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Regulating transnational corporate bribery: Anti-bribery and corruption in the UK and Germany

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Abstract Recent large-scale cases involving multi-national corporations such as the BAE Systems and Siemens bribery scandals illustrate the difficulties faced by the UK and German sovereign states in controlling complex trans-national and multi-jurisdictional crimes. This article analyses the mixture of enforcement (e.g. criminal prosecution, civil sanctioning), self-regulatory (e.g. transnational business initiatives, corporate compliance) and hybrid (e.g. self-reporting, self-investigation) mechanisms that are emerging as part of UK and German responses to controlling transnational corporate bribery. This regulatory landscape incorporates a diverse array of direct and indirect state (e.g. investigatory and prosecutorial agencies) and non-state (e.g. private sector enterprises, non-governmental and intergovernmental organisations) 'regulatory' actors of varying levels of formality. Mechanisms of a self-regulatory nature vary in terms of their mandatory/voluntary requirements and manufactured/organic formation. However, there is an assumption that the emergence of a variety of enforcement, self-regulatory and innovative hybrid mechanisms is sufficient but in reality this is not the case. Instead, the key argument of the article is that while these mechanisms are aiding the response, they are likely to fail leading to the default position of accommodation by state agencies, even where the will to enforce the law is high.

Introduction

The particular nature of transnational corporate bribery creates several obstacles to enforcement responses: for example, the necessary and contingent social relations and practices that characterise the organisation of corporate bribery at the trans-national and multi-jurisdictional level are often clandestine and frequently involve consenting actors whereby both parties benefit from the corrupt transaction. Furthermore, the lack of identifiable consequences (e.g. few direct victims or harms), the 'invisibility' of the actors, their relations and transactions due to the ambiguous nature of bribes (e.g. exchange of legitimate services) and the knowledge and power problems of the State in accessing corporate subsystems and their transactions (see 18, 25) are problems that are evident across different jurisdictions. Such transnational corporate bribery causes serious social, economic, political and environmental harms¹ (see also 31, 10) which have led concerned parties to focus on law enforcement and other control mechanisms but criminal justice mechanisms have not proven to be easy. Nation-states must address these common characteristics of bribery and in doing so encounter structural, legal, evidential, procedural and financial obstacles that reduce their ability to enforce the anti-bribery and corruption legal frameworks that they have been pressured into implementing by international organisations, even when resources and political will may be evident [24].

Business transactions are increasingly transnational in nature, a factor that has opened up increased opportunities for white collar crimes and the possibilities of externalising risk [17] and evading prosecution for those involved in bribery. For example, corporations using third parties and intermediaries in overseas jurisdictions to bribe to win or maintain contracts results in the disassociation of the risks from those who ought to be held accountable – although the UK Bribery Act 2010 (hereafter "UKBA") is one policy that aims to reduce the legally acceptable explanations should bribes come to light. But as business becomes more global, controllers at the national level

¹ See Transparency International's discussion of 'costs of corruption': http://archive.transparency.org/news_room/faq/corruption_faq#faqcorr4. Accessed 18 February 2013.

are generally constrained by divergent domestic rules and limited jurisdiction [28, 24]. The intense legal debates about extradition to the US of British businesspeople (see NatWest Three² case) and hackers (see Gary McKinnon³ case) illustrate the tensions created regarding the extraterritorial reach of the law. Additionally, the global marketplace intensifies the impacts of white collar crimes and risky transactions as we have seen recently with the global economic crisis and subprime mortgage lending [17]. Thus, the difficulty for States attempting to regulate the behaviour of *transnational* corporations often also includes a host of political concerns and economic interests [32].

However, both in the official narratives of international organisations and their conventions⁴ and in the narratives of criminological theory, the problem of controlling *trans*-nationally organised corporate bribery has not been sufficiently analysed or theorised. Criminological insights (notwithstanding notable exceptions - see for example Whyte [39]) have been preoccupied with problems of white-collar and corporate crime (so variously defined) *within* (rather than across) nation-states. An article by Edwards and Gill [11], published in an earlier edition of *Crime, Law and Social Change*, presents a theoretical framework for understanding the regulation of *populations* of actors in licit and illicit markets. The framework proposes a theoretical admixture of enforcement and non-enforcement responses in relation to transnational organised crime. The approach shifts focus away from a preoccupation with offenders towards a focus on the 'markets' within which they operate and within which criminal activities occur.

Transnational corporate bribery is inherently a market phenomenon in that it involves licit corporations operating in licit markets but involves illicit activities that are dependent on 'grey' markets where much transnational commerce is directed (e.g. where bribery may be culturally but not legally acceptable). This article utilises the framework set out by Edwards and Gill to analyse those mechanisms that are emerging within the control landscape of transnational corporate bribery. The article begins by analysing this framework in further detail and goes on to analyse the enforcement (e.g. criminal prosecution, civil sanctioning), self-regulatory (e.g. transnational business initiatives, corporate compliance) and hybrid mechanisms (self-reporting, self-investigation) that have emerged or are emerging in the context of transnational corporate bribery. This regulatory landscape incorporates a diverse array of direct and indirect state (e.g. investigatory and prosecutorial agencies) and non-state (e.g. private sector enterprises, non-governmental and intergovernmental organisations) 'regulatory' actors of varying levels of formality. Mechanisms of a self-regulatory nature vary in terms of their mandatory/voluntary requirements and manufactured/organic formation. However, there is an assumption that the emergence of a variety of enforcement, self-regulatory and innovative hybrid mechanisms is sufficient but in reality this is not the case. Instead, the key argument of the article is that while these mechanisms are aiding the response, they are likely to fail leading to the default position of accommodation by state agencies, even where the will to enforce the law is high.

Comparative analysis of the UK⁵ and Germany is particular suitable for understanding anti-bribery and corruption control responses as (i) both jurisdictions are sufficiently involved in the regulation of transnational corporate bribery to have modes of regulation to analyse while (ii) there are notable similarities and differences in their approaches – this is useful for demonstrating how the key argument in this article in relation to accommodation applies across more than one jurisdiction and is not due to the idiosyncrasies of one or another jurisdiction. Both the UK and Germany are key economic players, both being members of the G8 and both having the largest share of world exports in the EU. (This is significant given the focus on *transnational* corruption).

² BBC: 'Q & A: The NatWest Three', 29/11/2007: <http://news.bbc.co.uk/1/hi/business/5164652.stm>. Accessed 18 February 2013.

³ BBC: 'Extradition law review to consider US-UK treaty', 8 September 2010: <http://www.bbc.co.uk/news/uk-11226673>. Accessed 18 February 2013.

⁴ For example, the Organisation for Economic Cooperation and Development and the United Nations.

⁵ Specifically England and Wales, and Northern Ireland – Scotland not included as it constitutes a separate jurisdiction in relation to transnational corporate bribery.

Since the introduction of the Organisation for Economic Cooperation and Development's (OECD) Anti-Bribery Convention 1997 Germany has concluded significantly more cases than the UK, although these enforcement rates have become more similar in the last three years. Data taken from the most recent Transparency International (TI) Progress Report from 2012⁶ indicate that in the period since the Convention came into force up until the end of 2011, Germany had concluded 176 cases (of which over 16 were 'major') while the UK had concluded 23 cases (all of which were 'major') up until August 2012. Despite the significant difference in figures, the enforcement rates of major cases and individual prosecutions have become more similar in recent years (the UK concluded its first case in 2008). Both regimes are categorised as 'active enforcers' of the OECD Convention⁷ and significantly, the enforcement systems of the two jurisdictions differ in structure. The UK may be considered a centralised system while the German system is decentralised. Furthermore, *corporate* criminal liability exists in the UK but not in Germany. These phenomena are culturally shaped but comparable through the necessary and contingent social relations (see [12, 13]) that constitute how they are understood and applied amongst anti-corruption actors. The empirical findings are based upon data collected through a series of bilingual semi-structured interviews with UK and German investigators and prosecutors, lawyers and country specific experts as well as interviews with representatives of inter- and non-governmental organisations (IGOs and NGOs). Participant observation of corporate actors concerned with anti-bribery and corruption as well as document analysis were also carried out.

Crime as enterprise? Enforcement and non-enforcement mechanisms in legal markets

We can think of regulation as any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism) [33, p.331]

The concept of regulation, as used here, is broad and inclusive. It incorporates other mechanisms for controlling, regulating, and changing the behaviour of populations beyond criminal law enforcement and enables richer insights into various levels of formal and informal control in relation to corporate bribery in overseas commerce. Such regulation is reflexive and responsive, reflecting contemporary thinking on regulation: new regulatory models include 'responsive regulation' [4], 'smart regulation' [21], problem-solving regulation [36], 'meta-regulation' [27], the 'governance triangle' [1], 'regulatory capitalism' [7] and 'really responsive risk-based regulation' [6] while there has been recent focus on regulators as 'sociological citizens' [35, 34]. Multiple common themes can be seen throughout these approaches. For example, the need for a varied set of sanctions and strategies including both enforcement and self-regulatory mechanisms; the necessity of 'negotiated relationships' between the regulators and regulatees; the reflexivity, responsiveness and agency of the regulators; and, a recognition of the key roles of both state (e.g. law enforcement and public prosecutors) and non-state actors (e.g. private corporations, NGOs and IGOs) as 'regulators'. Such

⁶ Report available at:

http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio. Accessed 18 February 2013.

⁷ 'Active enforcers' refers to those countries with a share of world exports over 2% and with at least 10 major cases on a cumulative basis, at least three of which were initiated in the last three years and resulted in substantial sanctions. The category 'active enforcer' can also be given to those countries with less than 2% world export shares but these countries must have brought at least three major cases, at least one of which resulted in substantial sanctions and at least one case pending that was initiated in the last three years – these thresholds are arbitrary and are not premised on any logical foundation (it is unclear why the threshold is 10 major cases, for example).

conceptions of regulation have also been developed at the trans-national level (see [8, 9, 2]) where the roles of IGOs and NGOs and their interactions with public and private actors become increasingly significant. Thus, the definition enables a large range of regulatory mechanisms and regulatory actors beyond and above the state.

With such regulatory models, however, there is often a preoccupation with the institutions of regulation, their strategies and the actual or likely offenders. Thus, as argued by Edwards and Gill, it is more useful to think of the regulation of populations within markets and thus shift analytical focus to the emergence of a regulatory landscape that encompasses a diverse array of enforcement and self-regulatory practices in a dynamic landscape. With this in mind, Edwards and Gill identify a broadly indicative, but not empirically validated, continuum of actual and potential responses directed at the regulation of interdependent licit and illicit markets (see Fig. 1).

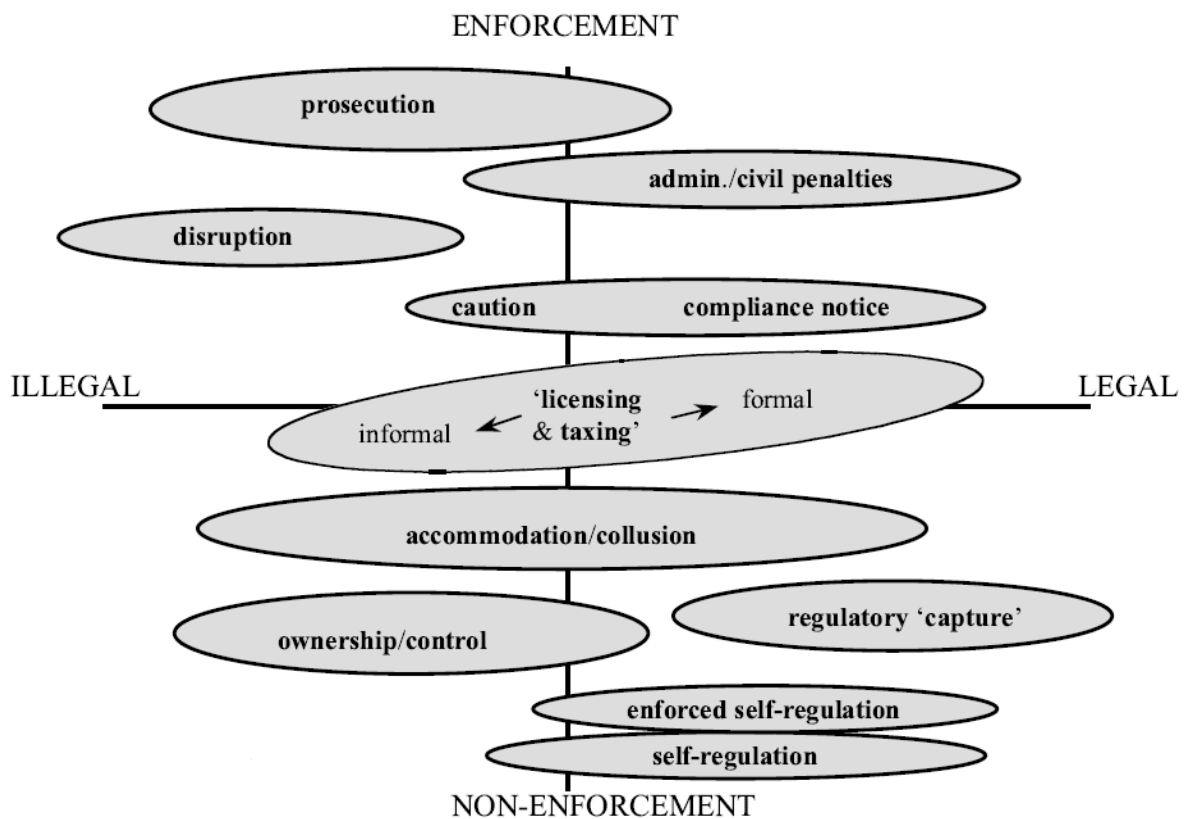


Fig. 1: Enforcement and non-enforcement mechanisms in legal and illegal markets [18, p.535, 11, p.212]

The mix of enforcement styles is shaped by the ‘negotiated relationships’ between regulators and traders. For a detailed explanation of each ellipse, the reader should refer to the original article by Edwards and Gill [11]. The continuum provides a useful framework for analysing and empirically evidencing the mixture of enforcement and non-enforcement responses within the control landscape of transnational corporate bribery.

Enforcement mechanisms

Regulation largely remains at the local, national level. There are no transnational enforcement bodies - especially not police bodies - though the US may be able to act outside its borders more than others can, and the UN and EU have terrorist sanctions lists which have to be enforced nationally but effectively are global because they are applied by global banks. Anti-corruption

enforcement is national, and the investigation and prosecution of transnational corporate bribery can often only be realised through Mutual Legal Assistance (MLA). The scope of national laws in the UK and US enable a larger reach, with any company or business based or carrying out business in these countries liable for investigation and prosecution but in reality legal frameworks alone are insufficient (see below and [24]). Two diverse enforcement systems exist in the UK (centralised) and Germany (decentralised) which reflects geographical, historical and cultural factors but both reflect traditional 'command and control' regulatory regimes (see [5]). In 2005 the Serious Fraud Office (SFO) became the lead agency in the UK for investigating and prosecuting transnational bribery and corruption. Prior to this, these responsibilities were with an extraordinary number of state agencies. Within the 16 German *Bundesländer* (federal states), there are around 110 *Staatsanwaltschaften* (Public Prosecutor's Offices, "PPO"). Within each *Bundesland* there are a number of PPOs, a *Landeskriminalamt* (State Criminal Investigation Office, "LKA") and numerous *Polizeipräsidien* (Local Police Headquarters, "PP"). The PPOs lead all transnational bribery and corruption cases and are supported by the LKA and the PPs during investigations. As in the UK, the German PPO is involved in investigation and prosecution throughout the case. There are strengths and weaknesses to both systems. For example, centralisation enables consistency but the large scope results in modest resources leading to the use of overt criteria to prioritise cases. In contrast, decentralisation enables an increased number of cases (small and major) to be dealt with but some states are more 'enthusiastic' than others to investigate while political will differs also [24].

Criminal prosecution and civil solutions

Criminal prosecution of corporations (legal persons) is at the time of writing rarely used in both jurisdictions. Enforcement statistics suggest that the rate of individual (natural person) prosecutions in both jurisdictions has been similar in recent years⁸ but only three substantive transnational bribery cases have involved criminal sanctioning of corporations in the UK, and Germany has seen zero criminal sanctions of corporations. In the UK, Mabey and Johnson⁹, the first corporation convicted of overseas corruption in 2009, and Innospec¹⁰ in 2010 were both charged with 'conspiracy to corrupt' and received criminal fines (in tandem with other sanctions e.g. Civil Recovery Orders, monitoring). In 2010 BAE Systems¹¹ received a criminal fine for failing to keep sufficient accounting records. Thus, criminal sanctions in the UK for corporations (or 'legal persons') have predominantly involved criminal fines, confiscations under the Proceeds of Crime Act (POCA) 2002 (Part 2) and 'monitoring' as well as requirements to instil regime change and ensure effective compliance systems are in place (see 'hybrid mechanisms' below). A criminal conviction also enables powers to debar corporations under the Public Contracts Regulations 2006 (in line with Article 45 of the EU public procurement directive 2004/18/EC¹²), and to impose Serious Crime Prevention Orders and Financial Reporting Orders but these mechanisms have not yet been used. Individuals in both jurisdictions have received prison sentences (often suspended), fines and restrictions on acting as Directors.

⁸ For enforcement statistics see Transparency International's progress reports on the OECD Anti-Bribery Convention. See note 6 (above) for latest report.

⁹ Mabey and Johnson paid bribes in Jamaica, Ghana and Iraq and received a total financial penalty (including a criminal fine) of £6.6m. SFO press release: <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx>. Accessed 18 February 2013.

¹⁰ Innospec paid bribes in Indonesia and were sanctioned to financial penalties and monitoring. See SFO press release: <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx>. Accessed 18 February 2013.

¹¹ BAE Systems engaged in corruption in Tanzania and received criminal and civil financial penalties. See SFO press release: <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx>. Accessed 18 February 2013.

¹² Full text of the Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:En:HTML>. Accessed 18 February 2013.

In the UK, corporate criminal liability has traditionally required courts to locate the corporate mind for purposes of assessing *mens rea*. English judges found the 'company's mind' in the mind of persons who could be 'identified' with the company for legal purposes [20, p.38]. Under section 7 of the UKBA corporations in the UK can be held criminally liable for the actions of their associated persons (i.e. their employees, third parties, intermediaries and agents, and so on) that are carried out on behalf of the corporation, in a form of strict liability. In this sense, the organisation can be thought of as providing the motive, opportunity and means for such crimes in a transnational environment and across time but such factors create difficulties for legal systems based on individual liability for discrete offences at specific locations with direct causal relations [29, p.110]. The difficulty in locating the 'controlling mind', in that a company is only likely to be guilty of a bribery offence if it can be proved that the senior management and executive is involved, still remains for the general offences of active and passive bribery (s.1, 2 and 6 of the UKBA) but this is not straightforward. Companies are 'conscious opponents' [36], able to export their corruption and thus distance the controlling mind sufficiently far from the bribery. The anonymity involved in international business transactions via numerous financial institutions and through difficult to access jurisdictions causes great difficulties for regulation [14]. Distant relationships between principals, agents and clients, and differing laws in different countries, not to mention the high level of secrecy and privacy or lack of direct victims to report, also create major problems. Thus, the nature of global business transactions creates a significant barrier to effective regulation and enforcement [17, p.550]. The main reason that smaller companies, such as Mabey and Johnson, are criminally prosecuted is that the directors are actively involved in the work.

In Germany, what a corporation does cannot be interpreted as an 'act' in German Penal Law and as a corporation cannot act, it has no criminal responsibility [22]. The principle of 'guilt' is fundamental to the German legal system but it is only the individual acting on behalf of the legal entity that can realise this guilt - only 'natural persons' can be held criminally liable. Consequently, the responsibility of legal persons and associations of persons is regulated by the law for violations of good order, or in other words, regulatory offences [30, p.334]. Instead, liability may be imposed on corporations by state authorities only for administrative offences (*Ordnungswidrigkeiten*) which result only in administrative fines (*Geldbußen*). The distinction between a 'legal person' and a 'natural person' is significant here although there is often some relationship between the two: '[w]hen offences by individuals occur in a corporate context, it may be because the company's policies, culture and ethos authorize, encourage, condone or tolerate the illegal behaviour...That the individual was committing the offence on behalf of a company provides a handy rationalization for the crime' [19, p.154]. The prerequisite is that as a result of the criminal offence, the company's duties have been violated or the company has been enriched or intended to be enriched. Additionally, in cases where a company's management has taken inadequate supervisory measures required to prevent bribery, the company may be held liable. For example, section 130 'Violation of obligatory supervision in firms and enterprises' of the Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG") relates to violations of supervisory duties as a result of failures by senior officers of the company to supervise employees if their actions led to criminal or administrative offences. The maximum civil fine for a corporate is €1m but this is often accompanied by the disgorgement of profits made from the corruption. In the Siemens case, for example, while a fine of €1m was imposed, Munich prosecutors have confiscated almost €600m from Siemens in two separate decisions. Concerns of IGOs reflect the relatively small size of the maximum fine rather than whether Germany implements a genuinely criminal or a para-criminal concept, reflecting the acceptance of 'functional equivalence' by IGOs (i.e. the 'goals' are more significant than the 'means').

The lack of criminal prosecution in the UK and the legal inability to criminally prosecute corporations in Germany has subsequently seen an increased use of non-criminal alternatives. While a wider variety of legal offences beyond corruption and bribery offences per se are available to authorities (e.g. money laundering offences, breach of trust offences, etc) for both legal (UK) and

natural persons (UK and Germany), the use of non-criminal sanctioning and/or agreements in relation to these offences is prevailing. This shift aligns with Wells [38, p.13] who states 'enforcement of criminal law against corporate crime increasingly uses classic regulatory techniques of negotiation and settlement'. For example, civil solutions include financial settlements and fines, restitution via Civil Recovery Orders (under POCA part 5 in the UK) that include the amount of the unlawful property (e.g. often profits from contracts won but also revenue), investigatory and prosecutorial costs, and deferred and non-prosecution agreements (DPA/NPAs) (currently in Germany only although DPAs are due to come into force in the UK in 2013). These settlements and agreements are often global and agreed through cooperation with other national authorities (e.g. the Munich prosecutors and the US Department of Justice (DoJ) in the Siemens case, or the SFO and the DoJ in the Innospec case).

Why, then, is there an apparent development towards non-criminal alternatives? UK and German investigators and prosecutors, as well as representatives of IGOs, accept the reality of financial, evidential and procedural restraints but this shift towards civil solutions is also ideological and symbolic as these actors suggest that much corporate, economic crime requires negotiation and persuasion rather than criminal prosecution. Conducting transnational investigations and prosecutions is resource intensive. Criminal prosecution is extremely expensive and time-consuming due to the high costs of investigation to meet the substantial evidential and legal requirements, due to the costs of recruiting external counsel and prosecutors for large complex cases, and due to the ability of corporations to employ technical and expert legal teams to defend them all of which lower the likelihood of conviction. For example, locating the 'controlling mind' of a corporation involves substantial evidential requirements which demand a high burden of proof and extensive investigatory resources as determining accountability of individuals, and therefore the corporation, in complex organisations is far from straightforward. Conversely, civil solutions are more cost effective, with corporations often covering the costs of investigation. Civil solutions enable the prosecutorial authorities to conclude an increased number of cases as there is no requirement to prove a criminal offence and the burden of proof is lower therefore increasing the likelihood of a successful outcome. This in turn enables the authorities to extend their reach. Furthermore, as one UK prosecutor suggested, implementing civil approaches does not make corporations less criminal, it means justice is obtained through a more resource-effective process. However, the shift towards civil responses may not only be beneficial for resources, but may also be the desirable approach for maximising impact. For example, Khanna [23] argues that corporate crime legislation may be the preferred outcome for corporate interests as it satisfies public outcry but imposes low costs on businesses and therefore avoids legislative and judicial responses that are more harmful to their interests and sometimes deflects criminal liability away from managers and executives and onto corporations (this may be contested by convicted executives). However, Wells [38] does not believe anyone seriously suggests private law as the only option as even Khanna emphasises the importance of public enforcement.

Nonetheless, in the current economic climate, particularly in the UK, available resources are influencing the adoption of more 'cost-effective' (or cheaper) approaches. The SFO has had its budget reduced in recent years. In Germany, resources are more widely available but the decentralised system results in some prosecutors being better equipped than others. Non-criminal approaches may also be preferred due to the risk of debarment under the abovementioned EU Directive that requires mandatory debarment of any corporation found guilty of a corruption offence. The financial consequences of debarment to a country's economy can be significant, causing tension for states between considering national economic interest and ensuring the Rule of Law. In Germany, corporations cannot be criminally convicted but courts do have available discretion to debar companies from public procurement contracts if found liable under administrative law - as of yet this has not occurred. In the UK, corporate prosecution is only likely for the strict liability offence of 'failure to prevent bribery' but the UK government has made clear a

prosecution here will not result in mandatory debarment¹³. One UK lawyer suggested states will always consider their economic interests (e.g. risk of losing corporations as providers of tax and employment) although this contradicts the requirements of the OECD Convention¹⁴. In any case, enforcement approaches to transnational corporate bribery, whether based on necessity, desire, practicability or morality, face significant challenges in the form of procedural, evidential, legal, financial and structural obstacles that hinder traditional enforcement practices [24].

Thus, the key argument is that whether the enforcement system is centralised (UK) or decentralised (Germany) and whether there is corporate *criminal* liability (UK) or not (Germany), criminal prosecution is unlikely to be or cannot be pursued resulting in a shift towards non-criminal alternatives primarily in the form of civil solutions that involve a significant element of negotiation between the regulator and the regulatee. Consequently, innovative and parsimonious approaches in the form of 'hybrid mechanisms' are emerging within the remit of, but extending beyond, state authorities.

Hybrid mechanisms

Achieving prosecutorial 'results' is important for state agencies to justify their existence and demonstrate their efficacy. However, engineering behaviour change within corporate cultures is equally, if not more, important when addressing corporate corruption. In reality this cannot be achieved through the criminal law alone and requires more innovative strategies of enforcement and self-regulation. UK and German prosecutors and investigators understand this problematic but are limited by their statutory remits and the available 'tools' at their disposal. A number of key trends representing a shift away from enforcement practices towards self-regulatory mechanisms on behalf of the state are emerging. These may be considered 'hybrid mechanisms' that incorporate high levels of state intervention to induce corporations to regulate their own behaviour.

Self-reporting

In the UK, the SFO has in recent years placed much emphasis on self-reporting and has even published guidance on how and when corporations should self-report. The SFO has held discussions with a significant number of corporations, both UK based and overseas, as well as outlining this approach at several corporate conferences which have received positive feedback and support from corporations. This private sector support stems largely from the significant incentives outlined by the SFO for corporations that voluntarily disclose details of any corrupt behaviour. The following extract from the 2009 guidance explains the incentives to corporations for self-reporting:

...the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively. The corporate will be seen to have acted responsibly by the wider community in taking action to remedy what has happened in the past and to have moved on to a new and better corporate culture. Furthermore, a negotiated settlement rather than a criminal prosecution means that the mandatory debarment provisions under Article 45 of

¹³ See Ministerial statement on the UKBA from Ken Clarke:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110330/wmstext/110330m0001.htm#11033059000255>. Accessed 18 February 2013.

¹⁴ See Article 5 of the Convention: <http://www.oecd.org/dataoecd/4/18/38028044.pdf>. Accessed 18 February 2013.

the EU Public Sector Procurement Directive in 2004 will not apply (SFO Self-Reporting Guidance¹⁵)

Interestingly, this guidance was removed in October 2012 following a review by the SFO's new Director, David Green, but he has maintained that self-reporting is still encouraged¹⁶ as can be seen in the case of Rolls-Royce who self-reported corrupt behaviour following an internal investigation¹⁷. But why would a corporation self-report and therefore incriminate themselves? First, criminal prosecution can be avoided with civil settlements negotiated instead. In some instances no sanction at all can be negotiated (e.g. where it can be demonstrated that the corruption was down to a 'bad apple' within the organisation). As per the extract above, the SFO makes explicitly clear that it does not want to debar corporations under the EU Directive. This undermines the EU but also acknowledges the preference for a more flexible, discretionary sanctioning framework. Thus, by self-reporting, any senior executives or board members that become aware of the bribery will not be held liable, unless they are directly involved with the bribery. Second, the corporation will have greater control over any publicity, with statements potentially being jointly drafted. This negotiation between regulator and regulatee enables the corporation to manage the corporation's reputation and public image. This is a form of re-integrative shaming, although the SFO were strongly criticised by Lord Justice Thomas¹⁸ for suggesting that Innospec could draft an approved press notice on their case. (This is part of an on-going struggle by the judiciary to reign in the autonomy of prosecutors in plea and sentence bargaining.) Third, the corporation can negotiate that the subsequent investigation is conducted by the corporation's professional advisers (e.g. third-party legal, accountancy, investigations teams) and thus maintain a degree of control. According to the self-reporting guidance, this system of self-referral creates effective and proportionate sanctions for this type of case, aids in producing a new corporate culture and subsequently brings about behavioural change within businesses.

There are no data available on the effectiveness of this self-reporting approach. An article from the *Financial Times*¹⁹ suggested that since the inception of the approach in 2009 up until August 2011, only 10 companies had self-reported. According to the former SFO Director, Richard Alderman, this lack of self-reporting was attributable to the uncertainty over how judges respond to such deals. (The introduction of DPAs may increase certainty). Furthermore, the lack of incentives for individuals to self-report needs addressing, given that an individual who cooperated and gave evidence may only receive a few months less in jail than someone who did not cooperate but then pleaded guilty in court at the first available opportunity. Alderman believes guidance from judges in sentencing bribery is required. However, in March 2012 Alderman outlined that since the coming in to force of the UKBA, this number had doubled to over 20 corporations self-reporting indicating further progress²⁰. This promotion of self-reporting is continuing under the new SFO Director, David Green, who has indicated that civil recoveries will remain prominent in appropriate cases. This was demonstrated with Oxford University Press who agreed a Civil Recovery Order for overseas bribery

¹⁵ SFO guidance on self-reporting: <http://www.sfo.gov.uk/bribery--corruption/the-sfo%27s-response/self-reporting-corruption.aspx>. Accessed 9 August 2012.

¹⁶ *Financial Times*: 'SFO toughens stance on bribery' 09/10/2012: <http://www.ft.com/cms/s/0/996d051e-120d-11e2-bbfd-00144feabdc0.html#axzz2I9e4hnm9>. Accessed 18 February 2013.

¹⁷ *Financial Times* 'Rolls-Royce adds to SFO's in-tray' 06/12/2012: <http://www.ft.com/cms/s/0/f9f76a28-3fb7-11e2-b0ce-00144feabdc0.html#axzz2I9e4hnm9>. Accessed 18 February 2013.

¹⁸ See paragraph 50 of Lord Justice Thomas' sentencing remarks on Innospec: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf>. Accessed 18 February 2013.

¹⁹ *Financial Times*: "'Plea bargaining uncertainty' hits SFO drive' 07/08/2011: <http://www.ft.com/cms/s/0/c55f88e6-bf6f-11e0-898c-00144feabdc0.html#axzz1WWTWzWSA>. Accessed 18 February 2013.

²⁰ SFO press release: <http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2012/enforcing-the-law-on-fraud-and-corruption-does-self-reporting-pay.aspx>. Accessed 9 August 2012.

in July 2012²¹. Such an explicit self-reporting approach does not exist and is not actively promoted in Germany.

Self-cleaning

The principle of self-cleaning has only become a well-established legal concept in some EU Member States, such as Germany and Austria [3]. In Germany, the concept of ‘self-cleaning’ as a ‘sanction’ was used most notably in the Siemens case. Self-cleaning mitigates the likelihood that corporations will be debarred from public contracts. As Arrowsmith *et al.* [3, pp.257-258] note, ‘the general idea would be that an economic operator can regain the possibility of participating in public contracts by demonstrating that it has taken effective measures to ensure that wrongful acts will not recur in the future’. Of course, preventing future criminality cannot be guaranteed, but the likelihood of future acts of bribery can be reduced.

Based on their analysis of jurisdictions that recognise the concept of self-cleaning but mainly Germany, Arrowsmith *et al.* [3, pp.259-61] suggest that four key measures will usually take place: clarification of the relevant facts and circumstances; repair of the damage caused; personnel measures; and, structural and organisational measures. Self-cleaning, while already established in the German anti-corruption system, is becoming more significant in the UK (although less formal) in line with the increased use of civil agreements and the ‘adequate procedures’ defence to section 7 UKBA. Corporations agreeing to civil settlements are frequently required to implement the four key measures outlined above, while adequate compliance procedures are required for corporations aiming to prevent and detect bribery within their organisation. But effectiveness of such requirements for culture change is unclear and difficult to measure. As things stand, apart from cases that involve the use of monitoring (see below), the anti-corruption authorities do not revisit and reassess the extent of the culture change. However, should a corporation be found to have reoffended and not have sufficiently enacted such changes, according to UK prosecutors this would increase the likelihood of criminal prosecution (although this may be more rhetorical than probable given the difficulties and obstacles faced in prosecution).

Monitoring

As part of self-cleaning and other civil fines, corporations in both the UK and Germany may be required to have a monitor in place for a set period of time. The monitor may be nominated by the corporation, but must be accepted by the authorities. It is the duty of the monitor to ensure compliance regimes and self-cleaning are effectively carried out and to ensure satisfactory culture change within the organisation. It is in relation to monitoring that contemporary theories of regulation that encourage regulators to be responsive may have the most relevance in relation to regulating transnational bribery. For example, a monitor would be able to recommend an increase or decrease in the severity of enforcement sanctions to the prosecutors therefore reflecting models of escalated or graduated sanctioning (see for example [4]). However, the actual obstacles to such escalation (e.g. difficulties obtaining overseas evidence for criminal prosecution) may render such models impracticable.

Self-regulatory mechanisms

The limitations of the state to provide security, law and order, and crime control within its territorial boundaries have long been acknowledged [15, 16]. For example, the state faces significant

²¹ SFO press release on OUP: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx>. Accessed 18 February 2013.

knowledge and power problems as gaining the required information from complex social and economic subsystems (e.g. corporations operating transnationally) and influencing these systems to be able to control and/or regulate them is highly problematic [25, pp.13-6]. Given the obstacles faced in enforcement, those tasked with 'governing' transnational corporate bribery acknowledge the limitations of their formal intervention and in tandem are aiming to trigger self-regulatory practices (see [37]). But self-regulation covers a wide-range of institutional arrangements and can differ according to the degree of monopolistic power, the degree of formality, their legal status, and the extent to which outsiders participate in rule formulation and enforcement [26, pp.108-9]. Taken in its broadest sense, self-regulation may refer not just to rigid and formal models of industry regulation or state intervention to negotiate an agreed practice, but also to more broader conceptions of a variety of self-regulatory practices with little or no state intervention and formality whereby a multitude of non-state actors may also be involved as direct and indirect 'regulators'.

These practices can be analysed in terms of the level of state intervention and the level of formality. Accompanied by a high level of state intervention, self-regulatory practices take a more manufactured form. In other words, they are organised by the state with the specific intention of developing self-regulatory mechanisms within international commerce. Self-regulatory practices may also emerge organically - these practices emerge independently of the state or with minimal state intervention and are products of the initiatives and/or policies of individual corporations, industries, business in general, or other non-state sources. Such organic practices may not necessarily be intended to regulate the behaviour of corporations but may do so indirectly.

The level of formality of both manufactured and organic self-regulatory mechanisms can also be analysed. For example, both state and non-state manufactured and organic self-regulatory practices may have mandatory or voluntary elements and may exist within formal (e.g. prescribed) or informal (e.g. general guidelines) frameworks. For example, the manufactured imposition of a 'monitor' by the state as part of a civil agreement will be mandatory but may be informal insofar as the corporation retains responsibility for how changes may be implemented within the organisation. In contrast, organic transnational business initiatives do not compel corporations to join but are voluntary. However, once associated with such initiatives, corporations agree to more formal frameworks and guidelines within which they should operate. Fig. 2 outlines several key self-regulatory practices:

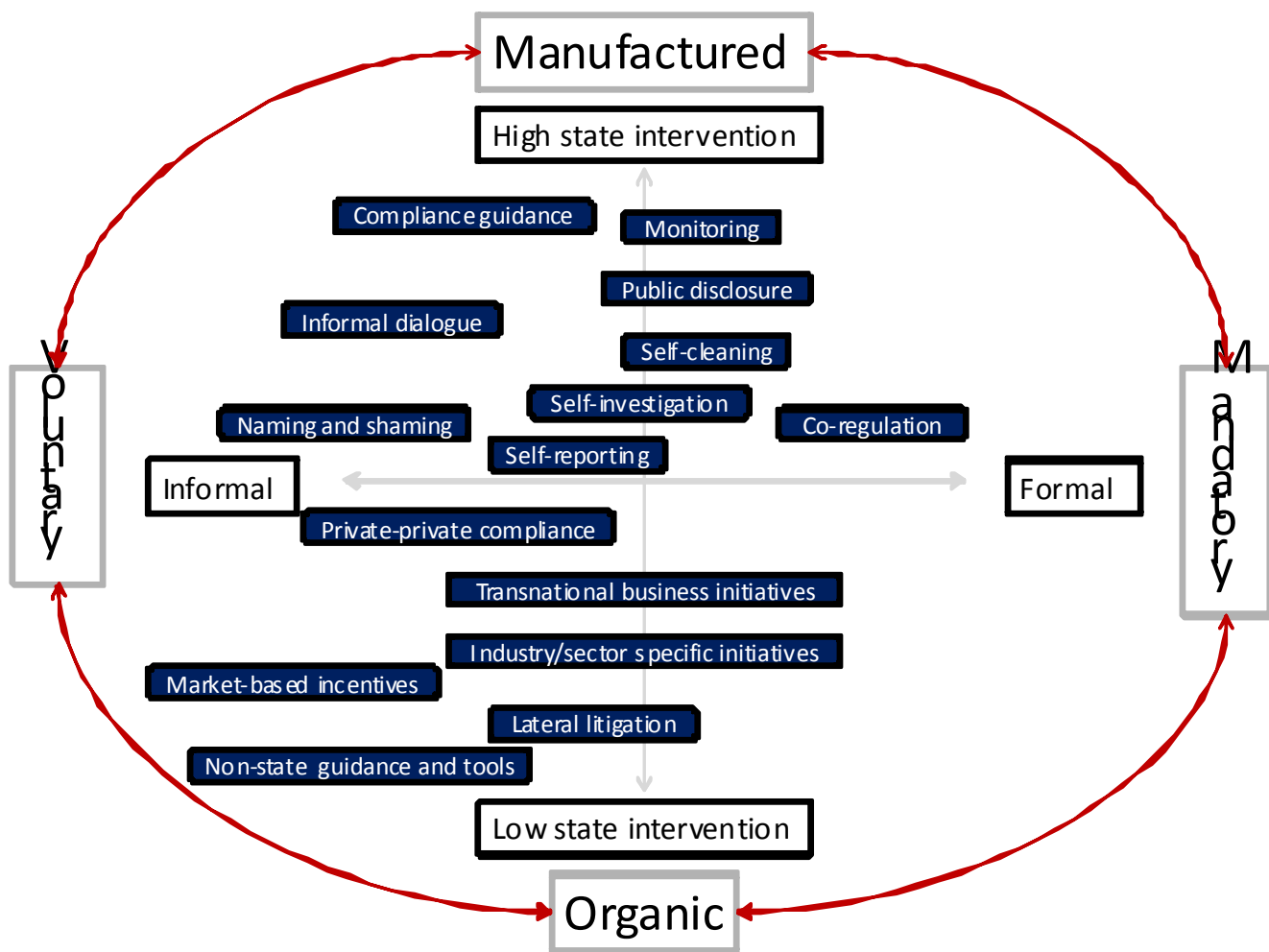


Fig. 2: Self-regulatory practices in the emerging regulatory landscape

The vertical spectrum implies a separation of state intervention with no state influence in the bottom half but in reality the state can still influence self-regulatory practices in this area in the same way that non-state organisations can influence the practices of the state. The primary actors, however, in the top half of the spectrum are state actors and agencies, with non-state actors and organisations being of primary importance in the bottom half. In the same manner, the informal/formal spectrum relates to the voluntary or mandatory requirement of the self-regulatory practice although it is acknowledged that some voluntary agreements may subsequently lead to mandatory elements and vice versa. Thus, in some cases, self-regulatory practices may involve a significant degree of cross-over in relation to the level of formality and level of state intervention but the majority of self-regulatory practices in relation to the problematic of transnational corporate bribery fall into specific areas.

Self-regulatory practices have emerged at the micro-corporate level (i.e. within a corporation, for a corporation, and/or between corporations); at the meso-market/structural level (i.e. financial incentives, market practices); and at the macro-multi-sector/multi-national level (i.e. transnational business initiatives, governmental/intergovernmental guidance). These practices may also be specific or general. Specific practices are focused on individual corporations while general practices aim at the regulation of 'populations' of corporations within markets. While there is not space here to analyse each of these mechanisms, it is worthwhile to provide a few examples. One

state manufactured practice aimed at specific corporations is that of 'self-investigation'. This often takes place following initial suspicions and/or preliminary investigations and requires the corporation, either on request of the regulator/prosecutor or on the initiative of the corporation, to internally investigate (usually by employing external professional investigators, auditors, lawyers, etc) any corrupt behaviour with the subsequent evidence being passed on to the regulator for use in the negotiation of sanctioning. One organic practice aimed at populations of corporations is that of transnational business initiatives. For example, within business and the private sector, a number of global, multi-industry initiatives have emerged to assist companies in creating anti-bribery and corruption frameworks. This industry and market-based self-regulatory mechanism demonstrates a significant level of cooperation and mutual support and provides a means of triggering changes in corporate behaviour through the promotion of good practice by significant international 'players'. Most notable are the roles of the International Chamber of Commerce (ICC), and the World Economic Forum Partnering Against Corruption Initiative (PACI). Several market-based practices have also emerged as with private-private compliance where a number of firms have been created to provide certification of corporate anti-bribery systems, to provide whistle-blowing services, e-learning solutions, and so on, each which profit from the increased pressure for corporations operating transnationally to implement sufficient anti-bribery and corruption self-regulatory compliance mechanisms.

A number of key reference groups can be found within this conceptual and self-regulatory framework, each with influential roles in creating the regulatory landscape in relation to the self-regulatory practices that are emerging. These groups are not conclusive or all-encompassing and may overlap or significantly interact but the following represent key groups that emerged during the research.

- **The corporates:** not a restrictive category, this refers to any company, their overseas subsidiary, partnership, etc, that on the whole as a legal entity operating overseas requires sufficient anti-bribery and corruption compliance mechanisms in order to regulate its own behaviour and provide a defence against extensive bribery legislation. Corporations may develop their own self-regulatory practices from within, employ the 'profiteers', take advice from or learn from literature provided by the 'moral entrepreneurs' and/or the 'negotiators', or be part of inter-corporate initiatives and academies providing information on 'best practice'.
- **The profiteers (other private sector organisations):** this includes legal firms, accountancy firms, etc, with expertise in anti-bribery and corruption along with companies founded specifically for the purpose of selling (and profiting from) their anti-bribery and corruption compliance systems, whistleblower systems, etc. All such companies may be employed by corporations as a means of strengthening their anti-bribery and corruption measures.
- **The moral entrepreneurs (non-private sector organisations):** NGOs, intergovernmental organisations, charities, etc. These individuals and organisations play a significant role in lobbying government and business, subsequently influencing changes in legislation and placing bribery and corruption on the agenda. These organisations also 'negotiate' with the corporates, giving advice and providing literature on how rigorous compliance can be implemented, and so on.
- **The negotiators (state regulators):** regulatory agencies, government departments, political corruption 'champions', etc. State actors play a significant role in negotiating, formally and informally, effective compliance regimes within corporations, leading to the emergence of self-regulatory practices. Hybrid mechanisms are also adopted to trigger self-regulation within the business sector.

- **The victims (individuals and corporations):** those facing the negative consequences of bribery and corruption may also influence forms of self-regulation within the market. Corporations that lose out on contracts due to bribery, disgruntled shareholders of corporations that have bribed or of corporations that have lost out on contracts, employees made scapegoats unfairly dismissed, etc, may aim to litigate or bring class actions against corporate enabling a form of market self-regulation.
- **The others:** representatives of transnational business initiatives; also the media have significantly pressured enforcement responses and also pressured corporations.

The negotiation of self-regulation therefore incorporates a varied set of practices each with varying levels of state intervention and formality, and involves a wide range of non-state actors and agencies. The incorporation of non-state actors echoes earlier regulatory models such as Gunningham and Grabosky's [21, p.398] expanded pyramid model of smart regulation that argues for the importance of first parties (government as regulator), second parties (business as self-regulator), and third parties (both commercial and non-commercial) in broader understandings of regulation. A key theoretical difficulty, however, is their promotion of escalation of enforcement responses by any set of parties, as in hierarchical pyramids originally proposed by Ayres and Braithwaite [4] – but when standards are not met in relation to transnational corporate bribery, criminal prosecution can rarely be reached due to the obstacles outlined earlier. However, as with these regulatory models, such self-regulatory practices as discussed here distort the boundaries between the 'public' and the 'private', and reflect the distribution of responsibility away from the state as sole provider of security, law and order, and crime control.

The default position: accommodating transnational corporate bribery

There is an assumption that the control mechanisms analysed above provide sufficient means for dealing with transnational corporate bribery. In reality, this is unlikely to be the case. Much corporate bribery currently goes undetected and is therefore unknown beyond the direct parties. Investigators and prosecutors in the UK and Germany have no comprehensive estimations of the scope and the extent of the transnational corporate bribery problem – the enforcement authorities are only aware of those cases that come to their attention. These cases are centrally recorded in both the UK and Germany and represent the scope and extent of the problem as understood by the enforcement authorities. However, such knowledge of bribery cases reflects only the extent of the resources invested into detection or the extent to which other parties are willing or able to notify the authorities. These datasets in both jurisdictions are inaccessible but it is these data that inform the enforcement authorities' estimation of the problem although the scale of the problem can be presumed to be much greater. However, these data are also reported by IGOs such as the OECD as part of the requirements of their Convention and it is these IGOs that provide the most wide-ranging understanding of the extent and scope of corruption. However, the estimations of international organisations such as TI and the OECD may provide an insight into how much greater the problem is but these figures are also inadequate due to various methodological limitations. Despite this, such organisations use these data to provide a threshold against which enforcement rates can be measured as demonstrated in the reports of TI, for example, that use the number of investigations and prosecutions as indicators of how 'active' a state is in enforcing the law.

The key issue is that even these (relatively conservative) estimations outweigh the UK's and Germany's capacities for enforcement and self-regulation, even more so in times of austerity – the difficulties in criminally prosecuting corporations, the shift towards civil settlements and negotiation,

the need to use resources effectively, the evidential burdens of transnational investigations, the unknown impact of self-regulatory practices and so on, inhibit the policy responses of the UK and Germany to address transnational bribery. Consequently, the default position is one of 'accommodation' by prosecutorial agencies and departments:

Accommodation and collusion reflects the fact that all regulatory agencies possess inadequate resources to pursue policies of full enforcement. An inevitable consequence of their selection of priorities (however this is done) is that much illegal trading and regulation-avoidance occurs without any regulatory response [11, p.213]

The SFO's 'acceptance criteria', for example, makes clear that only large, complex cases will be investigated meaning smaller bribery cases may be accommodated. The same can be said of facilitation payments, which although prohibited in UK law are unlikely to be investigated if small and one-off. Similar accommodation exists in Germany where unevenly distributed funding and expertise results in some *Bundesländer* being 'less enthusiastic' than others in relation to bribery enforcement. Consequently, regulatory agencies, restricted by their powers of enforcement, accommodate a certain level of corporate bribery either through their inability to do otherwise or as a result of their decisions to prioritise or focus on other issues. Accommodation occurs not only due to practical limitations but also in respect of political and economic ideologies. The BAE Systems case that involved a government to government arms contract between the UK and Saudi Arabia but enlisted BAE Systems as the arms producer and provider in this deal is a prime example of this – governments understand the importance of large corporations to a country's economic and national security interests that are shaped by transnational business agreements (e.g. UK - Saudi Arabia). Simultaneously, however, they have a legal obligation to enforce the law (following ratification of key international conventions) and must also manage criticism from IGOs and NGOs which appears only possible through increasing enforcement 'successes'. Antecedent influences to this 'default position' are the risk of regulatory capture and the revolving door phenomenon. Where the relationship between the regulator and the regulated becomes too intertwined due to shared ideologies and/or personnel, rewards and/or threats, the regulator may be captured and subsequently ensure non-enforcement. Where the movement of key actors from the public to the private sector, or *vice versa*, is frequent, conflicts of interest may also emerge which can result in attempts at regulation being undermined. However, accommodation, even where the will to enforce the law is high, may be a significant part of all control responses. In this case, it is more important to understand how resources are allocated and how intelligence is used (e.g. prioritisation and disruption) to address certain aspects of any given form of criminality.

Concluding thoughts

This article has provided empirical insights into the control of transnational corporate bribery, framed within the theoretical framework of Edwards and Gill [8] in relation to the variety of potential enforcement and non-enforcement responses within licit markets. 'Command and control' regulatory approaches to enforcement that place significant emphasis on criminal prosecution and sanctions to impose standards are impracticable with shifts towards non-criminal alternatives evident. There has also been an emergence of manufactured and organic self-regulatory practices with varying degrees of formality that directly and indirectly regulate the behaviour of corporations operating in international commerce. These innovative regulatory practices aid the response and enable leverage to be gained against offending corporations: traditional forms of enforcement that are the responsibility of the state are being supplemented by models of hybrid-regulation and self-regulation incorporating state agencies, private sector organisations, NGOs and IGOs that act as 'regulators'. By placing analytical focus on 'regulation' as a social relationship between law

enforcement agencies/regulators and corporations operating overseas at risk of bribery and corruption, the regulation of transnational corporate bribery is being negotiated. However, while some regulation is possible, these mechanisms are likely to fail with the default position of accommodation prevailing.

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