



Accountability Deferred? Rethinking Corporate Enforcement in India

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ABSTRACT

White-collar crimes in India have been a persistent proof of the deficiencies in the corporate law regime, particularly in functioning as a deterrent factor. This can be safely considered as a natural consequence of the scattered regulations, lengthy trials and the acute failure in enforcing board responsibilities. The paper addresses the question of whether Deferred Prosecution Agreements can be an aid in fortifying accountability on the Board of Directors of the corporate defendants. The relevance of this particular aspect has been gathered from the recent shift to stakeholder capitalism from that of shareholder primacy. Therefore, an analysis of the Deferred Prosecution Agreements can be examined alongside the additional layer of duty posed on the Board of Directors to safeguard the viable interests of consumers, employees, regulators and the society as well. The paper also briefly addresses the evolution of DPAs in the United States and in consideration of India's common law reference, a substantial reliance is placed on the statutory definition under the Crime and Courts Act, 2013 of the United Kingdom. It is further elaborated by a comparative jurisdiction analysis with few other nations such as France and Australia. The paper also addresses the current enforcement challenges through a comprehensive analysis of the statutory provisions in the Companies Act and SEBI regulations. The paper argues that the punitive nature of DPAs can be employed to implant stringent obligations directly at the board level. It also attempts to establish the



need for an extensive design which is laid on draught lessons drawn out from the precedents of corporate frauds in the country and at the same time encompassing the national emphasis on Corporate Social Responsibility and ESG governance. Therefore, the paper also argues that the DPAs in order to complement the corporate law regime, has to go beyond the common notion of the negotiated agreement by materialising as a bridge between the accountability building governance reforms in the corporate sector and the criminal liability in events of default. Thus, if implemented in a functional sense it can anchor down board accountability and the country's reputation in global markets.

Introduction

White Collar crimes in India have been a consistent and ever rising problem since the privatization policies of 1970s. The opening of the market led to various private players exercising excessive control over the industries and companies and due to the reduction in compliance procedures, it increased in the companies resorting to various illegal methods to earn profits leading to increase in white collar crimes. This along with the growth in stock market, technological advancements, etc. have only given an aid to Companies and their various employees to commit white-collar crimes. According to the latest National Crime Records Bureau (NCRB) report published in December 2023, over 193,000 economic offences were registered in 2022, which is a 11 per cent rise from 2021.

There have been various reasons for white collar crimes in India and one of them also being lack of accountability by the Board of Directors of the Company for their activities. Board accountability in this regard has gained wide spread importance over time. The reason for the same is because there is a clear inverse proportion between Board accountability and the commission of white-collar offences, i.e. the higher the accountability of the Board for their activities, the lesser is the chance of commission of white-collar crimes in the country.

In this regard, it becomes pertinent to understand the aspect of reinforcing Board accountability in order to mitigate white collar crimes. This aspect also has an added complexity in the rising focus on stakeholder capitalism in the business market. The clear shift from a shareholder centric business approach to a stakeholder focused business management approach can clearly be seen in the recent times



wherein due to excess focus being thrown on rights of minority shareholders, employees of the Company, etc.

Stakeholder capitalism is a model where corporations are expected to serve the interests of all stakeholders, i.e., employees, customers, suppliers, communities, and the environment—alongside shareholders. The major reason for this shift is to look at a more inclusive and sustainable business management which ensures not only short term profits but also long term goodwill in the market. However, while it promises long-term value creation and ethical governance, it also faces criticism for potential inefficiencies and conflicts of interest. Understanding these dynamics is crucial for navigating the evolving landscape of corporate governance and making informed decisions that benefit both businesses and society. Hence, it becomes pertinent to understand the importance of Board accountability in the era of growth and importance of stakeholder capitalism.

In this aspect, the new concept of Deferred Prosecution Agreement can be of used to study and analyse whether it can be introduced in India to ensure that white collar crimes are reduced by enforcing Board accountability through an incentivized approach rather than the traditional form of liability and penalty based method of enforcing Board accountability. Deferred Prosecution Agreements (hereinafter referred to as 'DPAs'), are agreements which are made between the Prosecutor and the Companies who have been suspected of committing corporate espionage. It lets the authorities frame charges against the erring company while also agreeing not to pursue the charges. In exchange, the company undertakes to comply with specified obligations as laid down in the agreement. This type of a method not only ensures that Companies are more responsible but also ensures accountability for their actions in a manner that helps to reduce white collar crimes.

This paper approaches the topic of DPAs as a method for enforcing Board accountability in the wake of stakeholder capitalism. The paper proceeds by discussing about the evolution of corporate governance and Board accountability in India and establishes the link between Board accountability and stakeholder capitalism. It then gives a brief view about DPAs and gives a comparative analysis of the DPA procedures in USA, UK and France and connects it with the wider perspective of enforcing Board accountability. The paper then proceeds to discuss about the enforcement challenges in India and the potential Indian framework by adopting the best practices from various other countries to introduce DPAs in the country. The paper concludes by stating the need of introducing DPAs as a method to ensure reduction of white collar crimes from a modern viewpoint to ensure Board accountability is maintained in the country.



Board Responsibility in the era of Stakeholder Capitalism

Corporate Governance is one of the governing principles that is practiced by Companies in their management policies. Good corporate governance provides a framework for achieving a company's goals and covers nearly every aspect of management, from action plans and internal controls to performance assessment and corporate disclosure. Corporate governance is important because it promotes fairness, openness, and responsibility in a company's relationships with all stakeholders. This forms an essential component of the responsibility of the Board of Directors towards the company. The main principles of Corporate Governance include transparency and accountability which is to be followed by the Board to ensure that it is answerable for the actions taken by the Company.

This principle of Corporate Governance can be understood to emphasize on the importance of Board accountability. Board accountability in India especially came into focus majorly after the introduction of Companies Act, 2013. The various mechanisms such as independent directors, Audit Committees, CSR related initiatives, etc. made a substantial difference in enforcing Board accountability in the country. This only increased with the creation and enforcement of SEBI Act and its various regulations which public listed companies had to comply.

This can clearly show the shift in focus from a shareholder focused Board management to a stakeholder capitalistic approach of management by the Board. The various rules and regulations have played a vital role in India in furthering the stakeholder centric approach by businesses. This can be seen by the various initiatives taken by Companies across the country towards various means of enforcing stakeholder focused mechanisms.

For instance, Nestle in its sustainability report of 2021 states that it has reduced greenhouse gas emissions by 4.0 million tonnes since 2018, stating that by 2030 it will be reduced by 50% from 2018 levels and eventually 0 by 2050. Accenture in its annual report (2022) of ESG metrics declares that it promoted 157,000 of its employees, along with delivering 40 million training hours and 47% of the staff employed are female with a target of gender parity by 2025.

These clearly show the visible shift for companies towards stakeholder capitalism and one such criteria which can be focused is also on Board accountability for their actions in order to deter white collar crimes. In this regard, the method of DPAs as mentioned above can be studied to understand the same.



Definitions and elements of Deferred Prosecution Agreements

Exploring the definition of the phrase ‘*Deferred Prosecution Agreements*’, hereinafter referred to as the DPAs, does not land in a multitude of overlapping explanations, rather it is understood on a logical understanding of the consequences it entails on both the adjudication process and the entities involved.

One can condense DPAs as a negotiated settlement device concluded between a prosecutor and a corporate defendant to defer the prosecution proceedings for an agreed specific time period, contingent to the fulfilment of certain conditions which may include but not limited to cooperation with investigations, change in governance, payment of penalties and compliance with agreed reforms. The main objectives behind the same is to incentivize corporate entities to voluntarily report corporate crimes and to develop an effective and speedy adjudication of the matters involved.

An explicit statutory definition of the same is provided in the Schedule 17 Part I of the UK Crime and Courts Act, 2013 as “*A deferred prosecution agreement (a “DPA”) is an agreement between a designated prosecutor and a person (“P”) whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the “alleged offence”)*”. However, there is no explicit statutory provision in the United States defining the phrase and therefore it is developed and materialised through practice by the Department of Justice under its Principles of Federal Prosecution of Business Organizations. Additionally, a comparable framework for DPAs has been introduced in France through Article 22 of Law No. 2016-1691 of December 9, 2016 (Sapin 2 Law) which brought in place a procedure called Convention Judiciaire d’Intérêt Public (CJIP), a French version of the deferred prosecution agreement.

It is also denoted globally as an instrument granting amnesty to corporate players in exchange of the fulfilment of the conditions required. The status of an official pardon is granted only if the conditions are fulfilled to the satisfaction of the terms of the agreement. The legal liability of the DPAs thus can be examined alongside that of a contract of specific performance, wherein the point of difference is that in the event of non-compliance, the remedy is not seeking the performance of the terms rather the prosecution proceedings which once were deferred by virtue of the DPA, will be resumed against the corporate defendant.

The fact that DPAs are voluntary in nature connotes that the deterrent function aims to achieved with it is heavily relied on the underlying framework governing corporate crimes and the penalties prescribed therein. The parties are open to decide whether the normal prosecution or the DPAs better aligns with their general business and professional goals. Considering the varied corporate law regimes around the globe,



there will be jurisdictions which may afford effortless procedures for the defendants that the DPAs. Therefore, it is a settled proposition that the function of DPAs cannot be analysed in isolation with the national or domestic legal framework. The feasible approach hence is to detail each element of DPA with extensive regard to the specifications required for the legal framework in which it attempts to fit in.

The common identified elements of DPAs gathered from the varied judicial interpretations thus are:

- the parties
- statement of facts
- judicial scrutiny
- conditions
- the duration
- the consequences of breach
- enforcement of the terms

In the above-mentioned elements, except for statement of facts, conditions and duration, each other element possess variations in their scope depending on the differing jurisdictions. For instance, there exists varied approaches in respect of exclusion of individuals from the scope of DPAs and the accepted level of judicial interference coupled with the procedure for enforcement consequences for breach. This reveals that the latitude of weighing the utility and risks of DPAs is critical and beneficial for a framework novel to the consideration of implementing the same but with a constant reference to the national corporate law framework.

Comparative Jurisdiction Analysis

In the United States of America:

The DPA regime in the US is characterized by minimal to zero permeability for judicial review, propounded a decade ago in the case of *Securities and Exchange Commission v Citigroup Global Markets, Inc*, wherein the right in persona character of the interests affected through an agreement generally insulates the contract from judicial scrutiny. This proposition was further reiterated in the case of *United States v. HSBC* , wherein the implementation of the DPAs in addition to the review of the terms of the same is not a subject matter for the judiciary rather it is entrusted with the executive. The case also illustrates how the US employs a controlled and efficient DPA system despite working with minimal judicial review as the impermeability to interference by the court is not extended to the extent of not allowing court appointed



monitors. Thus, court appointed compliance monitors can be one of the aspects running across all jurisdictions.

The practice of DPAs in the absence of a dedicated statutory framework is mostly prosecutor driven and although does not bring individual within its purview does not have a complete ban and occasionally does enter into with individuals as demonstrated in the case of *United States v. Saena Tech Corp*

An analysis of the efficiency of DPAs in the US can only be performed with due consideration to the corporate law framework prevalent there. Rather than adhering to a single, cohesive code, corporate governance in the US is determined by a variety of federal laws, state regulations, stock market rules, and institutional principles. The Sarbanes-Oxley Act (SOX) of 2002, which was implemented to improve investor protection and market integrity is a significant turning point. Through Section 802, which imposes severe penalties for fraud, Section 404, which requires adequate internal controls, and Section 302, which requires the CEO and CFO to certify financial reports, SOX enhances accountability.

In addition, in the US a vital consideration for a prosecutor contemplating a DPA resolution is the voluntary disclosure of the alleged wrongdoing by the corporation itself.

In the United Kingdom,

As mentioned above, the UK has an explicit definition of the DPAs and Schedule 17 Para 4 of the UK Crime and Courts Act, 2013 exclude individuals thereby providing an additional layer of clarity. A Code of Practice for Prosecutors was published jointly by the Serious Fraud Office, (SFO) and CPS on 14 February 2014 after a public consultation, further complements the statutory framework.

One of the main obstacles for the UK in implementing an effective framework is the absence of the concept of respondeat superior, therefore in case of corporate frauds the possibility of accounting liability to the employer, which is the corporations, has to be extensively furnished with explicit provisions extending liability at least in the event of serious corporate frauds. The corporate law framework in the UK has acquired flexibility through the DPA system, but has a varied ideology in establishing personal liability of the persons involved in the frauds by virtue of the identification principle in the Fraud Act, 2006.

In France,

As mentioned above, France is relatively a fresher into this field when compared to the US and UK. However, their system has a striking feature of connecting the payment of penalties to a certain per cent of the annual turn over of the corporate defendant. The French Financial National Prosecutor updated their



rules in 2023 and made it clear that the turnover of the entire firm group would now be taken into account. This modification was made to stop businesses from moving their criminal accountability to one of their lowest-turnover subsidiaries in an attempt to avoid paying as much in fines.

The country, although limits DPAs only to corporate persons, also permits judicial review of the DPAs incorporating a validation certificate to be issued by the courts along with another important fact that the acknowledgement of wrong doing by the company is not essential.

The Requirement for DPAs in India

The major reason for introducing a concept like DPAs in India is to ensure reduction in white collar crimes by dissecting from the traditional ideologies of justice and Court system. The usual route of prosecuting white collar offences includes the entire process of investigation, trials in various levels of Courts, etc. This not only takes a lot of time but also money and in most cases, companies walk free from conviction due to insufficient evidence. This can be seen in the case of Rolls Royce PLC wherein the company had in 2016, been accused of accounting fraud with various countries like UK, USA and India and had entered into DPAs with both USA and UK. In India, due to the trial and procedures taking a long time, the Company had to pay the liability in 2023 which was 9 years after the incident had occurred, proving a clear case of extreme delay in ensuring speedy justice.

This famous approach is now popularly known as the 'stick' approach, and the preference of DPAs over trial method is called the 'Carrot over stick' approach. This basically states as to how, instead of threatening companies with penalties to confess to crimes, it is better to ensure they are incentivized to do the same.

Further, the various legislations governing corporate crimes is only an added layer of complexity to the already existing delay in prosecution. The legislations of BNS, Companies Act, SEBI, Environmental laws, Prevention of Corruption Act, etc. are all significant proof as to how there exist a significant overlap in laws and hence the delay is a natural occurrence of the same. The various cases of Kingfisher Airlines, Nirav Modi & PNB, Satyam Scam case, etc. is sufficient to prove as to how individuals are left to walk away free due to the various complexities in the legal procedures.

DPAs as previously mentioned helps in tackling this, the simple procedure of entering into DPAs which are essentially contractual agreements make it a much faster and easier approach to escape the stringent and complex legal framework for corporate crimes which need early detection and speedy solution to ensure that stake holders are protected. DPAs also maintain timely check on the companies and hence



ensures a much longer compliance mechanism than Judicial decisions since regular monitoring of activities takes place. Thus, a true effort needs to be made to bring about DPAs in India.

Learning from Other Jurisdictions: A Model for India

Best Practices to Adopt:

Owing to the peculiar features of the Indian corporate law framework, a blanket incorporation of none of the jurisdictions analysed above can be made. As often the detailing of each element of the DPA in *pari materia* with other jurisdictions will be precluded by the vital differences in the corporate law framework as well as the legislative intent behind the statutes incorporating the system of DPAs. However, certain elements do have the potential to acquire the stance of foundational principles of DPA framework India which includes but not limited to:

1. **Due consideration of Voluntary Disclosure by Corporations:** This has been derived from the US model, wherein the voluntary disclosure of corporate crimes by companies is viewed as a factor inviting strong attention to the thought of initiating DPA with that particular corporation. Considering the fact that the main objective of introducing DPA into India is to assist in reducing litigation burden, voluntary disclosures can perform a dual function of acting as motivating factor to report compliance defaults and avoiding reliance on the lengthy enquiry processes to figure out these defaults and then consider DPAs.
2. **Explicit Exclusion of Individuals:** This feature has been adopted from the UK and this can aid in preventing misuse and additional disputes on the matter of capacity to enter into DPAs. The extensive common law reliance employed by India, particularly in the enactment of the Companies Act in India in reference to the UK Companies Act., aid the adoption of this feature. This is further, supported by the heavy reliance placed on principles of natural justice and public interest dimension in corporate frauds.
3. **Balanced approach between judicial oversight and Validation Certificate:** A blend of the US and the French model. The general understanding of power imbalances between a sovereign governmental authority and the growing business corporations, a validation certificate as issued by the court can be instrumental as safeguards against arbitrary agreement terms and which in turn project the corporate governance as sensible to the budding corporate entities.
4. **Penalty Linked to Annual Turnover of the Corporate Defendant:** Adopted from the French Model. The varied economic capacity of the corporations involved are often overlooked by a single formula of penalties which can be made efficient if the they could be linked with annual turnover, which ensures that



along with the other terms and conditions which may not directly impact the financial position of the company, penalties function as deterrent against corporate crimes. This also helps in ensuring that DPAs as a counter mechanism against corporate crimes is covering dual dimensions of penalty, which is improvising and penalising the corporate entities.

Adapting to Indian Context

The current Indian context, already decorated with multi layered regulations do not call for a separate regulation to address DPAs, rather a smooth incorporation of DPAs as an additional form of settlement is enough. The principal legislation, the Companies Act, 2013 is wide enough in its ambit for such incorporation. A dedicated chapter on DPAs to introduce it as a framework of negotiated agreement with monitoring powers to be granted on the SEBI, can be incorporated, thereby reinforcing protection of investors. The National Company Law Tribunal, can be the validation certificate issuing authority for DPAs as well as the first instance forum to decide disputes related on prima facie issues of arbitrariness and not for procedural infirmities, rather than Civil Courts, thus ensuring that the legislative intend behind the establishment of NCLT is redirected. It shall also be granted with an additional power to decide whether repeated offenders should be eligible for DPAs, in consideration of facts and circumstances of each case.

General policy considerations such as the heavy reliance on CSR and ESG governance can utilise DPAs as method of settlement in issues of non-compliance, ensuring that beyond the payment of penalties, practical and realistic fulfilment of social obligations are carried on by the corporate entities. Further, DPAs on other general corporate matters can be redirected as contribution to CSR and ESG governance, through a redirection of a portion of penalties to such compliances. An observation period before incorporating DPAs into realm of personal liabilities under the Companies act is advisable.

Conclusion

Deferred prosecution agreements, or DPAs, are a novel way to balance corporate responsibility with the speedy settlement of corporate crimes. From a conceptual standpoint, DPAs are negotiated agreements between business entities and prosecuting authorities that postpone prosecution in exchange for the fulfilment of requirements such as financial fines, governance reforms, compliance measures, and cooperation with investigations. Comparative jurisprudence demonstrates differing emphasis: the US values voluntary disclosure with little judicial involvement; the UK includes judicial supervision but excludes individuals; and France links fines to company turnover with judicial approval. By incorporating



DPAs into the Companies Act, 2013, and overseen by SEBI, a customised Indian framework can incorporate board-level responsibility. Alignment with CSR and ESG obligations ensures that DPAs transcend punitive objectives, advancing governance reforms, safeguarding stakeholder interests, and enhancing the credibility of Indian corporate entities in the global regulatory ecosystem.

This, when accompanied with the aim of ensuring that Board accountability is maintained can be a helpful tool that can be used by the authorities to ensure that companies are complying with the agreements as well as it acts as a deterrent to further commit crimes in the country. Thus, the ‘Carrot over stick’ approach essentially does involve a deviation from the traditional norm of prosecution and goes against the traditional notions of justice in a country like India, however, the only way to survive in a changing world is by adapting to the world around us and DPAs is a definitive start for the same in the field of Corporate Governance in the country.