have more far stretching consequences than it first may seem. It can be submitted that the Swedish system, because of things like this, is not built for an international togetherness. The legal landscape including transnational crimes has changed from national to global and thus, it is a question of adapting. Arguably, as the Working Group concluded in the OECD Phase 3 report, the Swedish legislator needs to do something about the framework for corporate fines.\textsuperscript{225}

\textbf{7.4.6 Ch 36 s 10 BrB}

According to the Swedish sentencing reform in 1989, the principles governing sentencing are the rule of law, legality, equality, proportionality, objectivity and impartiality. “Penal value” (Sw; \textit{straffvärde}) is the legal term for an assessment based on these principles.\textsuperscript{226} According to ch 29 s 1 p 1 BrB:

Punishments shall, with due regard to the need for consistency in sentencing, be determined within the scale of punishments according to the penal value of the crime or crimes taken.

Focus is placed on the following: damage, intent, aggravating and mitigating circumstances.\textsuperscript{227} As aforesaid, ch 29 BrB only applies to natural persons.

\textsuperscript{224} Dir. 2015:58, pg. 1.
\textsuperscript{225} See, above 6.4.4.
\textsuperscript{226} Prop 1987/88:120, pg. 36; See also, Prop 2014/15:37.
\textsuperscript{227} See, ch 29 s 1 p 2 BrB and ch 29 s 2 and 3 BrB.
The principles of proportionality and equality intertwine. The kind of proportionality used in sentencing is relative. For determining the proportionality of a sentence, the sentence has to be compared with other sentences. For example in Innospec the crime at hand was compared to other crimes with similar harmful effects, e.g. cartel cases and cases of deception against the regulator. The UK judge said the following:

UK Courts have a duty to impose penalties appropriate to the serious level of criminality that [is] characteristic of [foreign bribery].

The UK judge also said the following:

Indeed there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state. If the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states, whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states.

The UK judge considered the level of fines agreed to in the settlement agreement to be too low. In cases of concurrent jurisdiction, where no coordination has occurred, the level of sanctions and special legal effects may on the contrary be too high or at least unbalanced. Hence, the proportionality between crimes of similar nature is likely to be disturbed. Depending on if a state makes an effort to harmonise DPAs with their legal system or not, may affect a company’s choice of where to conduct its business. This is because depending on each state’s approach to DPAs, the level of sanctions or special legal effects is likely to be different.

If DPAs are not accounted for in a Swedish judgment the result will be a form of joinder of sanctions. In general, joinders of sanctions are accounted for by using the mitigating circumstances in ch 29 s 5 BrB, to ensure the overall reaction to a crime is not being disproportionate. As aforesaid, ch 29 BrB only applies to natural persons. However, according to a similar provision; ch 36 s 10 BrB, a corporate fine may, due to mitigating

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228 Borgeke, Att bestämma påföljd för brott, pg. 32.
230 R v Innospec Limited, p. 31.
231 Prop 2014/15:37, pg. 9.
circumstances, be set at less or in extraordinary cases be remitted.\textsuperscript{232} The provision includes four situations of when this is possible.

First, if the crime has brought about other duties of payments or special legal effects, to ensure the collective response to a crime is not disproportionate. The situation is similar to ch 29 s 5 p 8 BrB and has the same purpose: to account for joinder of sanctions. However, according to preparatory work, the provision generally only applies to sole traders (Sw; enskilda näringsidkare) or smaller companies. In most cases sole traders and smaller companies are closely entwined to an individual and therefore, in practice the sanction and corporate fine for a crime may affect the same person.\textsuperscript{233} Foreign bribery is more likely to involve larger companies than sole traders or smaller companies. Nevertheless, the word “generally” implies some room also for other situations. Yet, the room for applying the provision is rather small in cases of forfeiture of property. This is because of the nature of forfeiture of property. The provision aims at “joinder of sanctions” and as discussed above forfeiture of property does not aim at being punitive and is also not regarded as a sanction, but a special legal effect. It is however possible to apply the provision in situations where the forfeiture of property has some punitive elements.\textsuperscript{234} Arguably, depending on if a global settlement agreement is formulated as eliminating profit or as a corporate fine and also, depending on how the forfeiture is calculated is most likely to affect the possible application of ch 36 s 10 p 1.

Second, if the corporate representative has tried to prevent, remedy or limit the damage. It is likely a company, due to the specified conditions in the global settlement agreement, has already paid, for example, restitution to victims and thus, has “tried to prevent, remedy or limit the damage”. This is possible something the Swedish Courts could consider as a mitigating circumstance.

Third, if the corporate representative has self-reported the crime. In most cases DPAs are the result of an extensive cooperation between companies and authorities. As has been said previously, the rules on self-reporting and legal privacy differ between the UK and the US. However, the use of DPAs is closely entwined with the question of self-reporting.\textsuperscript{235} Also,

\textsuperscript{232} According to Prop 2005/06:59, pg. 62, the provision is similar to ch 29 s 5 BrB and was also enacted using the latter as a model.
\textsuperscript{233} Ibid, pg. 38.
\textsuperscript{234} Brottsbalken En kommenter, ch 36 s 10.
\textsuperscript{235} Proudlock, David, Bribery and corruption: negotiated settlements in a global enforcement environment, Practical Law Thomson Reuters, Legal UK & Ireland 1/10 2014 (25/5 2016), http://uk.practicallaw.com/9-586-2485; Scott, K, Self-reporting corporate corruption: where are we after Innospec?, Practical Law
at some stage, in cases of global settlement agreements where multiple jurisdictions are involved, the information is likely to be passed on or made public. If a Swedish company has cooperated with foreign authorities and the result of that cooperation, e.g. the settlement agreement and collected evidence, has made its way to Swedish authorities and helped them to build a case against the company, it should perhaps be viewed as a mitigating circumstance.

Fourth, if there are any other special grounds for reducing the corporate fine. According to preparatory work, the fourth situation aims at situations when it would be manifestly unreasonable because of the crime being indirectly aimed at the company itself.236 The fourth situation is therefore of limited interest from a foreign bribery point of view.

Arguably, using ch 36 s 10 BrB is a possible method for the Swedish Courts to bridge together the gap between global settlement agreements and current Swedish law. In conclusion, it is possible to view global settlement agreements as a mitigating circumstance and as such a reason for setting corporate fines at less.237 However, the problem is because of the size of Swedish corporate fines, the room is too small for setting it at less, i.e. no room for mitigation.

From an international point of view, the main concern with the Swedish legislation is that corporate fines are, in accordance with ch 36 s 8 BrB, limited to a maximum of ten million SEK. In addition, the upper scale is reserved for extreme cases.238

The Swedish legislator has previously held current legislation on corporate fines to be sufficient for satisfying the Swedish international commitments.239 However, this is not likely the case. For example the maximum penalty under the Bribery Act is 10 years' imprisonment and unlimited fines.240 In R v Innospec, the level of fines agreed to in the global settlement agreement was criticised for being too low, as a fine of 12.7 million dollars was “wholly inadequate” to reflect the crime.241 Without the global settlement agreement, fines and other penalties would most likely have exceeded 400 million dollars in

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236 Prop 2005/06:59, pg. 40.
238 Prop 2005/06:59, pg. 62.
239 Ibid, pg. 16.
240 See, s 11 of the Bribery Act.
241 R v Innospec, p. 40.
the US and 150 million dollars in the UK.\textsuperscript{242} Hence, the corporate fines in Sweden appear pale into insignificance.

The provisions on corporate fines were reviewed as late as 2006. However, the area of sanctions has during the last couple of years, in Sweden, EU and internationally, developed rapidly.\textsuperscript{243} The OECD has criticised the Swedish corporate fine. Another growing trend is also corporate criminal liability; something that OECD has recommended Sweden to implement.\textsuperscript{244} In May 2015, the Swedish Government assigned an investigator with the task of reviewing the provisions on corporate fines.\textsuperscript{245} The investigator was to consider and suggest improvements on the following: an increased maximum level of the corporate fine; the basis for calculating the size of the corporate fine; if the corporate fine are to be constructed as a penalty or as a special legal effect of a crime; the restriction in ch 36 s 7 BrB to crimes committed in the exercise of business activities; the relationship between corporate fines and individual criminal liability; how issues of joinder of sanctions is to be solved and also, to analyse whether there is a need for further legislative action, to ensure Sweden complies to the OECD.\textsuperscript{246} According to the Swedish Government, the very reasons behind assigning an investigator, with the task of reviewing the provisions on corporate fines, were the work against corruption and the OECD criticism of Swedish anti-bribery legislation and enforcement.\textsuperscript{247}

Arguably, if Sweden is to participate at an international level, i.e. establish and retain jurisdiction in cases of concurrent jurisdiction and foreign bribery, Swedish legislation needs to be up to date and adapted to an international togetherness. As was said in 6.2, at present, international comity is the only available solution to concurrent jurisdiction. Arguably, Sweden must place itself in the best possible negotiable position. At present, the size of Swedish corporate fines is inadequate. As the UK judge in R v Innospec said, “…there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials”.\textsuperscript{248} If states do not ensure the same applies on a national and international level, some companies will be competitive advantaged and others competitive disadvantaged on the international market. The flaws of the Swedish legislation

\textsuperscript{242} R v Innospec, p. 7.
\textsuperscript{243} Dir. 2015:58, pg. 3.
\textsuperscript{244} Ibid, pg. 11.
\textsuperscript{245} Dir. 2015:58.
\textsuperscript{246} Ibid, pg. 1.
\textsuperscript{247} Ibid, pg. 12.
\textsuperscript{248} R v Innospec, p. 31.
are also likely to urge the UK and the US to conduct their own investigations and criminal proceedings. Arguably, tougher legislation is likely in the best interest also for Swedish companies.

### 7.5 In summary

Ch 2 s 5a BrB is also applicable on foreign judgements whereby a company has been held criminal liable. However, the applicability of ch 2 s 5a BrB further requires a "legally binding judgment". A vital question is therefore whether a foreign settlement agreement constitutes a judgment. An analogy to ch 20 s 12 RB would suggest so. However, foreign bribery is a very serious crime. Thus, foreign bribery is, in contrast to ch 20 s 12 RB, of public interest. According to the ECJ, plea agreements bar further prosecution and criminal proceedings in other Member states. To reach this conclusion, the ECJ referred to the principle of mutual recognition and the object and purpose of the provision at hand. The ECJ approach may affect a Swedish interpretation in three ways: first and foremost, in relation to EU Member states, second, due to the principle of conform interpretation and third, as the ECJ approach is reasonable. The EU experience tells us that mutual trust requires a minimum level of harmonization. The UK approach and the approach of the French criminal Court are two different alternatives. In a Swedish context, the latter is most likely the better alternative. However, to grant DPAs the status of a foreign judgment is an unbalanced solution. To acknowledge foreign settlement agreements as foreign judgments also means to let them in through the backdoor. Moreover, without similar Swedish legal tools, the fears of the UK legislator may become reality in Sweden, i.e. the risk of Swedish prosecutors and Courts being outmanoeuvred and forum shopping. However, what speaks against this is the fact that, in Sweden, the number of bribery cases with foreign connection is low. Nevertheless, this is likely to change. The OECD has also criticized Sweden for this, as a low number of reported bribery cases are necessarily not the same as crimes not being committed. The question of concurrent jurisdiction should preferably be solved at an international level. By doing so, countries such as Sweden will not have to struggle to adapt. However, for Sweden to benefit from an international coordination of concurrent jurisdiction, the Swedish legislation needs to be up to date and adapted to an international togetherness. At present, this is not the case.

The distinction between systems based on the principle of legality and systems based on the principle of opportunity is nowadays elusive. The Swedish prosecutor has some room
for making a balanced and opportune decision of whether to prosecute or not. According to current Swedish law, it is however not likely the Swedish prosecutor, in cases of foreign bribery, can use special consideration of charges or waiver of prosecution. This is because foreign bribery is a serious crime and thus, a prosecution is most likely considered of public interest. Nevertheless, de lege ferenda, it could pose as an option, but preferably not, as it is important to send a signal.

It is important to keep the proportionality intact between different crimes, otherwise crimes of the same magnitude will not be treated the same. Two alternatives are to use ch 2 s 6 BrB or ch 36 s 9 BrB together with ch 36 s 10 BrB. However, for ch 2 s 6 BrB to be applicable a "sanction" is required and neither forfeiture of property nor corporate fines are classified as sanctions. To bridge together the gap between global settlement agreements and current Swedish law ch 36 s 10 BrB is the most likely option. Global settlement agreements are possible to view as a mitigating circumstance and thereby, to set the corporate fines at less. Even so, the Swedish corporate fines are too low. It may therefore be hard to adjust an outcome at this level, as there is no room for adjustment. The Swedish Government has appointed an investigator to explicitly deal with the aforesaid and also, the OECD criticism. Arguably, if Sweden is to participate at an international level, i.e. establish and retain jurisdiction in cases of concurrent jurisdiction and foreign bribery, the Swedish legislation needs to be up to date and adapted to an international togetherness. The inadequacy of current Swedish law puts Sweden in a weak negotiation position.

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8 Case study

8.1 Innospec Inc and Innospec Ltd

8.1.1 About Innospec Inc and Innospec Ltd

Innospec Inc is a global speciality chemical business. The company’s headquarter is in the US. Also, the company is listed at NASDAQ. Innospec Ltd is Innospec Inc’s UK subsidiary.250 Thus, the companies most likely fulfil the prerequisites of “close connection” and “issuer”.251 Hence, the UK and US jurisdiction are indisputable.

8.1.2 Global settlement agreement

On 18 March 2010, the DOJ stated in a press release: “Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba”. This was a result of a “Coordinated Global Enforcement Action by DOJ, SEC, OFAC and United Kingdom’s Serious Fraud Office”.252 Innospec was the first case of a global settlement agreement in criminal proceedings between the UK and US authorities.

In March 2010, the UK Crown Court at Southwark delivered its judgment against Innospec Ltd, i.e. Innospec Inc’s UK subsidiary. The UK judge Lord Justice Thomas directed strong criticism towards the global settlement agreement and his sentencing remarks will therefore be presented and discussed down below.253

As for the US: Innospec Inc was charged on conduct of; paying kickbacks to the government of Iraq, in exchange for contracts under the UN Oil for Food Program (OFFP); bribing officials in the Iraqi Ministry of Oil, i.e. foreign officials; violating the FCPAs anti-bribery provisions on internal controls, books and records; violating the

251 See, s 12 p 2 and 12 p 4 of the Bribery Act and 15 U.S.C. § 78dd-1 of the FCPA.
Trading With the Enemy Act and Cuban Embargo Regulations and bribing Indonesian
government officials.\(^{254}\)

As for the UK: Innospec Ltd was charged on conduct of; having paid, between the years of
2002 and 2006, through its agents, an estimated 8 million dollars to public officials of the
Government of Indonesia. The payments were made to secure business contracts and also,
to block legislative attempts made to prohibit their product. The corruption was systematic
and large-scale. The company had also taken active measures to conceal the bribes from its
auditors.\(^{255}\)

It is evident that the alleged crimes were not of minor nature. Foreign bribery is a serious
crime and causes great harm to society. Thus, the decision of the DOJ, SEC, OFAC and
SFO to settle instead of initiating criminal proceedings may appear offensive. Nonetheless,
the cooperation between the US and UK authorities resulted in a global settlement at 40.2
million dollars. Out of this, the UK subsidiary, were to pay 12.7 million dollars.\(^{256}\) Arguably,
it is a question of natural justice, but also a question of result.

8.1.3 Regina v Innospec\(^{257}\)

According to the Crown Court, the case consisted out of two important questions. The
first question was the level of criminality in foreign bribery. The second question was how
the UK prosecutors and Courts should approach sentencing in cases of this nature.\(^{258}\)

The Crown Court commended SFO for its vigorous policy towards foreign bribery.\(^{259}\)
According to the Crown Court, there were two difficulties with the case at hand. First, the
UK and US legal position on plea agreements differed. Second, Innospec Inc did not have

Memorandum (March 18, 2010), pg. 3-11; Department of Justice, Innospec Inc. Pleads Guilty to FCPA
Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba, Justice
News 18/3 2010 (30/5 2016), https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-
defrauding-united-nations-admits-violating-us

Memorandum (March 18, 2010), pg. 3-11; Department of Justice, Innospec Inc. Pleads Guilty to FCPA
Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba, Justice
News 18/3 2010 (30/5 2016), https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-
defrauding-united-nations-admits-violating-us

\(^{256}\) Department of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations;
Admits to Violating the U.S. Embargo Against Cuba, Justice News 18/3 2010 (30/5 2016),
https://www.justice.gov/opa/pr/innospec-inc-pleads-guilty-fcpa-charges-and-defrauding-united-nations-
admits-violating-us


\(^{258}\) R v Innospec, p. 2-3.

\(^{259}\) Ibid, p. 22 and 45.
sufficient funds to pay the penalties that, without a settlement agreement, would be imposed. The DOJ, SEC, OFFC and SFO had tried to work around the latter. The result of their efforts was the global settlement agreement that had been presented to the Crown Court.260

The Crown Court stated:

However, the question has arisen as to the extent of [the authorities] powers and duties in the light of the constitutional position of a prosecutor, the role of the courts in the UK and the rules relating to plea agreements in the UK.261

The Swedish constitution sets out the principle of legality and also, the role of the Courts.262 In addition, the Swedish criminal procedural law includes provisions on public and mandatory prosecution. Moreover, as has been established previously, the use of settlement agreements in criminal proceedings is not in accordance with current Swedish law.263 Arguably, the question asked by the Crown Court is the same question a Swedish Court would have to ask itself, in case of a settlement agreement between for example the DOJ, SEC and TeliaSonera and the Swedish prosecutor concurrently decides to prosecute TeliaSonera.

The UK judge answered the question by listing the duties of the UK prosecutors.264 The UK judge then concluded that the SFO had had no authority to enter into a settlement agreement.265 The right to impose sentences was, with exception for minor offences, reserved for the judiciary.266 The Swedish prosecutor has an obligation to prosecute, in case of a crime and sufficient evidence for conviction.267 If the Swedish prosecutor neglects his duty it may be deemed as malpractice and result in a penalty or disciplinary action.268 Two exceptions to this are: special consideration of charges and waiver of prosecution. However, similar to what the UK judge said, special consideration of charges and waiver of prosecution basically only applies to minor offences.269 Arguably, by listing the duties of the

260 R v Innospec, p. 23.
262 Cf, ch 1 s 1 p 3, ch 1 s 8 RF and ch 11 RF.
263 See, ch 20 s 2, 3 and 6 RB.
264 R v Innospec, p. 25.
266 Ibid, p. 27.
268 See, ch 15 s 5 BrB and ch 20 s 1 BrB; Ekelöf, Rättegång. Femte häftet, pg. 154.
269 See, ch 20 s 7 RB and ch 10 s 10 BrB.
Swedish prosecutor it is possible to reach the same conclusion as the UK judge.

In addition, the Crown Court stated:

Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence … It is a necessary consequence of the rule of law that procedures, particularly those relating to criminal justice, cannot be amended save in accordance with amendments to [Procedural law] or by decisions of the Court of Appeal.270

The Swedish legislator has repeatedly, e.g. the Nordic Seminar and the 2014 reform, affirmed the following: the questions of guilt and reduction of penalties are reserved for the Courts.271 For this to change the Swedish legislation would have to be amended.

As to the fines at hand, it was stressed that corruption is a serious offence, in terms of culpability and harm. In accordance with article 3.1 of the Anti-Bribery Convention, the criminal penalties must be “effective, proportionate and dissuasive”. The Courts are obliged to impose a sentence that is proportionate to the seriousness of the offence.272 Proportionality is also one of the principles governing sentencing in Swedish criminal procedure.273 Moreover, Sweden is a member of the OECD and has ratified the Anti-Bribery Convention. Hence, Sweden also adheres to article 3.1 of the Anti-Bribery Convention.

To assess the proportionality of the sentence, a comparison was made with criminal offences with similar harmful effects, e.g. cartel cases and cases of deception against the regulator. According to the UK judge, the fine agreed to by the UK and US authorities were, in contrast to the seriousness of the offence, too low. In addition, a comparison was made to the normal level of fines in the US. It was estimated that the US could have imposed 101.5 million dollar in fines and also, disgorged profits. The UK judge emphasised the importance of having a uniform approach to the level of financial penalties. If the level of fines differs between states, it will affect the degree of deterrence and also, it will cause a

270 R v Innospec, p. 27.
271 Nordiska ministerrådet, Effektivare hantering av stora och komplicerade brottmål, pg. 44; Prop 2014/15:37, pg. 25.
272 R v Innospec, pg. 30.
273 Prop 1987/88:120, pg. 36; See also, Prop 2014/15:37.
competitive distortion. The UK judge seems to have viewed the settlement agreement as a way for the company to evade legal justice. However, in Sweden the situation would most likely be the reverse, as the fine imposed by a foreign settlement agreement is likely to be higher than the Swedish corporate fine.

According to the UK judge, the reasons behind the civil settlement order were threefold. The most important of the reasons, from a Swedish point of view, was the question of non bis in idem. The offence committed in Iraq by Inspec Inc was subject to criminal proceedings in the US, but not the UK. However, the offence had been organised in the UK and this had to be displayed through the penalties. In this respect the UK authorities were faced with limited options, as the US prosecution was related to the same offence and therefore, a criminal penalty would go against the principle of non bis in idem. Hence, the SFO proposed a civil penalty. Arguably, the civil penalty was used to circumvent the principle of non bis in idem. According to ch 2 s 5a BrB, the Swedish prosecutors and Courts are to account for international non bis idem. However, as previously discussed, ch 2 s 5a BrB only applies if DPAs are equivalent to foreign judgements. Arguably, it is something wrong to circumvent a principle as vital to the rule of law as non bis in idem. Also, it infringes on the rights of the accused.

However, the settlement agreement also lead to Inspec getting away easier than otherwise possible. The UK judge accentuated the following: “those who commit such serious crimes as corruption of [foreign officials] must not be viewed or treated in any different way to other criminals”. Instead, the Courts have the possibility to ”take account of cooperation and the provision of evidence against others by reducing the fine otherwise payable”. Arguably, the reasoning of the UK judge can be applied to the Swedish system, as the Swedish Courts also have the possibility to set a corporate fine at less due to mitigating circumstances. However, because of the size of Swedish corporate fines it is doubtful whether there would be anything left.

The UK judge also said, “It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions”. The Swedish

274 R v Inspec, p. 31.
275 Ibid, p. 37 i).
276 Ibid, p. 38.
277 Ibid.
278 See, ch 36 s 8 and 10 BrB.
provisions on special considerations of charges and waiver of prosecution often include the prerequisite “public interest”. As for special consideration of charges the purpose of the prerequisite is to ensure the most serious crimes are prosecuted.\textsuperscript{279} The Swedish legislator and Courts are therefore likely to agree with the UK judge also in this respect.

Furthermore, the Crown Court stated, ”[i]t would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction”.\textsuperscript{280} The principles governing sentencing in Swedish criminal procedure are the rule of law, legality, equality, proportionality, objectivity and impartiality, also known as “penal value”.\textsuperscript{281} It is likely that more than one of the principles would be set aside in case of a foreign settlement agreement.

Lord Justice Thomas listed with “considerable reluctance” five reasons for agreeing to the settlement agreement. First, Innospec Ltd had pleaded guilty to a very serious offence. Second, the company had made a full confession and assisted with evidence. The evidence had also been of significant importance, as it had been used to prosecute others. Third, a criminal proceeding was most likely to result in a larger fine. Innospec Ltd’s ability to pay had been examined and the company could not pay such a fine without entering into immediate insolvency. In respect of Innospec Ltd’s employees, the Crown Court did not wish to impose a fine of that scale. Fourth, the settlement agreement had already been announced. Fifth, the US Courts had already agreed to the settlement agreement.\textsuperscript{282}

Lord Justice Thomas said the following:

…this court was placed in a position where it had little alternative but to agree to the limit of $12.7m, if it was to avoid injustice. It must, however, be appreciated that the circumstances of this case are unique. There will be no reason for any such limitation in any other case and the court will not consider itself in any way restricted in its powers by any such agreement.\textsuperscript{283}

The recited statement indicates that the case was not to set a precedent. However, the case is now superseded, as the UK legislator implemented DPAs into the UK legal system in 2014. This is rather startling as the finishing line of the case was, “…the SFO had no

\textsuperscript{279} See, ch 20 s 7 RB and ch 10 s 10 BrB; Ekelöf, Rättegång. Femte häftet, pg. 166; RåR 2008:2, pg. 6.
\textsuperscript{280} R v Innospec, p. 38.
\textsuperscript{281} Prop 1987/88:120, pg. 36; See also, Prop 2014/15:37.
\textsuperscript{282} R v Innospec, p. 42.
\textsuperscript{283} Ibid, p. 42.
power to enter into the arrangements made and no such arrangements should be made again”. 284 Moreover, the Courts are, according to the rule of law, obliged to sentence as set out in the law. Nonetheless, the UK judge did say that this was provided no changes were made to the UK legislation. 285 According to current Swedish law and the principle of legality, the Swedish Courts are obliged to sentence as set out in the law. However, the situation would of course, also in Sweden, be different if changes were made to the Swedish legislation.

8.2 BAE System Plc and BAE System Inc

8.2.1 Global settlement agreement

On 5 February 2010, the SFO together with the DOJ announced a global settlement had been reached with BAE System PLC, as a result of the investigations of bribery allegations in several countries, e.g. Saudi Arabia and Tanzania. 286

BAE Systems PLC had pleaded guilty to one offence of failing to keep sufficient accounting records. According to the settlement agreement, the SFO were to ”terminate all its investigations into the BAE Systems Group” and also, not to conduct ”[any] further investigations or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010”. 287 Some, including the SFO, regarded the settlement agreement as a victory. Others viewed the outcome of the case with frustration. The BAE Systems had for years been the subject of investigations of serious corruption. The frustration derived from the fact that even in the event of new evidence, it would no longer be possible to prosecute the company for any offences committed before the time period set out by the settlement agreement. 288

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284 R v Innospec, p. 45.
285 Ibid, p. 46.
287 R v BAE System PLC, p 2(7)-(8).
8.2.1 Regina v BAE System PLC\textsuperscript{289}

Mr Justice Bean met the settlement agreement in R v BAE Systems PLC with scepticism and frustration. According to Mr Justice Bean, the agreement was loosely and most likely hastily drafted. The "heart of the matter" was however the agreement’s non-investigation and prosecution clause. The problem with the clause was the crimes not being specified, admitted nor listed in the agreement, which is the general custom. In addition, Mr Justice Bean was surprised with the "granting [of] a blanket indemnity for all offences committed in the past, whether disclosed or otherwise".\textsuperscript{290}

Mr Justice Bean condemned the basis of the agreement. According to the basis of the agreement, the probability was high that large payments had been made in the negotiation process with foreign officials to favour the company. According to Mr Justice Bean, the payments and the company's behaviour were evident, as anything else would be inexplicable.\textsuperscript{291} In addition, the SFO had said that the agent of BAE Systems PLC was not corrupt but simply a well-paid lobbyist. In Mr Justice Bean's opinion, this was, based on the documents, a "naive in the extreme" way of thinking.\textsuperscript{292}

The following five mitigating facts were accounted for: the company had been charged with a single offence; the single offence was the only offence the company had admitted to and therefore, it could not be sentenced for any other offences;\textsuperscript{293} it had been prosecuted and fined with 400 million dollars in the US for related offences; it had enforced a new Code of Conduct and prohibited the use of facilitation payments; it had paid 30 million pounds in voluntary reparation "for the benefit of the people of Tanzania", a payment that formed a part of the settlement agreement. At the end BAE Systems PLC was fined a total of 500,000 pounds.\textsuperscript{294}

Arguably, this case illustrates another side of the problem, a side that also was emphasised by the UK judge in R v Innospec: the use of settlement agreements may lead to corporate offenders getting a different treatment in comparison to other criminal offenders.

\textsuperscript{289} R v BAE Systems PLC, [2010] EW Misc (Crown) 16.
\textsuperscript{290} R v BAE System Plc, p. 5.
\textsuperscript{291} Ibid, p. 8.
\textsuperscript{292} Ibid, p. 9-10.
\textsuperscript{293} The case was referred to the Crown Court for sentencing, i.e. the company’s criminal liability had already been established.
\textsuperscript{294} R v BAE System Plc, p. 16 and 19.
8.3 In Summary

The case of Innospec is interesting on so many levels. From a Swedish point of view, the case illustrates how a UK Court approached a global settlement agreement.

The UK Court addressed the following matters: the UK not having the same legal tradition on plea agreements as the US; the detrimental effects that, without a settlement agreement, would follow; the duties of the UK prosecutor; the importance of a transparent and open justice system; the relative proportionality between crimes of similar nature and the use of civil penalties in relation to the rule of law and ne bis in idem.

However, what is most striking about the case is that the UK judge regarded the settlement agreement as a sort of "special treatment" of Innospec, i.e. the settlement agreement allowed for the company to evade justice. This is rather interesting, as the situation would most likely be the reverse in Sweden, at the very least when it comes to the level of fines. A corporate fine imposed by a Swedish Court is likely to be smaller, than a fine agreed to in a settlement agreement with foreign jurisdictions. Arguably, this could justify foreign jurisdictions using settlement agreements against Swedish companies. However, the relative proportionality in Sweden will be disturbed, i.e. similar crimes will be treated differently. Also, it is a question of whether Sweden wishes other jurisdictions to deal with Swedish companies through settlement agreements, instead of the Swedish legislator just increasing the size of Swedish corporate fines.

According to the UK judge, the case of Innospec was a one-time occasion. However, DPAs are now part of the UK legal system. The question is whether this is something we want for Sweden. Arguably, if the Swedish legislator wishes to keep the Swedish legal tradition intact, Sweden must be tougher towards Swedish companies and by doing so, fend off foreign authorities and DPAs.

The BAE System PLC is similar to Innospec, as it also was a question of "special treatment" and BAE System PLC potentially evading justice. In BAE System PLC it was not solely a question of fines, but more the granting of a blanket indemnity for all offences committed in the past. This is rather offensive considering the serious level of criminality displayed by a company accused of foreign bribery.

However, the use of settlement agreements may be a more realistic alternative, as it has time over time proved to be hard to prosecute companies. The Swedish record of terminated investigations and non-prosecutions is not a very elevating one. At least
through global settlement agreements the companies get some sort of punishment. Besides, the fines and disgorgement of profits, the companies are also often obliged to implement measures to prevent future offending, e.g. compliance programs. It can be submitted that settlement agreements may therefore be a more realistic and fruitful approach.

9 Conclusion

Before 2012, Sweden had not met the standards of the OECD Anti Bribery Convention and especially not vis-à-vis foreign bribery. The 2012 reform opened up for new possibilities. However, as the new provisions have not been used in practice, it is unclear whether the Swedish anti-bribery legislation fulfils its international commitments, e.g. the Anti-Bribery Convention and the UNCHR. Other problems with the Swedish legislation are that it does not include any corporate criminal liability and the size of corporate fines is too low. This is likely to have implications for the issue of concurrent jurisdiction, as other countries may not trust the Swedish legal system.

The extra territorial application of the Bribery Act and the FCPA is far-reaching, for example a telephone call from, to, or through the US is considered “enough” to establish US jurisdiction. The question of jurisdiction almost becomes a non-issue. Where there is a will, there is a way. Arguably, the Swedish legislator and companies needs to count on this possibility and also, take appropriate measures, so they are not unprepared when it happens.

Preferably the issue should be solved at an international level. At present, the only available solution is international comity, e.g. article 4.3 of the Anti-Bribery Convention and article 42.5 of the UNCAC. However, the basic legal principles of each country are also to be respected. The use of DPAs is likely to start a chain of reactions. Many countries, including Sweden, do not have any legal tradition of neither plea agreements nor settlement agreements in criminal proceedings. Arguably, it can be put to question whether basic legal principles are truly being respected, when the aggressive use of settlement agreements indirectly affects also other legal systems.

The occurrence of concurrent jurisdiction and parallel investigations and criminal proceedings has been defended with reference to the nature of foreign bribery. However, such a justification is hollow, as it does not need to stop there.
The US authorities have defended their vigorous approach towards foreign bribery, with the lack of legal action from other jurisdictions. Herein lays the problem. International cooperation requires mutual trust, something that can be learned from the EU experience. For UK and US authorities to show restraint and also, for applying international ne bis in idem all countries must have a minimum level of anti-bribery legislation and effective enforcement. There is no need to look far to realise this, as the Swedish anti-bribery legislation and enforcement was heavily criticized by the OECD for being too weak and also, the revised version of the Swedish anti-bribery legislation has only been in force for four years.

For companies the implications of being scrutinized by the UK and US authorities can be significant. Their focus should not have to be on the issue of concurrent jurisdiction, but rather on combating and preventing further foreign bribery. The other side of the case is that companies also may evade justice, by entering into settlement agreements and thus, get away with serious criminal behaviour at a low cost. It also undermines public confidence, for a Swedish citizen it may seem far-fetched that US authorities are interested in prosecuting a Swedish company with barely any connections to the US.

In the spirit of international cooperation, global settlement agreement is a possible way forward. This is illustrated through the cases of Innospec, BAE Systems Plc and Johnson & Johnson/De Puy. However, the use of settlement agreements in criminal proceedings is foreign to the Swedish judicial system. This is because of the principle of legality and public and mandatory prosecution. Nevertheless, also in the UK the procedures surrounding negotiated settlements are different from the US plea agreements. Even so, the UK legislator decided to implement DPAs into the UK legal system. However, this was in part a forced decision. Also, the Swedish system may not be as far away from a system based on agreements, as it first may seem. This was emphasized both at the Nordic seminar and also, illustrated in NJA 1981 s 1035. However, instead of implementing a system based on agreements the Swedish legislator has so far used the mitigating circumstances in ch 29 s 5 BrB and ch 36 s 10 BrB. However, on a scale DPAs are further away from the Swedish legal tradition and current law than plea agreements. It is highly unlikely the Swedish legislator would allow these kinds of agreements. The arguments in favour and against a system based on agreements can be summed up in a question of the rule of law versus efficiency.
Arguably, there are two potential stages when the Swedish prosecutors and Courts could try to harmonize a global settlement agreement with current Swedish law. The first stage is before prosecution: by referring to international litispendens, international ne bis in idem or using discretionary prosecution. The second stage is during criminal proceedings: by using ch 2 s 6 BrB or ch 36 s 9 BrB together with 36 s 10 BrB.

It is likely that a global settlement agreement would be viewed as a foreign judgement and thus, bar further prosecution and criminal proceedings in Sweden, at the very least on a European level. This is because of the ECJ decision in Gözütok and Brügge. However, the ECJ reasoning, i.e. the principle of mutual recognition and the object and purpose of the provision at hand, may also affect a Swedish interpretation of "legally binding judgement". First, because of the principle of conform interpretation and second, as the ECJ arguably has a point: to give ne bis in idem the intended effect. DPAs also resemble judgements as they for example impose restitution of victims.

Arguably, two alternatives: are the UK approach of introducing DPAs and the French Criminal Courts approach of granting DPAs the status of a foreign judgement. From a Swedish point of view the latter is more suitable, even though it would create unbalance vis-à-vis US authorities. It is however important to ensure companies are not entering into agreements with foreign jurisdictions to evade justice. In Sweden, this is likely not the case, because of the size of Swedish corporate fines.

The distinction between systems based on the principle of legality and systems based on the principle of opportunity is nowadays elusive. The Swedish prosecutor has some room for making a balanced and opportune decision of whether to prosecute or not. According to current Swedish law, it is however not likely the Swedish prosecutor, in cases of foreign bribery, can use special consideration of charges or waiver of prosecution. This is because foreign bribery is a serious crime and thus, a prosecution is most likely considered of public interest. Nevertheless, de lege ferenda it could pose as an option, but preferably not, as it is important to send a signal.

It is important to keep the proportionality intact between different crimes, otherwise crimes of the same magnitude will not be treated the same. Two alternatives are to use ch 2 s 6 BrB or ch 36 s 9 BrB together with ch 36 s 10 BrB. However, for ch 2 s 6 BrB to be applicable a "sanction" is required and neither forfeiture of property nor corporate fines are classified as sanctions. To bridge together the gap between global settlement agreements and current Swedish law ch 36 s 10 BrB is the most likely option. Global
settlement agreements are possible to view as a mitigating circumstance and thereby, to set the corporate fines at less.\textsuperscript{295} Even so, the Swedish corporate fines are too low. It may therefore be hard to adjust an outcome at this level, as there is no room for adjustment. The Swedish Government has appointed an investigator to explicitly deal with the aforesaid and also, the OECD criticism. Arguably, if Sweden is to participate at an international level, i.e. establish and retain jurisdiction in cases of concurrent jurisdiction and foreign bribery, Swedish legislation needs to be up to date and adapted to an international togetherness. The inadequacy of current Swedish law places Sweden in a weak negotiation position.

The final words of this thesis are the following: mutual trust requires not only a sufficient Swedish anti-bribery legislation and effective enforcement, but also a criminal justice system that generally corresponds to the international arena. As of now, Sweden is not equipped with the legal tools to assert their right to jurisdiction. Sweden therefore falls under fire in cases of concurrent jurisdiction. There is a high risk this will lead to legal singularities such as DPAs, foreign to the Swedish legal system, being let in the backdoor. The paradox may be the following: to protect Swedish companies, from parallel investigations and criminal proceedings, the Swedish legislation and enforcement needs to become tougher towards Swedish companies, e.g. the framework for corporate fines and the size of corporate fines should be amended.

\textsuperscript{295} Prop 2005/06:59, pg. 37-42. The Government also recently reviewed the mitigating circumstances in ch 29 BrB; Prop 2014/15:37, pg. 26.
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